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## Editorial

This is the first issue of the *African Human Rights Law Journal* to appear as an on-line open-access publication. Looking back at the 12 years since its launch in 2001, we are confident that the *Journal* has played an important role in providing a forum for scholarship on human rights in Africa, focusing on the African regional human rights system. By publishing the *Journal* in open-access format, it is anticipated that the visibility of the issues related to the promotion and protection of human rights in Africa will increase. Greater visibility, it may be argued, in turn is likely to enhance the effectiveness of the African regional human rights system. Greater awareness and understanding of the extent to which states fulfil their obligations under African human rights treaties may raise the cost of non-compliance with these obligations, and thus contribute to improving the system's effectiveness.

The adoption of this new format represents an addition rather than a change. A limited number of copies of the *Journal* will still be printed, for use by subscribers to the hard copy publication, or will be printed on demand. The on-line open-access format therefore does not substitute but supplements the previous dispensation. While the *Journal* no longer bears the Juta imprint, its 'look and feel' has remained largely intact under the new publisher, Pretoria University Law Press (PULP). As we look back to the 24 issues that appeared between 2001 and 2012, we express our gratitude to Juta for their professionalism and enthusiasm in getting the *Journal* established.

The context of this issue also confirms the continuity between this and previous issues of the *Journal*. As in the past, the current issue deals with the African regional system, the emerging role of sub-regional economic communities in human rights promotion and protection in Africa and with the domestic legal frameworks of African states. As far as the regional system is concerned, the pertinent issue of refugee and asylum seekers receives Bekker's attention. Nwauche looks at the horizontal applicability of human rights by the ECOWAS Court and, as has become customary, Ebobrah provides an overview of developments in the sub-regional systems during the past year. Other authors deal with various aspects of human rights protection at the domestic level in Botswana, South Africa and Malawi, and engage in discussion of two prominent court decisions, dealing with coerced sterilisation of HIV-positive women (in Namibia), and gender equality (in Botswana). Oyowe continues the conversation about *ubuntu*, by

responding to an earlier article on this topic by Metz ((2011) 11 *AHRLJ* 532).

As we prepared this edition, we received the news of the passing of former South African Chief Justice Pius Langa, who served on the South African Constitutional Court from 1994 to 2009. Justice Langa was one of South Africa's most prominent legal minds and a major contributor to the judicial advancement of human rights in South Africa and, indeed, Africa as a whole. Along with many South Africans and well-wishers from beyond its borders, the editors express their sadness at his death. Rare is it to find among lawyers someone so selfless and down-to-earth, yet so inspirational through principled pragmatism and wisdom. We fondly remember him as a member of the international editorial advisory board of the *Journal*.

We acknowledge with appreciation and sincerely thank the independent reviewers who gave their time and talents to ensure the consistent quality of this issue of the *Journal*: Adem Abebe; Atangcho Akonumbo; Jean Allain; Gina Bekker; David Bilchitz; Lilian Chenwi; Danwood Chirwa; Bonolo Dinokopila; Jackie Dugard; Ebenezer Durojaye; Yonatan Fessha; Sean Flynn; Nicole Fritz; Laurence Helfer; Bonita Meyersfeld; Salima Namusobya; Charles Ngwena; Priti Patel; Marius Pieterse; Karen Stefiszyn; Jackie Stewart; Ally Possi; Karin van Marle; and Ernst Wolff.

# The protection of asylum seekers and refugees within the African regional human rights system

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## Summary

*The first treaty with a human rights focus adopted under the auspices of the Organisation of African Unity (now the African Union) was the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa adopted in 1969. Seventeen years later, the African Charter on Human and Peoples' Rights, which elaborated on the rights of asylum seekers and refugees in Africa, came into force. The next two decades would see two further instruments adopted under the auspices of the OAU/AU in which the rights of asylum-seeking women and children would be spelt out further. This article considers not only the legal framework providing for the promotion and protection of the rights of asylum seekers and refugees within the African regional human rights system, but also the manner in which the institutions charged with supervising the implementation of these treaties have interpreted the rights afforded to asylum seekers and refugees within the African regional human rights system.*

## 1 Introduction

### 1.1 Historical background to the creation of an African human rights system

The Organisation of African Unity (OAU), created in 1963, had as its primary goal the protection of sovereignty and non-interference in domestic affairs for those states that had already gained indepen-

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dence and the liberation of those yet to gain independence.<sup>1</sup> Given this preoccupation with sovereignty, it is unsurprising that the language of human rights and the potential scrutiny which rights protection entailed were almost entirely absent from the organisation's diction,<sup>2</sup> the only exception in this regard being the use of the language of human rights in the battle against the elimination of racial discrimination and oppression and the fight for self-determination from colonial rule. Equally unsurprising, given the organisation's primary goals, was the blind eye turned to abuses committed by newly-independent African states against their own citizenry, particularly in the period between the 1960s and 1980s.<sup>3</sup>

The first proposal for the adoption of an African human rights instrument predated the establishment of the OAU by two years. However, it was to take two more decades, punctuated by sporadic calls made at a number of conferences and seminars organised primarily under the auspices of the United Nations (UN) and the International Commission of Jurists, for the African human rights system to come into being.<sup>4</sup> These calls for the creation of an African human rights convention and mechanism for the protection of human rights in the main emanated from outside the continent. Nevertheless, by the mid-1960s, African states began to contemplate the creation of a human rights mechanism for Africa as a means of holding minority regimes in Southern Africa accountable for abuses committed there. However, it was only at the 16th ordinary session of the Assembly of Heads of State and Government of the OAU, held in Monrovia, Liberia from 17-20 July 1979, that a decision on human rights and peoples' rights was adopted. In this decision, the Assembly of Heads of State and Government of the OAU called on the Secretary-General to organise a meeting of qualified experts to prepare a preliminary draft of an African Charter, providing *inter alia* for the establishment of bodies to promote and protect human rights.<sup>5</sup> Two years and several meetings as well as draft instruments later, the Assembly of Heads of State and Government adopted the African Charter on Human and

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1 See in general on the OAU, sovereignty and non-interference in domestic affairs, AB Akinyemi 'The OAU and the concept of non-interference in the internal affairs of member states' (1972-1973) 46 *British Yearbook of International Law* 393; O Okongwu 'The OAU Charter and the principles of domestic jurisdiction in intra-African affairs' (1973) 13 *Indian Journal of International Law* 589; and UO Umozurike 'The domestic jurisdiction clause in the OAU Charter' (1979) 78 *African Affairs* 197.

2 This position is also reflected in the OAU's founding document, the OAU Charter, 25 May 1963, 479 UNTS 39.

3 Some of the most notorious examples in this regard can be found in relation to Uganda under Idi Amin, Equatorial Guinea under Macias Nguema and Jean Bédel-Bokassa's Central African Republic.

4 On the background to the adoption of the African Charter, see E Kannyo 'The Banjul Charter on Human and Peoples' Rights: Genesis and background' in CE Welch & RI Meltzer (eds) *Human rights and development in Africa* (1984) 140.

5 Decision 115(XXVI) Rev 1 AHG/115(XVI).



Peoples' Rights (African Charter), thus ushering in the African human rights system.<sup>6</sup>

## 1.2 Current legal framework for the promotion and protection of human rights in Africa

The African Charter drew inspiration from the Universal Declaration of Human Rights (Universal Declaration), the two international covenants, as well as the European and American Conventions on Human Rights. However, it also contained a number of distinctive features, the most notable of which were the inclusion of peoples' rights and duties placed upon individuals.<sup>7</sup> In addition, it also catalogued a host of civil and political as well as economic and social rights, all of which, with the exception of political participation and access to the public service detailed in articles 13(1) and (2) of the African Charter, were to apply equally to citizens and to non-nationals.<sup>8</sup> Finally, it provided for the creation of the African Commission on Human and Peoples' Rights (African Commission) to oversee the implementation of the treaty. This institution, whilst theoretically independent, was in practice to be made subservient to the political machinery of the OAU, with article 59 of the African Charter in this regard providing that all measures taken by the African Commission are to 'remain confidential until the Assembly of Heads of State and Government shall otherwise decide', thus effectively ensuring that no decisions or reports adopted by the Commission are publicised until the Assembly has approved them.<sup>9</sup>

Over the next two decades, primarily as a result of pressure exerted on African states in order to address a number of deficiencies and gaps inherent in the substantive provisions of the African Charter as well as the supervisory mechanism established in terms thereof, three

6 As of July 2013, the African Charter had been ratified by 53 of the 54 member states of the AU. Only South Sudan is yet to ratify this instrument.

7 The African Charter places specific duties on individuals towards family, community, society and the state. (For a list of these duties, see arts 28 and 29 of the African Charter.) Peoples' rights to be equal (art 19); to existence and self-determination (art 20); to freely dispose of their wealth and natural resources (art 21); to economic, social and cultural development (art 22); to peace and security (art 23); and to a satisfactory environment (art 24) are recognised in the African Charter.

8 The African Charter recognises the following civil and political rights: the prohibition of discrimination (art 2); equality (art 3); bodily integrity and the right to life (art 4); dignity and prohibition against all forms of exploitation and degradation, including slavery and torture and inhuman treatment (art 5); liberty and security of the person (art 6); fair trial (art 7); freedom of conscience (art 8); information and freedom of expression (art 9); freedom of association (art 10); assembly (art 11); freedom of movement (art 12); political participation (art 13); property (art 14); and independence of the courts (art 26). In respect of economic and social rights, the African Charter provides for the right to work 'under equitable and satisfactory conditions' and equal pay for equal work (art 15); the right to health (art 16); and the right to education (art 17).

9 Up until 2004, approval by the Assembly was given automatically. However, after objections raised by the Zimbabwean authorities in respect of a report on a

further treaties were adopted, adding to the arsenal of the African human rights system. The first of these instruments was the African Charter on the Rights and Welfare of the Child (African Children's Charter),<sup>10</sup> which was adopted in 1990 in order to supplement the provisions of the African Charter in respect of children and as a complementary mechanism to the UN Committee on the Rights of the Child.<sup>11</sup> The African Children's Charter in substance replicated a number of the provisions contained in the UN Convention on the Rights of the Child (CRC). In much the same way as the African Charter, it too provided for the recognition of a number of civil and political as well as economic, social and cultural rights.<sup>12</sup> In keeping

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mission to that country undertaken by the Commission in 2002, the Assembly suspended publication of this report until such time as Zimbabwe had been given an opportunity to respond (see Decision on the 17th Annual Activity Report of the African Commission, Assembly/AU/Dec.49(III)). Thereafter the Assembly failed to authorise the publication of resolutions adopted by the Commission on Eritrea, Ethiopia, the Sudan, Uganda and Zimbabwe (Decision on the 19th Activity Report of the African Commission on Human and Peoples' Rights, Assembly/AU/Dec. 101 (VI)). Subsequently, the Executive Council prevented publication of a decision by the Commission on Zimbabwe (Decision on the 20th Activity Report of the African Commission, EX CL/Dec. 310 (IX)). More recently, the Executive Council failed to adopt the African Commission's 29th Activity Report, requesting that the Commission 'engage concerned member states in the verification of the facts' and resubmit its 29th Activity Report (see Decision on the Activity Report of the African Commission, EX CL/Dec.639(XVIII)). For reasons that remain unclear, the Executive Council also failed to adopt the resubmitted 29th Activity Report, along with the Commission's 30th Activity Report (see Decision on the Activity Report of the African Commission, EX.CL/Dec.666(XIX)). These two reports were subsequently adopted by the Executive Council along with the 31st Activity Report and a request made that the Commission 'carry out the necessary consultations with the member states concerned regarding allegations of human rights violations, thus enabling it to present a balanced report to the AU Policy Organs' (see Decision on the 29th, 30th and 31st Activity Reports of the African Commission, EX.CL/Dec.689(XX)). Thereafter, the Executive Council failed to consider the African Commission's 32nd Activity Report, due to the position taken that in future it would consider reports by the African Commission on its activities on an annual rather than bi-annual basis. This position was subsequently reversed in January 2013, with the Executive Council announcing 'that in line with article 54 of the African Charter on Human and Peoples' Rights, the Commission will continue to present its Report at every session of the Executive Council'. The Executive Council once again asserted its authority by emphasising that the Commission ought to 'respect its procedures when considering reports submitted to it, and consult member states concerned, as appropriate prior to the issuance of its resolutions' (see Decision on the 32nd and 33rd Combined Activity Reports of the African Commission, EX.CL/Dec.752(XXII)).

10 African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49, July 1990, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 77.

11 See Draft Resolution on the Signature and Ratification of the African Charter on the Rights and Welfare of the Child, CM/Draft/Res.13 (LXIII) Rev 1.

12 The following civil and political rights are protected: non-discrimination (art 3); the rights to life and survival and development (art 5); the rights to a name and nationality (art 6); freedom of expression (art 7); freedom of association (art 8); freedom of thought, conscience and religion (art 9); the protection of privacy (art 10); the protection against child abuse and torture (art 16); rights relating to the administration of juvenile justice (art 17); and protection of the family (art 18). Economic, social and cultural rights recognised in the African Children's Charter

with the emphasis on individual duties found in the African Charter, this instrument placed responsibilities on both parents and children. In recognition of the fact that CRC did not adequately address issues of particular concern in respect of the rights of the child in Africa, the provisions of article 23 provided for a higher threshold of protection in respect of displaced children than the corresponding provisions relating to refugee children in CRC.<sup>13</sup> As was the case in respect of the African Charter, the provisions of this instrument applied to citizens as well as non-citizens. Rather than assign responsibility for monitoring the implementation of the treaty to the African Commission, the African Children's Charter created a separate institution, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) to oversee its implementation, arguably duplicating the work of the African Commission in respect of children.

The next major addition to the African human rights system came in June 1998, by way of the adoption of a Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol),<sup>14</sup> which created a court in order to 'complement' the protective mandate of the African Commission.<sup>15</sup> In 2003, three years after the transformation of the OAU into the African Union (AU), which brought about greater formal recognition of the importance of human rights, another piece of the puzzle was added to the African human rights system, with the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).<sup>16</sup> This instrument in effect mirrored a number of UN instruments, including the Convention on

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include the right to education (art 11); rights to leisure, recreation and cultural activities (art 12); the right to the best attainable state of physical, mental and spiritual health (art 14); and protection from economic exploitation and from performing work hazardous to physical, mental, spiritual, moral or social development (art 15).

13 Note that only Algeria, Morocco, Senegal and Egypt actively participated in the drafting of CRC and, as such, it was felt that the provisions of CRC did not adequately address African concerns. Art 23 provides for special measures of protection for asylum-seeking and refugee children as well as the extension of refugee protection to internally-displaced children. The African Children's Charter also sets out the principle of the best interests of the child (art 4); provides for special measures in respect of handicapped children (art 13); provides for a right to parental care and protection (art 19); protection against harmful practices (art 21); protection of children in armed conflict (art 22); safeguards in respect of adoption (art 24); special measures of protection for children who are separated from their family (art 25); protection against apartheid and discrimination (art 26); protection from sexual exploitation (art 27); protection from drug abuse (art 28); protection from the sale, trafficking and abduction of children (art 29); and special measures in respect of children of imprisoned mothers (art 30). With regard to responsibilities, see arts 20 and 31 respectively.

14 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights OAU/LEG/MIN/AFCHPR/PROT(I)Rev2.

15 See arts 2 and 8 of the Protocol Establishing the African Court.

16 CAB/LEG/66.6, 11 July 2003, reprinted in Heyns & Killander (n 10 above) 61.

the Elimination of All Forms of Discrimination Against Women (CEDAW) and the General Recommendations emanating from the CEDAW Committee, as well as the UN Declaration on the Elimination of Violence Against Women. It also augmented the provisions of the African Charter in respect of women and, in similar fashion to the African Charter as well as the Children's Protocol which preceded it, it provided for the recognition of a wide range of rights – civil, political as well as economic and social – applicable to both nationals and non-nationals.<sup>17</sup> Further amongst its provisions, the African Women's Protocol provided for special measures of protection for asylum-seeking and refugee women.<sup>18</sup> Unlike the African Children's Charter which created a new institution to supervise the implementation of the treaty, the Women's Protocol assigned supervisory functions to both the African Commission as well as the newly-established African Court on Human and Peoples' Rights (African Court).<sup>19</sup>

Before proceeding to consider the rights of asylum seekers and refugees and the work of the supervisory institutions charged with human rights promotion and protection within the African human rights system, it should be noted that there are a number of AU organs and initiatives within the framework of the OAU/AU specifically addressing the issue of displacement in Africa.<sup>20</sup> However, this article considers only the practice of the institutions charged with rights promotion and protection, namely, the African Commission, the

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17 The following civil and political rights are provided for in the African Women's Protocol: elimination of discrimination (art 2); dignity (art 3); life, integrity and security of the person (art 4); access to justice and equal protection before the law (art 8); the right to participation in the political and decision-making process (art 9); and the right to a remedy (art 25). An extensive list of economic, social and cultural rights is also provided for in this instrument. These are the right to education and training (art 12); economic and social welfare rights (art 13); health and reproductive rights (art 14); food security (art 15); adequate housing (art 16); right to a positive cultural context (art 17); right to a healthy and sustainable environment (art 18); and the right to sustainable development (art 19).

18 See arts 4, 10 & 11. Other noteworthy provisions include articles dealing with the elimination of harmful practices, including the prohibition of all forms of female genital mutilation (art 5); the encouragement of monogamy as the preferred form of marriage (art 6(c)); equal rights in relation to separation, divorce and annulment of marriage (art 7); control over fertility (art 14); the right to inheritance (art 21); and widows' rights (art 20). The right to peace (art 10) and the protection of women in armed conflict (art 11) are also recognised, as are special measures of protection which are to be afforded to elderly women (art 22), women with disabilities (art 23) and women in distress (art 24).

19 The African Commission is to monitor the implementation of the Protocol through an evaluation of periodic state party reports (art 26) and the African Court on Human and Peoples' Rights is to 'be seized with matters of interpretation arising from the application or implementation of this Protocol' (art 27). As a transitional arrangement, the African Commission was mandated to deal with the interpretation of the Protocol, '[p]ending the establishment of the African Court' (art 32).

20 It should be noted that the Council of Ministers of the OAU/Executive Council of the AU and the OAU Heads of State and Government/AU Assembly of Heads of State have adopted a number of decisions as well as resolutions since 1963 on the topic of refugees. Similarly, the AU Peace and Security Council regularly expresses itself on the issue of refugees and has an express mandate in respect of peace

African Children's Committee and the African Court. It also does not consider the Kampala Convention dealing with the rights of internally-displaced persons, rather focusing more narrowly on the rights of asylum seekers and refugees within the framework of the African human rights system.

## **2 Right to asylum and the protection of asylum seekers and refugees within the African human rights system**

Whilst the adoption of the African Charter heralded the birth of the African human rights system, the first OAU treaty with what may be broadly termed a human rights dimension was the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention), adopted in 1969.<sup>21</sup> This instrument affirmed the provisions of the 1951 UN Refugee Convention, but also went further in expanding the refugee definition to include individuals fleeing their country of origin or nationality due to 'external aggression, occupation, foreign domination or events seriously disturbing public order'.<sup>22</sup> Although the OAU Convention failed to make use of the language of rights, and did not take a direct human rights approach in respect of the protection of asylum seekers and refugees, it nevertheless had important rights implications which were elaborated upon in subsequent instruments. In particular, the OAU Refugee Convention called upon states to grant asylum, emphasising that they<sup>23</sup>

use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

This provision was ultimately picked up and expanded upon in article 12(3) of the African Charter, which provides that '[e]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and

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building to undertake activities related to the 'resettlement and reintegration of refugees and internally-displaced persons' (see in this regard art 14(3)(d) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union). Other AU organs/departments that have an explicit mandate in respect of refugees include the Division of Humanitarian Affairs, Refugees and Displaced Persons of the Political Affairs Department of the AU and the Permanent Representative Council (PRC) by way of the Sub-Committee on Refugees. In relation to the latter, in spite of its inactivity, the Co-ordinating Committee on Assistance and Protection to Refugees, Returnees and Internally-Displaced Persons as advisory body to the PRC's Sub-Committee on Refugees also needs to be taken note of.

21 10 September 1969, 1001 UNTS 45.

22 Art 1(2) OAU Refugee Convention (n 21 above).

23 Arts 2(1) & (2) OAU Refugee Convention (n 21 above).

international conventions'. This article further and in more general terms stipulates that non-nationals legally admitted to the territory of a state party may only be expelled 'by virtue of a decision taken in accordance with the law', and additionally prohibits the mass expulsion of non-nationals.<sup>24</sup> Finally, article 23(2) of the African Charter provides:

For the purpose of strengthening peace, solidarity and friendly relations, state parties to the present Charter shall ensure that:

- (a) any individual enjoying the right of asylum under 12 of the present Charter shall not engage in subversive activities against his country of origin or any other state party to the present Charter;
- (b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other state party to the present Charter.

In addition to these general provisions, both the African Children's Charter and the African Women's Protocol, in acknowledgment of the fact that up to 80 per cent of the world's refugee population is comprised of women and children, further set out specific obligations incumbent on state parties with regard to these two groups. Thus, article 23 of the African Children's Charter details that 'all appropriate measures' are to be taken in order to ensure that children seeking refugee status or who have been granted refugee status, regardless of whether they are accompanied or not, receive 'appropriate protection and humanitarian assistance in the enjoyment of the rights set out in ... [the Children's] Charter and other international human rights and humanitarian instruments to which the states are parties'.<sup>25</sup> State parties are also to assist unaccompanied children to 'trace the parents or other close relatives ... in order to obtain information necessary for reunification with the family'.<sup>26</sup> Where no parents or guardians are to be found, the state is to ensure the same protection to the unaccompanied child as is given in respect of 'any other child permanently or temporarily deprived of his family environment for any reason'.<sup>27</sup> In recognition of the fact that asylum-seeking and refugee women have particular needs which may differ from those of men, the African Women's Protocol provides for: equality of access in respect of the refugee status determination process; the provision to refugee women of their own identity as well as other documentation; the inclusion of women in decision-making structures at all levels; and the protection of asylum-seeking, refugee, returnee and displaced women from 'all forms of violence, rape and other forms of sexual exploitation'.<sup>28</sup> With regard to the latter, the African Women's

24 Arts 12(4) & (5) African Charter. Mass expulsion is defined as 'that which is aimed at national, racial, ethnic or religious groups' (see art 12(5)).

25 Art 23(1) African Children's Charter.

26 Art 23(2) African Children's Charter.

27 Art 23(3) African Children's Charter.

28 Arts 4(2)(k), 10(2)(c) & (d) and 11(3) African Women's Protocol.

Protocol further requires states to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that perpetrators of these acts are 'brought to justice before a competent criminal jurisdiction'.<sup>29</sup>

### 3 Approach of the African Commission on Human and Peoples' Rights in respect of asylum seekers and refugees

The 11-member African Commission, which started operating in 1987, has a broad mandate to both protect and promote human rights in terms of the African Charter.<sup>30</sup>

#### 3.1 The protection of asylum seekers and refugees

In terms of its protective mandate, the African Commission's primary function relates to the receipt of inter-state as well as individual communications alleging violations of human rights.<sup>31</sup> In respect of the latter, the Commission has interpreted broadly the notion of standing, allowing for petitions by non-governmental organisations (NGOs) on behalf of someone else as well as complaints from individuals without requiring that they be the victim of the violation or even that the victim consents to them bringing a complaint on their behalf.<sup>32</sup> In *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, the African Commission further indicated its preparedness to accept communications brought as an *actio popularis*

29 Art 11(3) African Women's Protocol.

30 See arts 45(2) & (1) respectively of the African Charter.

31 See in this regard arts 47-59 of the African Charter as well as rules 87-113 of the African Commission's Rules of Procedure (2010). To date, only one inter-state communication has been brought before the Commission, *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003).

32 Whilst the African Commission's 1988 Rules of Procedure stipulated that communications could only be brought on behalf of victims when they were unable to do so themselves, these provisions were not reiterated in either the Commission's 1995 Rules of Procedure or the most recent Rules adopted in 2010. The Commission in its Guidelines on the Submission of Communications also confirms broad standing, noting that '[a]nybody, either on his or her own behalf or on behalf of someone else, can submit a communication to the Commission denouncing a violation of human rights ... The complainant or author of the communication need not be related to the victim of the abuse in any way, but the victim must be mentioned.' See [http://www.achpr.org/files/pages/communications/guidelines/achpr\\_infosheet\\_communications\\_eng.pdf](http://www.achpr.org/files/pages/communications/guidelines/achpr_infosheet_communications_eng.pdf) (accessed 3 July 2013). The practice of the Commission has also been very clear in broadly interpreting standing, allowing for the submission of complaints without requiring a victim linkage. Thus, in *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 43 (ACHPR 2004) para 46, the Commission also noted that '... the *locus standi* requirement is not restrictive so as to imply that only victims may seize the African Commission ... The existence of direct interest (like being a victim) to bring the matter before the Commission is not a requirement under the African Charter.' Most recently, the African Commission in Communication 361/08 *JE Zitha & PJJ Zitha v Mozambique* 30th Activity Report of the African Commission

– in the public interest.<sup>33</sup> With regard to communications brought by asylum seekers and refugees, complaints have been lodged variously by a refugee association, by individuals in their own name as well as NGOs on behalf of others whose rights are alleged to have been violated.

### 3.1.1 Admissibility

In order for individual communications to be considered admissible, seven 'conjunctive' criteria set out in article 56 of the Charter have to be met.<sup>34</sup> These are that the communications indicate their authors even if they request anonymity; are compatible with the OAU/AU as well as African charters; are not written in insulting or disparaging language; are not based solely on information disseminated through the mass media; are sent after the exhaustion of domestic remedies, unless these procedures are unduly prolonged; are submitted within a reasonable time after the exhaustion of such remedies; and have not already been settled in terms of international law. Of these criteria, perhaps unsurprisingly, the issue of the exhaustion of domestic remedies has proven to be the most contentious.<sup>35</sup> Within the context of communications brought by asylum seekers and refugees, the question arises as to whether persons who no longer find themselves in the country against which they are alleging violations for fear of persecution, are nonetheless required to exhaust domestic remedies in that country before approaching the African Commission. The Commission's jurisprudence in this regard is largely inconsistent. A distinction appears to be drawn between cases where an individual filing an application has been granted refugee status and those where the complainant is merely an asylum seeker, seeking redress against the country from which they had fled. In the latter case, the Commission appears to be reluctant to apply the constructive exhaustion of domestic remedies principle.

In *Rights International v Nigeria*,<sup>36</sup> the complainant who was living in the United States as a refugee at the time of lodging the communication, alleged that he had been illegally arrested and detained in Nigeria and that, whilst in detention, he had been

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on Human and Peoples' Rights, November 2010-May 2011 para 106 confirmed that its jurisprudence had developed in such a manner 'that the person submitting the communication (author or complainant) need not be the victim'. On the reasons for broad standing, see *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 78. Also see *Bakweri Land Claims Committee v Cameroon* (n 32 above) para 46.

33 (2001) AHRLR 60 (ACHPR 2001) para 49.

34 See *Anuak Justice Council v Ethiopia* (2006) AHRLR 97 (ACHPR 2006) para 44.

35 The African Commission has held that the domestic remedies rule ought to be dispensed with where such remedies are unavailable, ineffective or insufficient. On the exhaustion of domestic remedies in general, see NJ Udombana 'So far, so fair: The local remedies rule in the jurisprudence of the African Commission on Human and Peoples' Rights' (2003) 97 *American Journal of International Law* 1.

36 (2000) AHRLR 254 (ACHPR 1999).



subjected to torture. He additionally attested that after being abducted and threatened by persons whom he believed to be agents of the Nigerian government, he fled the country first to Benin, where he was granted refugee status, and then to the United States. The African Commission in this case, as it had done with regard to contemporaneous Nigerian cases, held the communication to be admissible on grounds that there was a 'lack of available and effective domestic remedies for human rights violations in Nigeria under the military regime'.<sup>37</sup> By coming to this conclusion, the Commission effectively sidestepped the issue of whether someone who had fled the country against which they were alleging violations, for fear of persecution, still had to avail themselves of available domestic remedies. The Commission then went on to find violations of the prohibition against torture, cruel, inhuman and degrading treatment, the right to liberty and security of the person, fair trial and freedom of movement and residence as well as the right to leave and return to Nigeria. In *Jawara v The Gambia*,<sup>38</sup> decided at the session following the *Rights International* case session, the African Commission directly confronted the issue of the necessity of exhausting domestic remedies, holding it to be 'an affront to common sense and logic to require the complainant to return to his country to exhaust local remedies' given the particular facts of the case, the salient features of which were that the complainant was a former head of state who had been overthrown by the military, who had been tried *in absentia* and whose political contemporaries had been detained.<sup>39</sup> Having found the case admissible, the African Commission went on to hold The Gambia in violation of the general obligations provisions of the African Charter, the right to non-discrimination, liberty and security of the person, the right to fair trial, freedom of expression, opinion, assembly and association, the right to participate in government, freedom of movement as well as the right to leave any country and return to his own country, the right to self-determination and the duty to ensure the independence of the judiciary. In *Ouko v Kenya*,<sup>40</sup> the African Commission, relying on its decision in the *Rights International* case, provided the most explicit link between the granting of refugee status and the constructive exhaustion of domestic remedies principle, holding that<sup>41</sup>

the complainant is unable to pursue any domestic remedy following his flight to the Democratic Republic of Congo (DRC) for fear of his life, and

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37 *Rights International* case (n 36 above) para 23.

38 (2000) AHRLR 107 (ACHPR 2000).

39 *Jawara* (n 38 above) para 36. The Commission had in an earlier decision, *Abubakar v Ghana* (2000) AHRLR 124 (ACHPR 1996), also held, given that Mr Abubakar had escaped to Côte d'Ivoire from a prison hospital, having been held without charge for seven years and possibly facing a penalty as a result of his escape, that '[i]t would not be logical to ask the complainant to go back to Ghana in order to seek a remedy from national legal authorities' (see para 6).

40 (2000) AHRLR 135 (ACHPR 2000).

41 *Ouko v Kenya* (n 40 above) para 19.

his subsequent recognition as a refugee by the Office of the United Nations High Commissioner for Refugees,

and therefore declared the communication admissible. It further held the Kenyan government to be in violation of the prohibition against torture, cruel, inhuman and degrading treatment, the right to liberty and security of the person, the right to freedom of opinion, freedom of association and freedom of movement as well as the right to leave any country and return to his own country. Most recently, the African Commission has held the case of *Shumba v Zimbabwe*<sup>42</sup> to be admissible, finding a violation of the prohibition against torture and ill-treatment on the merits. The brief facts of the case were that Mr Shumba left Zimbabwe on or about 17 January 2003 after allegedly being tortured and charged with a treasonable offence, returning to the country on 4 February 2003 and making a court appearance the following day, before permanently fleeing the country. Notwithstanding the fact that there was in theory a remedy provided for in domestic law prohibiting torture, the Commission held that this remedy was ineffective and could not be pursued 'without much impediment'.<sup>43</sup> Quoting the *Jawara* case, the Commission further held that the principle of constructive exhaustion of local remedies would apply to Mr Shumba by virtue of the fact that he was 'outside the country, due to the fear for his life'.<sup>44</sup> Addressing the issue of the complainant's return to the country, the Commission noted that this did not negate the constructive exhaustion of remedies rule.<sup>45</sup>

These cases are to be contrasted with two decisions in respect of Zimbabwe decided prior to the *Shumba* case. In *Chinhamo v Zimbabwe*,<sup>46</sup> the African Commission declared the case, brought by an employee of the Zimbabwean section of Amnesty International, who alleged that agents of the Zimbabwean government had violated his African Charter rights, causing him to seek asylum in South Africa, to be inadmissible due to the non-exhaustion of domestic remedies. Seemingly conflating issues of admissibility and the merits of the case as well as overstepping its mandate, which does not extend to establishing whether or not someone has a well-founded fear of persecution, the Commission indicated that the facts suggested 'inhuman and degrading treatment' and that, in its opinion, the

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42 *Gabriel Shumba v Zimbabwe* 288/04 <http://caselaw.ihrrda.org/doc/288.04/> (accessed 3 July 2013).

43 *Shumba* (n 42 above) para 75.

44 *Shumba* (n 42 above) para 74.

45 *Shumba* (n 42 above) para 66.

46 (2007) AHRLR 96 (ACHPR 2007).

complainant had failed to substantiate his allegations with facts.<sup>47</sup> Thus, the Commission noted that<sup>48</sup>

[e]ven if, for example, the detention of the complainant amounted to psychological torture, it could not have been life-threatening to cause the complainant [to] flee for his life. Apart from the alleged inhumane conditions under which he was held, there is no indication of physical abuse ...

The case of *Majuru v Zimbabwe*,<sup>49</sup> in which a Zimbabwean judge, living in exile in South Africa, alleged interference in the judicial process, was similarly declared inadmissible for failure to exhaust remedies.<sup>50</sup> The African Commission once again focused on the establishment of a well-founded fear,<sup>51</sup> a fear which it deemed was absent, noting that<sup>52</sup>

the complainant has not sufficiently demonstrated that his life or those of his close relatives were threatened by the respondent state, forcing him to flee the country, and as such, [the Commission] cannot hold that the complainant left the country due to threats and intimidation from the state.

The more recent case of *JE Zitha and PJL Zitha v Mozambique*,<sup>53</sup> brought by Professor Dr Liesbeth Zegveld on behalf of Mr Jose Eugency Zitha (first victim) and Professor Pacelli LJ Zitha (second victim), also declared inadmissible for failure to exhaust domestic remedies and for failure to comply with the reasonable time requirements found in article 56(6) of the African Charter, is also worthy of discussion. In this case, the African Commission acknowledged the difficulties encountered by Professor PLJ Zitha, who had applied for refugee status in France, in bringing a case in respect of his father (the first victim) who had disappeared from detention in Mozambique some time in 1975. However, it ultimately held that Professor PLJ Zitha could have seized the Commission sooner than the 13 years that it took from 1995, when he obtained permanent employment in The Netherlands and returned to Mozambique for the first time, before either approaching the domestic courts in

47 *Chinhamo* case (n 46 above) paras 73 & 75.

48 *Chinhamo* case (n 46 above) para 75.

49 (2008) AHRLR 146 (ACHPR 2008).

50 In particular, Mr Majuru pointed to threats directed towards him as a result of his involvement as presiding judge in a case against the Associated Newspaper Group of Zimbabwe (ANZ).

51 Distinguishing the case of *Majuru* from other cases in which the exhaustion of domestic remedies was held to be unnecessary, the African Commission noted that the common denominator in all of these cases was 'the clear establishment of the element of fear perpetrated by identified state institutions' (*Majuru* case (n 49 above) para. 90).

52 *Majuru* case (n 49 above) para 95.

53 Communication 361/08, 30th Activity Report of the African Commission on Human and Peoples' Rights, November 2010-May 2011.

Mozambique or seizing the Commission, and that this therefore constituted an 'unreasonable' delay.<sup>54</sup>

In a small number of cases in which violations were alleged against the receiving state, the African Commission has also held communications to be inadmissible for failure to exhaust domestic remedies. Unlike communications brought against the state alleged to have been involved in persecution, no general impediments exist in relation to the exhaustion of available domestic remedies in receiving states, with access to courts theoretically open to all – nationals as well as non-nationals.<sup>55</sup> In *Institute for Human Rights and Development in Africa (on behalf of Simbarakiye) v Democratic Republic of Congo*,<sup>56</sup> a Burundian national who had been granted refugee status in the DRC and had lived there for just over 20 years, found himself in the position of being dismissed without notice or compensation from his job (along with all other Rwandan, Burundian and Ugandan nationals in the country) following the war between the DRC, Rwanda, Burundi and Uganda. Thereafter, he left for Togo from where he lodged the complaint, claiming that he had been subjected to 'moral and material pressure' which made the exhaustion of domestic remedies impossible.<sup>57</sup> The African Commission held that, as neither Mr Simbarakiye nor his wife (a DRC national), who had remained behind in the DRC, had attempted to exhaust domestic remedies and further, as he had failed to provide evidence to the effect that moral and material constraints prevented him from exhausting domestic remedies, the communication was inadmissible.<sup>58</sup> The case of *Mouvement des Réfugiés Mauritiens au Sénégal v Senegal (1)*,<sup>59</sup> which alleged a series of violations by the Senegalese authorities against Mauritanian refugees, including arrest and humiliating treatment by the security forces as well as threats from the Mauritanian authorities when they attempted to return to their country of origin, was also held inadmissible *inter alia* for a failure to exhaust domestic remedies.<sup>60</sup> Similarly, in *Mouvement des Réfugiés Mauritiens au Sénégal v Senegal (2)*,<sup>61</sup> in which the complainant alleged violations of the African Charter as a result of the banning of a demonstration by the refugees of Podor in commemoration of International Refugee Day, the African Commission held that the complainant had failed to

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54 *Zitha* case (n 53 above) paras 111-114.

55 Note in this regard that the African Charter provides for equal access to justice in arts 2, 3 and 7 of the Charter.

56 (2003) AHRLR 65 (ACHPR 2003).

57 *Simbarakiye* case (n 56 above) para 9.

58 *Simbarakiye* case (n 56 above) paras 31-33.

59 (2000) AHRLR 287 (ACHPR 1997).

60 The other reasons provided for the inadmissibility decision is the failure to identify the relevant African Charter provisions said to have been violated.

61 (2003) AHRLR 131 (ACHPR 2003).

'provide proof of attempting to exhaust the local remedies that were available to him'.<sup>62</sup>

Where serious and massive violations involving a large number of complainants have been alleged against a receiving state, the African Commission has dispensed with the domestic remedies requirement. Thus, in *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*,<sup>63</sup> the Commission noted that allegations appeared to 'reveal the existence of a series of serious or massive violations of the provisions of the African Charter', and that it was therefore not necessary to exhaust domestic remedies.<sup>64</sup> Similarly, the Commission held on review in the case of *Doebbler v Sudan*<sup>65</sup> that 'where the violations involve many victims, it becomes neither practical nor desirable for the complainants or the victims to pursue such internal remedies in every case of violation of human rights'.<sup>66</sup> Addressing the specific facts of the case in which it was alleged that as a result of a tripartite agreement between the Sudanese and Ethiopian governments and the United Nations High Commissioner for Refugees (UNHCR), approximately 14 000 Ethiopian refugees would lose their refugee status, the African Commission noted that<sup>67</sup>

even if certain domestic remedies were available, it was not reasonable to expect refugees to seize the Sudanese courts of their complaints, given their extreme vulnerability and state of deprivation, their fear of being deported and their lack of adequate means to seek legal representation.

Finally, in *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea*,<sup>68</sup> the African Commission noted three reasons why it considered the exhaustion of domestic remedies to be futile where large numbers of refugees had been *refouled*. In the first instance, the Commission held that it would dispense with the exhaustion of domestic remedies requirement where the complainant is in a 'life-threatening situation that makes domestic remedies unavailable'.<sup>69</sup> It further noted in this regard that the availability of domestic remedies is compromised in circumstances where 'the authorities tasked with providing protection are the same individuals persecuting victims'.<sup>70</sup> On the impracticability of large numbers of Sierra Leonean refugees in Guinea (put at nearly 300 000 at the time of the alleged violations) approaching the domestic courts as well as the scale of crimes committed against the refugees, the Commission held that 'the domestic courts would be

62 *Mouvement des Réfugiés Mauritanien au Sénégal v Senegal* (n 61 above) para 21.

63 (2000) AHRLR 321 (ACHPR 1996).

64 *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (n 63 above) paras 15-18.

65 (2009) AHRLR 208 (ACHPR 2009).

66 *Doebbler* case (n 65 above) para 117.

67 *Doebbler* case (n 65 above) para 116.

68 (2004) AHRLR 57 (ACHPR 2004).

69 *Sierra Leonean Refugees* case (n 68 above) para 33.

70 *As above*.

severely overburdened if even a slight majority of victims chose to pursue legal redress in Guinea'.<sup>71</sup> Finally, the Commission held that it would be both 'impractical' and inadvisable for the refugees to return to Guinea, where they had suffered persecution. Citing the case of *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*,<sup>72</sup> the Commission held that 'victims of persecution are not necessarily required to return to the place where they suffered persecution to exhaust local remedies'.<sup>73</sup>

### 3.1.2 Rights of asylum seekers and refugees

Whereas the African Commission's stance in respect of the exhaustion of domestic remedies in respect of those seeking asylum, as illustrated by the *Chinhamo* and *Majuru* cases cited above, may be said to be disappointing, its position with regard to the rights of asylum seekers and refugees in respect of the substantive provisions of the African Charter is more encouraging. Though, as will be shown, the African Commission's jurisprudence has done little to flesh out the substantive provisions in the African Charter in respect of asylum seekers and refugees, nor has the Commission expressed itself on the provisions contained in the African Women's Protocol in respect of asylum-seeking and refugee women.<sup>74</sup>

Whilst the African Commission, invoking article 55 of the African Charter, declined to deal with a plea in *Vitine v Cameroon* in one of the first cases to be decided by it, to the effect that the Commission 'save ... [Mr Vitine's] life and prevail on his government to stop the hunt against him' and further 'appeal to the governments of Senegal and Niger to grant him refugee status', the Commission has subsequently engaged with the issue of the rights of asylum seekers and refugees.<sup>75</sup> In the case of *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*,<sup>76</sup> the Commission unequivocally confirmed that article 2 of the African Charter places an obligation on

71 *Sierra Leonean Refugees* case (n 68 above) para 34.

72 n 63 above.

73 n 63 above, para 35.

74 In the absence of cases being brought to the African Commission in respect of arts 4(2)(k), 10(2)(c) and (d) and 11(3) of the African Women's Protocol, a possible solution in this regard may lie in the use of General Comments clarifying the normative content of the rights provided for in human rights treaties, such as the first one adopted by the African Commission during its 52nd ordinary session held from 9 to 22 October 2012 in Yamoussoukro, Côte d'Ivoire, on arts 14(1)(d) and (e) of the African Women's Protocol.

75 (2000) AHRLR 55 (ACHPR 1994). Note that art 55 of the African Charter provides, *inter alia*, that a communication 'shall be considered by the Commission if a simple majority of its members so decide'. The rationale for the African Commission declining to consider this communication is further elaborated upon in *Ligue Camerounaise des Droits de l'Homme v Cameroon* (2000) AHRLR 61 (ACHPR 1997) para 11, with the Commission noting that '[t]he information in ... communication [106/93] did not give evidence of *prima facie* violations of the African Charter. For this reason the Commission declared the communication inadmissible.'

76 n 63 above.

state parties to ensure and secure the rights protected in it to everyone within their jurisdiction – nationals as well as non-nationals.<sup>77</sup> With regard to the provisions providing for a right to asylum, the African Commission noted in *Organisation Mondiale Contre la Torture and Others v Rwanda* that it should be understood as ‘including a general protection of all those who are subject to persecution, that they may seek refuge in another state’.<sup>78</sup>

To date, the African Commission has only been asked to comment on one occasion on the provisions of article 23(2) in the case of *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaire and Zambia*.<sup>79</sup> However, without examining the substance of the allegation that ‘Tanzania, Zaire and Kenya sheltered and supported terrorist militia’, the Commission found that the respondent states were not guilty of the alleged violations of the African Charter.<sup>80</sup>

Once granted asylum, the greatest threat to refugees in Africa, if the record of cases litigated before the African Commission is anything to go by, appears to be the possibility of expulsion from the receiving state and the violations of rights ensuing from this. In *Organisation Mondiale Contre la Torture and Others v Rwanda*,<sup>81</sup> four Burundian refugees, Bonaventure Mbonuabucya, Baudouin Ntandini, Vincent Sinarairaye and Shadrack Nkuzwenimana, were expelled from Rwanda, ostensibly on security grounds. In this case, the Commission, without elaborating on the substance of the African Charter insofar as it pertains to refugees, found violations of the right to non-discrimination; the rights to liberty and security of the person; the right to have their cause heard, including an appeal to competent authorities and the rights to asylum; expulsion without due process as well as the prohibition against the mass expulsion of non-nationals contained in the African Charter. In *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea*,<sup>82</sup> it was held that a speech by the Guinean President urging the arrest, search and confinement of Sierra Leonean refugees to refugee camps, also on so-called security grounds, clearly violated a number of Charter provisions.<sup>83</sup> In particular, it was held that there

77 n 63 above, paras 18 & 21-22.

78 (2000) AHRLR 282 (ACHPR 1996) para 31.

79 (2003) AHRLR 111 (ACHPR 2003). This case was brought by the *Association pour la Sauvegarde de la Paix au Burundi*, a Belgian-based NGO against the Democratic Republic of Congo, Ethiopia, Kenya, Rwanda, Tanzania, Uganda and Zambia, after the embargo declared by these countries against Burundi on 31 July 1996, following the *coup d'état* carried out by the Burundian army on 25 July 1996 against the democratically-elected government.

80 As above.

81 n 78 above.

82 n 68 above, 8.

83 These measures ultimately caused thousands of refugees to flee their homes. Many were left no other choice but to return to Sierra Leone, whereas others were forcibly returned to their home country by the authorities.

had been violations of the right to non-discrimination; the right to life and integrity of the person; the right to dignity and freedom from torture, cruel, inhuman and degrading treatment; the prohibition against mass expulsions; as well as the right to property. In addition, it was also held that the principle of non-discrimination guaranteed in article 4 of the OAU Refugee Convention had been violated. Whilst there are similarities between these two cases, there are also distinctive differences, the most notable of which is in relation to remedies ordered. Thus, in the first of these cases, the Rwandan authorities were simply urged to 'adopt measures in conformity with this decision' and, in the second case, the African Commission recommended that a joint commission of the Sierra Leonean and Guinean governments be established to assess the losses incurred by various victims with a view to compensating them.

The issue of the repatriation or return of refugees has also come to the fore in three cases before the African Commission. In the case of *Malawi African Association and Others v Mauritania*,<sup>84</sup> a host of violations were alleged during the period between 1986 and 1992, much of which centred around events of April 1989, which saw the Mauritanian government expel almost 50 000 people to Senegal and Mali with the consequent loss and destruction of property. Many of those expelled were black Mauritians and bearers of Mauritanian identity cards.<sup>85</sup> Upon their return to Mauritania, large numbers of these refugees were arrested 'as a generalised reprisal'.<sup>86</sup> In response to the assertion by the respondent state that 'all those who so desired could cross the border, or present themselves to the Mauritanian Embassy in Dakar and obtain authorisation to return to their village of birth' and the affirmation of the establishment of a government department responsible for the resettlement of these individuals, the African Commission made it plain that, whilst 'laudable', these efforts did not 'annul the violation committed by the state'.<sup>87</sup> Having declared grave or massive violations of the African Charter, and in particular the provisions of articles 2, 4, 5(6), 7(1)(a), (b), (c) and (d), 9(2), 10(1), 11, 12(1), 14, 16(1), 18(1) and 26, the Commission recommended *inter alia* that diligent measures be taken

to replace the national identity documents of those Mauritanian citizens which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania as well as the restitution of the belongings looted from them at the time of the said expulsion; and to take the necessary steps for the reparation for the deprivations of the victims of the above events.

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84 (2000) AHRLR 149 (ACHPR 2000).

85 Note that these identity cards were torn up by the authorities when these individuals were arrested or expelled, thus leaving them with no way to prove their Mauritanian identity.

86 n 84 above, para 15.

87 n 84 above, para 126.



It further recommended that appropriate measures be taken to 'ensure payment of a compensatory benefit to the widows and beneficiaries of the victims of the above-cited violations'.

The second case, *Doebbler v Sudan*,<sup>88</sup> concerned allegations brought prior to the implementation of the cessation clause in Sudan under article 1(c)(5) of the 1951 UN Refugee Convention. The African Commission held that it had found no evidence of the *refoulement* of refugees and that the communication had effectively been filed 'in anticipation of a violation, which did not happen in actual fact after the implementation of the cessation clause set in motion'.<sup>89</sup> As such, the Commission did not engage with the nature of repatriation or the obligations on the repatriating or receiving state.

The final case, *Sudan Human Rights Organisation and Another v Sudan*,<sup>90</sup> touched upon state obligations where refugees had been voluntarily returned to their country of origin, with the African Commission requiring that 'all necessary and urgent measures to ensure protection of victims of human rights violations' be taken, including the rehabilitation of 'economic and social infrastructure, such as education, health, water, and agricultural services ... in order to provide conditions for return in safety and dignity for the IDPs and refugees'.<sup>91</sup>

### 3.1.3 Recommendations and compliance

Whilst a number of the African Commission's recommendations have been very broad, compliance with these recommendations has generally not been forthcoming. In a study measuring compliance with the Commission's decisions between 1987 and mid-2003, full compliance was recorded in only six out of 44 cases.<sup>92</sup> Measures taken on the part of the Commission to remedy this situation – requiring states to report back to it – either in its periodic state party reports<sup>93</sup> or within a specified period of time,<sup>94</sup> and the adoption in

88 n 65 above.

89 n 65 above, para 163.

90 (2009) AHRLR 153 (ACHPR 2009).

91 n 90 above, para 229(e).

92 See F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 *American Journal of International Law* 1 8-11. Note that none of the cases cited above in relation to asylum seekers or refugees was amongst the six in which full compliance was achieved.

93 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001); *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003); and *Interights & Others (on behalf of Bosch) v Botswana*, (2003) AHRLR 55 (ACHPR 2003).

94 *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005); *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa Zimbabwe* (2009) AHRLR 268 (ACHPR 2009); *Scanlen & Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009); *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009); *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009); and *Interights & Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004).

2006 of a Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties, requesting states found in violation to inform the Commission of the measures taken as well as obstacles in implementation within a period of 90 days, have done little to engender greater compliance.<sup>95</sup> Whilst the Commission's new Rules of Procedure, adopted in 2010, provide for a number of follow-up measures, including the drawing of the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union, to instances of non-compliance, it remains to be seen whether these measures go far enough in addressing the lack of compliance with decisions and the Commission's lack of follow-up.<sup>96</sup>

### 3.2 Promotion of the rights of asylum seekers and refugees

The African Charter lists amongst the activities falling within the Commission's promotional mandate the collection of documents; the undertaking of studies and researches; the organisation of seminars, symposia and conferences; the dissemination of information; encouraging national and local institutions concerned with human and peoples' rights and, should the case arise, making recommendations to governments; the formulation of principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms; and co-operation with other African and international institutions concerned with the promotion and protection of human and peoples' rights.<sup>97</sup> The Commission's Rules of Procedure augment this list with the inclusion of the function of the examination of state party reports which, in terms of article 62 of the African Charter, are to be submitted by state parties every two years, detailing 'the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter'. In fulfilment of its promotional mandate in respect of asylum seekers and refugees, the African Commission has taken a number of measures with varying levels of success, many of its efforts in this regard being hamstrung by institutional weaknesses.

In February 1994, the African Commission convened a seminar entitled 'The Protection of African Refugees and Internally-Displaced Persons' in Harare, Zimbabwe,<sup>98</sup> which concluded that the 'plight of

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95 See ACHPR/Res 97(XXX).06. The African Commission does not appear to have followed up on this resolution.

96 See Rule 112 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (2010).

97 Arts 45(1)(a), (b) & (c) African Charter.

98 See Conclusions of the Seminar on Protection of African Refugees and Internally-Displaced Persons Held in Harare 16-18 February 1994, as reprinted in 7th Annual Activity Report of the African Commission 1993-1994; also reprinted in (1994) 4 *Review of the African Commission on Human and Peoples' Rights* 168 and C Heyns (ed) *Human rights law in Africa* (1999) 335.

African refugees and internally-displaced persons is a flagrant violation of human dignity and basic human rights' and further highlighted the threat which their plight poses to 'orderly and peaceful development in African countries'. However, beyond accentuating the plight of refugees on the continent and making a number of recommendations of which only a handful actually came to fruition, nothing more came of this seminar. Nevertheless, it heralded the start of dialogue between various institutions involved in refugee protection on the continent. Thus, in November 1999, discussions were convened between the UNHCR and the African Commission at the Commission's 26th session, as to co-operation between the two institutions, ultimately leading to the signing in May 2003 at the Commission's 33rd ordinary session in Niamey, Niger of a memorandum of understanding. This memorandum had as its aim the more effective promotion and protection of the rights of asylum seekers, returnees and other persons of concern to both institutions.<sup>99</sup> Ten years after the signing of this document, it would, however, appear that little progress has been achieved.

Further in fulfilment of its promotional mandate, the African Commission has over the years adopted a number of country-specific as well as thematic resolutions touching specifically on refugees and displaced persons – drawing attention to their plight as well as singling them out within the context of special measures of protection for vulnerable groups.<sup>100</sup> However, without a mechanism to follow up on recommendations made within the context of resolutions adopted by the Commission, their practical effect has been negligible.

With regard to the state party reporting procedure, the African Commission has in the last nine years highlighted in a relatively small number of its concluding observations that have been made public, areas of concern as well as the need for action in respect of the protection of the rights of asylum seekers and refugees.<sup>101</sup> Thus, in respect of the first periodic report by South Africa, the Commission urged the government to 'take appropriate administrative measures to

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99 Art 1 Memorandum of Understanding.

100 See eg Resolution on Human and Peoples' Rights Education, ACHPR/Res.6(XIV)93; Resolution on the Human Rights Situation in Africa, ACHPR/Res.14(XVI)94; Resolution on Sudan, ACHPR/Res.15(XVII)95; Resolution on Burundi, ACHPR/Res.24(XIX)96; Resolution on the Observance of the 30th Anniversary of the OAU Convention Governing the Specific Aspects of Refugees in Africa (1999), ACHPR/Res.43(XXVI)99; Resolution On Darfur, ACHPR/Res.68(XXXV)04; Resolution on Migration and Human Rights, ACHPR/Res.114 (XXXII) 07; Resolution on the Human Rights Situation in Côte d'Ivoire, ACHPR/Res.182(EXT.OS/IX)2011; Resolution on the Situation of the North of the Republic of Mali, ACHPR/Res.217 (XXXXXI)2012; and Resolution on the Right to Nationality, ACHPR/Res.234 (2013).

101 The increased prominence accorded to this issue coincides with the appointment by the African Commission of a Rights of Refugees, Asylum Seekers and IDPs (see the discussion in respect of the Special Rapporteur below).

ensure the speedy consideration of the applications for asylum seekers'.<sup>102</sup> In relation to the periodic report of Sudan, a recommendation was made that the government 'ensure that measures are taken for specific protection of the rights of the refugees and displaced persons in Sudan'.<sup>103</sup> In commenting on a subsequent report submitted by Sudan, the Commission further expressed concern at the failure to integrate as 'full citizens' into Sudanese society, more than 1 million refugees, the vast majority of whom had been in the country since the 1960s.<sup>104</sup> With regard to Ethiopia, the Commission addressed the issue of unaccompanied and separated children, recommending that the authorities 'take all measures to guarantee the protection of minor refugees in line with the provision of the African Charter and international refugee laws'.<sup>105</sup> It further recommended that the Ethiopian government 'take the necessary steps to address through legislative measures concerns regarding ... refugee children ...'.<sup>106</sup> In respect of Mauritius, the Commission expressed concern at the fact that no provision had been made for the 'granting of asylum or refugee status in accordance with the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol' in Mauritian law.<sup>107</sup> To remedy this, the Commission recommended that measures be taken, including the enactment of laws providing for the protection of refugees.<sup>108</sup> With regard to Angola, the Commission recommended the expedition of the 'process to finalise the study and review of the Law on the Status of Refugees by the Inter-Sectoral Commission in order to guarantee the rights of refugees in Angola'.<sup>109</sup> With respect to Rwanda, the Commission noted that measures taken to facilitate the return of refugees and displaced persons to their original places of residence

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102 See para 26 of the Concluding Observations, 38th ordinary session of the African Commission, 21 November to 5 December 2005, Banjul, The Gambia.

103 The Sudanese report was presented to the 35th ordinary session of the African Commission on Human and Peoples' Rights held in Banjul, The Gambia, from 21 May to 4 June 2004 (see para 27).

104 Para 39 Concluding Observations and Recommendations on the 3rd Periodic Report of the Republic of Sudan (2003-2008), 45th ordinary session of the African Commission, 13-27 May 2009, Banjul, The Gambia.

105 See para 69 of the Concluding Observations and Recommendations on the Initial, 1st, 2nd, 3rd and 4th Periodic Report of the Federal Democratic Republic of Ethiopia, 47th ordinary session of the African Commission, 12-26 May 2010, Banjul, The Gambia.

106 n 105 above, para 71.

107 See para 41 of the Concluding Observations and Recommendations on the 2nd, 3rd, 4th and 5th Periodic Reports of the Republic of Mauritius, 45th ordinary session of the African Commission, 13-27 May 2009, Banjul, The Gambia.

108 n 107 above, para 60.

109 See para 41 XXII of the Concluding Observations and Recommendation on the 2nd, 3rd, 4th and 5th Cumulative Periodic Reports of the Republic of Angola, adopted at the 12th extraordinary session of the African Commission, 30 July-4 August 2012.

were 'insufficient'.<sup>110</sup> In this regard, the Commission recommended that the state take measures to<sup>111</sup>

guarantee the effective protection of returning refugees and displaced persons, by according them equal rights in all areas including economic and social rights, without discrimination, thereby allowing their social reinsertion/reintegration which should lead to genuine national reconciliation.

The Commission similarly expressed concern at the insufficiency of measures for the repatriation of refugees, the resettlement of IDPs and secure reception centres for displaced persons in Côte d'Ivoire.<sup>112</sup> In relation to the initial report of the Republic of Kenya, the African Commission noted its concern at the closing of the borders with Somalia as well as reports of violations of the principle of *non-refoulement*.<sup>113</sup> Finally, in a handful of reports, the Commission lamented the absence of information in respect of asylum seekers and refugees.<sup>114</sup>

These comments represent an important shift in focus on the part of the Commission and would appear to signal a greater willingness to engage with states on the issue of the protection of asylum seekers and refugees. However, there are a number of factors which operate in order to diminish the effectiveness of the Commission's recommendations in respect of state party reports. The first of these is the lack of state compliance with regard to its reporting obligations, with only eight out of 53 states having complied with all its periodic reporting obligations and a further 11 countries having never submitted a report as at October 2012.<sup>115</sup>

Furthermore, the fact that the Commission's concluding observations have not been well or uniformly publicised means that it is very difficult to ascertain the true extent to which the Commission is prioritising refugee rights. The lack of publication in this regard also

110 Para 24 Concluding Observations and Recommendations on the Second Periodic Report of the Republic of Rwanda, 36th ordinary session, 23 November to 7 December 2004, Dakar, Senegal.

111 n 110 above, para 32.

112 See para 54 of the *Observations Finales sur le Rapport Périodique Initial et Cumulé de la République Côte d'Ivoire*, 52nd ordinary session of the African Commission on Human and Peoples' Rights, Yamoussoukro, Côte d'Ivoire, 9-22 October 2012.

113 See para 23 of the Concluding Observations, adopted at the 41st ordinary session of the African Commission, 16-30 May 2007, Accra, Ghana.

114 See, in this regard, para 21 of the Concluding Observations and Recommendations on the 7th and 8th Periodic Report of the Arab Republic of Egypt, 37th ordinary session, 27 April-11 May 2005, Banjul, The Gambia; para 35 of the Concluding Observations of the African Commission on the 3rd Periodic Report of the Republic of Uganda, 45th ordinary session of the African Commission, 13-27 May 2009, Banjul, The Gambia. Also see part V paras (o) and (q) and para 22 of the Concluding Observations and Recommendations on the 7th and 8th Periodic Reports of the Republic of Burkina Faso, adopted at the 35th ordinary session of the African Commission, 21 May-4 June 2004, Banjul, The Gambia.

115 See Combined 32nd and 33rd Activity Reports of the African Commission on Human and Peoples' Rights, para 16.

makes it difficult for any possible domestic pressure and follow-up to occur in instances where the Commission has made recommendations affecting the rights of asylum seekers and refugees. Finally, the lack of visible follow-up on its own concluding observations, in spite of the rather vague provisions of the Commission's 2010 Rules of Procedure, which stipulates that Commission members are to follow up on concluding observations 'within the framework of their promotion activities to the states parties concerned', means that states are largely able to escape accountability in this regard.

### **3.3 Taking the rights of asylum seekers and refugees seriously: The appointment by the African Commission of a Special Rapporteur on the Rights of Refugees, Asylum Seekers, Internally-Displaced Persons and Migrants**

Whereas the African Commission has made some headway in respect of its protective as well as promotional mandate with regard to the rights of asylum seekers and refugees, one of the most significant developments has been the appointment in 2004 of a Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally-Displaced Persons.<sup>116</sup> The Special Rapporteur is mandated to examine the situation of persons falling within its mandate, to 'act upon information', to undertake fact-finding missions to refugee and IDP camps, to assist states in the development of appropriate legal and policy frameworks, to raise awareness about these groups and to promote implementation of both the UN and OAU Refugee Conventions. Activities undertaken by the Special Rapporteur in fulfilment of this mandate to date have been limited, with budgetary constraints frequently cited as a reason for this. Nevertheless, the Special Rapporteur has given greater visibility to issues pertaining to asylum seekers and refugees within the African human rights system. The four Special Rapporteurs who have fulfilled this mandate up to July 2013 have issued press statements condemning violations, written to governments to enquire about specific measures taken or to be taken in respect asylum seekers and refugees, undertaken fact finding missions to Mali, Mauritania and Senegal, participated in a number of seminars and conferences and, in the case of Bahame Tom Nyanduga, the first Special Rapporteur, also participated in the

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<sup>116</sup> See Resolution on the Special Rapporteur on Refugees, Asylum Seekers and IDPs, ACHPR/Res.72 (XXXVI). On the extension of the mandate of the Special Rapporteur, see ACHPR/Res.95 (XXXIX)06. On the appointment of Commissioner Mohamed Fayek to the position of Special Rapporteur for a two-year period commencing in November 2009, see ACHPR/Res.160(XLVI)09. On the appointment of Commissioner Kayitesi Zainabo Sylvie to the position as of May 2011 for a period of two years, see ACHPR/Res.180 (XLIX) 2011. Finally, on the appointment of Maya Sahli-Fadil for a two-year period as of November 2011, see ACHPR/Res.203 (2011).

drafting of an AU Convention on the Protection and Assistance of Internally-Displaced Persons in Africa.<sup>117</sup>

#### 4 African Committee of Experts on the Rights and Welfare of the Child

The African Children's Committee, like the African Commission, has a promotional as well as a protective mandate. Whereas the African Commission has developed a relatively substantial body of jurisprudence in respect of its protectional functions, the work of the 11-member African Children's Committee had until 2011 been limited to promotional activities which included the issuing of a small number of concluding observations in respect of state party reports in which the issue of asylum-seeking and refugee children was addressed. Thus, the Committee recommended in respect of Kenya that 'special measures be taken to declare refugee and displaced children'.<sup>118</sup> With regard to Rwanda, the African Children's Committee noted the need to improve support and facilities for foreign refugee children in Rwanda as well as returned Rwandan

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117 See in this regard Report of Activities for the Inter-Session Period June-November 2006 for Commissioner Bahame Tom Nyanduga, presented to the 40th ordinary session of the African Commission on Human and Peoples' Rights, 15-29 November, 2006, Banjul, The Gambia; Report of Intersession Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur on Refugees, Asylum Seekers, Migrants and IDPs in Africa to the 41st session of the African Commission on Human and Peoples' Rights, 16-30 May 2007, Accra, Ghana; Report of the Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa during the Intersession Period November 2007 to May 2008; Report of the Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa during the Intersession Period May-November 2008; Report of the Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa during the Intersession Period November 2008 to May 2009; and Report of the Activities by Commissioner Bahame Tom Nyanduga, Special Rapporteur for Refugees, Asylum Seekers, IDPs and Migrants in Africa during the Intersession Period May to November 2009. Also see Report of the Activities by Commissioner Mohamed Fayek, Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants in Africa for the Intersession Period between November 2009 and May 2010 and Zainabo Sylvie Kayitesi, Activities as Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally-Displaced Persons for the period between the 49th ordinary session in May 2011 and the 50th ordinary session of the African Commission on Human and Peoples' Rights. Finally, see Maya Sahli-Fadel, Activities as Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally-Displaced Persons presented at the 51st ordinary session of the African Commission on Human and Peoples' Rights, 18 April to 2 May 2012 and Maya Sahli-Fadel, Report of the Mechanism of the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons and Migrants in Africa Since its Creation, presented to the 52nd ordinary session, 9-22 October 2012.

118 Recommendations and Observations to the Government of Kenya by the African Committee of Experts on the Rights and Welfare of the Child concerning the Initial Report on the Implementation of the African Charter on the Rights and Welfare of the Child.

refugee children.<sup>119</sup> It also recommended that the Rwandan government ensure the best possible conditions for the return of refugee children to their country of origin.<sup>120</sup> In relation to Tanzania, the Children's Committee expressed concern at the fact that family-tracing programmes were being conducted by an NGO as well as the lack of clear and updated information, allowing for family reunification.<sup>121</sup> The Tanzanian government was also requested to enact legislation and establish mechanisms allowing for the implementation of the National Refugee Policy and further information was requested in relation to the manner in which children's rights were dealt with during the repatriation of Burundian refugees.<sup>122</sup>

In March 2011, the African Children's Committee handed down its first decision in *Nubian Children in Kenya v Kenya*,<sup>123</sup> a case which, whilst not directly addressing the rights of asylum seekers and refugees, nonetheless provides important guidance on issues of nationality and statelessness. This case was brought as an *actio popularis* on behalf of Nubians in Kenya who, in spite of having lived in the country for more than a century, had effectively been denied Kenyan nationality. The applicants argued that this violated a number of provisions of the African Children's Charter. The African Children's Committee concurred, finding violations of the rights of Nubian children to non-discrimination, nationality and protection against statelessness, as well as consequential violations of the rights to health and education. On the issue of statelessness, the Children's Committee emphasised in particular the negative consequences thereof on children, including the 'difficulty to travel freely, difficulty in accessing justice procedures when necessary, as well as the challenge of finding oneself in a legal limbo vulnerable to expulsion from their home country'.<sup>124</sup> Furthermore, the Children's Committee also noted the 'devastating' impact of the denial of nationality on the realisation of children's socio-economic rights, such as access to health care and education.<sup>125</sup> Amongst the measures ordered, the Committee required the Kenyan authorities to report on the implementation of these recommendations within a six-month period from the date of notification of the decision.<sup>126</sup> This does not appear

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119 *Recommandations par le Comité Africain D'Experts sur les Droits et le Bien Etre De L'Enfant au Gouvernement du Rwanda*.

120 As above.

121 Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Republic of Tanzania Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child.

122 As above.

123 Communication 002/2009.

124 *Nubian Children* (n 123 above) para 46.

125 As above.

126 *Nubian Children* (n 123 above) para 69(5). Other measures ordered included a recommendation that the Kenyan government take legislative, administrative as well as other measures in order to ensure that children of Nubian descent are



to have occurred, and at the Children's Committee's 18th session held from 27 November to 1 December 2011 in Algiers, Algeria, the Committee appointed one of its members as the individual responsible for following up on the implementation of this decision.<sup>127</sup> Subsequently, three members of the Committee were designated to visit Kenya in order to follow up on the decision.<sup>128</sup> It remains to be seen whether the Committee will be able to engender compliance in a way that the African Commission has to date failed to do.

## 5 African Court on Human and Peoples' Rights

As noted at the beginning of this article, the Protocol Establishing an African Court on Human and Peoples' Rights was adopted in 1998 in order to 'complement' the African Commission's protective mandate, addressing in particular the issue of the lack of legally-enforceable judgments.<sup>129</sup> This instrument, as well as the subsequent Protocol on the Statute of the African Court of Justice and Human Rights, merging the African Court with the African Court of Justice,<sup>130</sup> have been criticised for their failure to allow for automatic individual and NGO access – requiring states instead to make a declaration accepting the Court's jurisdiction in terms of article 34(6). As at July 2013, only six states have made this declaration.<sup>131</sup> As the initial cases before the African Court demonstrate, including the very first case of *Michelot Yogogombaye v The Republic of Senegal*<sup>132</sup> in which the applicant requested amongst its prayers that the Court rule that Senegal

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registered immediately after birth and that those who would otherwise be stateless are able to acquire a Kenyan nationality and the proof of such a nationality at birth. The Committee also recommended that the state take measures to ensure, as a matter of priority, that existing children of Nubian descent whose Kenyan nationality is not recognised are afforded the benefit of these measures. Finally, a recommendation was also made that the Kenyan government implement its birth registration system in a non-discriminatory manner and adopt short, medium and long-term plans, so as to ensure the fulfilment of the rights to health and education (see paras 69(1)-(5)).

127 See ACERWC/Rpt (XVIII).

128 See ACERWC/Rpt (XIX) para 99.

129 With regard to the issue of binding judgments, see art 27(1) of the Protocol which explicitly provides that, in the event of finding a violation of human and peoples' rights, the Court may make any order to remedy the violation, including the payment of compensation. Art 30 of the Protocol further provides that the '[s]tate parties ... undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution'.

130 This instrument was adopted on 1 July 2008 in Sharm El Sheikh, Egypt.

131 These states are Burkina Faso (declaration signed on 14 July 1998 and deposited on 28 July 1998); Ghana (declaration signed on 9 February 2011 and deposited on 10 March 2011); Malawi (declaration signed on 9 September 2008 and deposited on 9 October 2008); Mali (declaration signed on 5 February 2010 and deposited on 19 February 2010); Tanzania (declaration signed on 9 March 2011 and deposited on 29 March 2010); and Rwanda (declaration signed on 22 January 2013).

132 Application 001/2008.

violated the African Charter and the OAU Refugee Convention, it is likely that the African Commission will for some time yet be the primary institution through which asylum seekers and refugees will seek to have their rights vindicated.<sup>133</sup> The willingness, however, of the African Commission to bring cases to the African Court, as illustrated by *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya*,<sup>134</sup> may, if this trend is continued, lead to cases dealing with the rights of asylum seekers and refugees to come before the Court. Similarly, the possibility of advisory opinions being sought on the rights of asylum seekers and refugees may also force the Court to confront the issue of refugees in Africa.<sup>135</sup> If such cases were to arise, it is imperative that the Court takes a strong, courageous stance in favour of protecting the rights of some of the most vulnerable members of society.

## 6 Conclusion

While refugees were initially viewed within the context of the OAU as a natural outflow of the struggle against colonialism and, as such, tended to be welcomed in the receiving states, more recent events, in particular the expulsion of non-nationals by African states, would seem to indicate that this traditionally generous approach has begun to wane. Whilst the institutions with responsibility for human rights promotion and protection in Africa have made some strides in the advancement of the rights of asylum seekers and refugees on the continent, it is apparent that there are a number of challenges impeding the effective protection of their rights, the most important of which include the lack of political will on the part of states to implement recommendations of the institutions with responsibility for rights promotion and protection on the continent; the unwillingness

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133 See Application 002/2011, *Soufiane Ababou v People's Democratic Republic of Algeria*; Application 005/2011, *Daniel Amare and Mulugeta Amare v Republic of Mozambique*; Application 008/2011, *Ekollo Moundi Alexandre v République du Cameroun et République Fédérale du Nigéria*; Application 012/2011, *National Convention of Teachers Trade Union v the Republic of Gabon*; Application 002/2012, *Delta International Investments SA, Mr and Mrs AGL de Lange v The Republic of South Africa*; Application 004/2012, *Emmanuel Joseph Uko & Others v The Republic of South Africa*; and Application 005/2012, *Amir Adam Timan v The Republic of Sudan*, in which the Court held that it did not have jurisdiction due to the fact that the respondent states in question had not made a declaration recognising the right to individual petition provided for in art 34(6) of the African Court Protocol. Similarly, the request for provisional measures in Application 007/2012, *Baghdadi Ali Mahmoudi v The Republic of Tunisia*, was also rejected for failure on the part of the Tunisian authorities to have made the declaration in terms of art 34(6).

134 Application 004/2011. This case was brought by the African Commission to the African Court after 'successive complaints' had been submitted to it alleging serious and widespread violations of human rights by the government of Libya.

135 As of July 2013, four advisory opinions had been sought by Libya (Request 002/2012); Mali (Request 003/2012); the Socio-Economic Rights and Accountability Project (SERAP) (Request 001/2012); the Pan-African Lawyers Union (PALU); and the Southern Africa Litigation Centre (SALC).

of the African Commission to clearly separate admissibility from the merits of cases brought before it; the lack of genuine engagement with the normative provisions by the African Commission in respect of both the African Charter and the African Women's Protocol; the lack of follow-up mechanisms embedded within the Commission's procedures; and the restricted access granted to individuals under the African Court Protocol. It is only once these issues have been addressed fully that asylum seekers and refugees on the continent will be able to fully enjoy the rights afforded to them by the African human rights system.

# The ECOWAS Community Court of Justice and the horizontal application of human rights

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## Summary

*In three cases, Peter David v Ambassador Ralph Uwechue, The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The President of the Federal Republic of Nigeria and Tandja v Djibo and Another, the ECOWAS Community Court of Justice (ECCJ) has ruled that only ECOWAS member states and community institutions may be sued before it. This article reviews the conclusions of the ECCJ against the background of its dual mandate as a court of integration and human rights as it pertains to the articulation of community freedoms and human rights, and argues for a more integrated approach in the elaboration of the dual mandate of the ECCJ, which should recognise the horizontal application of human rights in the protection of community freedoms such as the free movement of goods, services, persons and capital.*

## 1 Introduction

In three cases, *Peter David v Ambassador Ralph Uwechue*,<sup>1</sup> *The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) v The President of the Federal Republic of Nigeria*<sup>2</sup> and *Tandja v Djibo and Another*,<sup>3</sup> the ECOWAS Community Court of

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1 (ECW/CCJ/RUL/03/10) (*Uwechue*).

2 (ECW/CCJ/APP/07/10) (*SERAP*).

3 (ECW/CCJ/05/10) (*Tandja*).

Justice (ECCJ)<sup>4</sup> has ruled that only Economic Community of West African States (ECOWAS) member states and community institutions can be sued before it. In *Uwechue* and *SERAP*, the ECCJ held that, in the event of a dispute between individuals on an alleged violation of human rights enshrined in the African Charter on Human and Peoples' Rights (African Charter), it is only when there is no appropriate and effective national forum for seeking redress against individuals that the victim of such offences may bring an action before the ECCJ, not against the individual, but against an ECOWAS member state for failure to ensure protection and respect for the human rights allegedly violated. These three cases have brought, at least from the Court, an emphatic resolution of the ambiguity which has trailed the adoption of article 9(4) of the 2005 Supplementary Protocol,<sup>5</sup> regarding who can be a defendant in a human rights case before the Court. In effect, the ECCJ reached significant conclusions on the horizontal application of human rights, important not just for ECOWAS but for other regional economic communities (RECs) in Africa and elsewhere.

The article reviews the conclusions of the ECCJ against the background of the dual mandate of the ECCJ as a court of integration and human rights as it pertains to the articulation of community freedoms and human rights, and argues for a more integrated approach in the elaboration of the dual mandate of the ECCJ, which should recognise the horizontal application of human rights in the protection of community economic freedoms, such as the free movement of goods, services, persons and capital that undergird common markets and economic unions. It is inevitable, as will be demonstrated later in this article, that certain human rights are directly implicated and often intertwined with the protection of economic freedoms as the reverse is also the case. Accordingly, since individuals can bring actions against ECOWAS member states for human rights abuses that are directly or indirectly connected to economic freedoms, there is no justifiable reason why they should not be able to do so against other individuals. Such actions invite regional judiciaries such as the ECCJ to curtail or remove obstacles to the attainment of common markets and economic unions. Consequently, it is clear that the capacity of individuals to proceed against other individuals in the protection of their economic freedoms flows from

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4 The ECCJ is the judicial organ of ECOWAS. ECOWAS is a 15-member (Benin; Burkina Faso; Cape Verde; Côte d'Ivoire; The Gambia; Ghana; Guinea; Guinea Bissau; Liberia; Mali; Niger; Nigeria; Senegal; Sierra Leone; and Togo) regional economic community whose principal aim is to promote co-operation and integration leading to the establishment of a West African Economic Union. See art 3(1) of the Revised Treaty Establishing the Economic Community of West African States 1993 (Revised ECOWAS Treaty).

5 The 2005 Supplementary Protocol of ECOWAS (2005 Supplementary Protocol) amends the 1991 ECOWAS Community Court of Justice Protocol by granting direct access to individuals to the ECCJ for 'the violation of human rights that occur in any member state'.

the integration mandate of the ECCJ. Unfortunately it is doubtful if the cast and interpretation of the human rights jurisdiction of the ECCJ contemplate individual defendants. It will be contended that the human rights jurisdiction of the ECCJ is not a stand-alone jurisdiction, but is facilitative and intricately tied to the ECOWAS integration mandate and that the horizontal application of human rights by the ECCJ is crucial to substantive integration efforts in West Africa. Furthermore, it will be demonstrated that, unless individual complaints of a breach of human rights by other individuals are cognisable before the ECCJ, at least as they relate to integration issues, it will be impossible to holistically address issues and obstacles to the attainment of the integration objectives of ECOWAS.

The horizontal application of human rights refers to instances where individuals are parties to a case before a court and should not be confused with the enforcement of the positive treaty obligations of states that have a horizontal effect on individuals.<sup>6</sup> In such a circumstance, a state is the defendant before an international tribunal that is alleged to have breached positive treaty obligations in terms of the duty of the state to take all measures to ensure the effective enjoyment of a fundamental right different from negative obligations where the state abstains from human rights violations. The use of horizontal application in this article contemplates individual defendants before the ECCJ. Individuals can be defendants in at least two ways before a community court. The first way is by virtue of a treaty provision, whereby the state parties in manifestation of a consensus recognise the possibility that individual defendants can be sued before an international court. While it is not the usual practice, there are international courts that recognise individual defendants, an example of which is the Seabed Disputes Chamber of the International Tribunal of the Law of the Sea (ITLOS).<sup>7</sup> The second way is through a referral procedure whereby national courts refer cases involving individual parties to the community court. The individual parties thereby become parties before the community court. The notion of the horizontal application of human rights proceeds from the belief that individuals, just like the state, are capable of human rights abuses. The recognition of individual defendants in national and international adjudication is a conceptual matter that affirms a legal system's belief that individuals are capable of human rights abuses. Whether particular individuals and other non-state actors, such as

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6 See JH Knox 'Horizontal human rights law' (2008) 108 *American Journal of International Law* 1.

7 See art 37 of Annex VI (Statute of the International Tribunal for the Law of the Sea) to the United Nations Convention on the Law of the Sea 1982. See also FO Vicuña 'Individuals and non-state entities before international courts and tribunals' (2001) 5 *Max Planck Yearbook of United Nations Law* 53.

corporations, should be proceeded against is a procedural matter which is often a matter of evidence.

The article proceeds as follows. In the next section follows an overview of the ECCJ jurisprudence on the horizontal application of human rights. In part three, the nature of the human rights jurisdiction of the ECCJ is considered to provide a context for the view that the integration mandate of ECOWAS is not properly articulated, while part four explores the ramifications of human rights and economic freedoms in the horizontal application of human rights in the ECCJ.

## 2 Overview of the ECCJ jurisprudence on the horizontal application of human rights

This section reviews the ruling and judgments of the ECCJ in three cases – *SERAP*, *Uwechue* and *Tandja* – where the ECCJ held that it would not entertain suits against individual defendants for human rights abuses. All three cases were instituted pursuant to the human rights jurisdiction of the ECCJ, which is found in the amended article 9(4) of the 1991 Protocol<sup>8</sup> of the ECCJ,<sup>9</sup> which provides that the Court has jurisdiction to determine cases of violations of human rights

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8 Art 3 of the 2005 Supplementary Protocol A/SP.1/01/2005 amended Protocol A/P.1/7/91 relating to the Community Court of Justice by deleting and substituting art 9 of the 1991 Protocol.

9 The jurisdiction of the ECCJ is as follows: '(1) The interpretation and application on any dispute relating to the following: (a) the interpretation and application of the Treaty, Conventions and Protocols of the Community; (b) the interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS; (c) the legality of regulations, directives, decisions and other legal instruments adopted by ECOWAS; (d) the failure by member states to honour their obligations under the Treaty, Conventions and Protocols, regulations, directives or decisions of ECOWAS; (e) the provisions of the Treaty, Conventions and Protocols, regulations, directives or decisions of ECOWAS member states; (f) the Community and its officials; (g) the action for damages against a Community institution or an official of the Community for any action or omission in exercise of its official functions. (2) The Court shall have the power to determine any non-contractual liability of the Community and may order the Community to pay damages or make reparation for official acts or omissions of any community institution or community officials in the performance of official duties or functions. (3) Any action by or against a Community institution or any member of the Community shall be statute barred after 3 (three) years from the date when the action arose. (4) The Court has jurisdiction to determine cases of violations of human rights that occur in any member state. (5) Pending the establishment of the Arbitration Tribunal provided for under article 16 of the Treaty, the Court shall have the power to act as arbitrator for the purpose of article 16 of the Treaty. (6) The Court shall have jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement. (7) The Court shall have the powers conferred on it by this Protocol as well as any other powers that may be conferred by subsequent protocols and decisions of the Community. (8) The Authority of the Heads of State and Government shall have the power to grant the Court the power to adjudicate on any specific dispute that it may refer to the Court other than those specified in this article.'

that occur in any member state.<sup>10</sup> It is important to make the tentative point that the provisions of the amended article 9(4) are ambiguous with respect to whether both states and individuals can be defendants in human rights cases,<sup>11</sup> since there is no clear indication that only states can be defendants in suits of human rights abuses. Since all that is required is that there is an allegation of human rights abuse in an ECOWAS state, it can be argued that the cast of article 9(4) contemplates suits against individual defendants. While this position may appear contrary to the practice of international courts and tribunals that permit only states as defendants, it is to an enabling treaty that recourse should be had in determining whether individuals can be defendants in an international tribunal or court. Where a treaty, such as the Revised ECOWAS Treaty, suggests that individuals can be defendants before the ECCJ, it must be taken to be a conscious decision to break from normal practice.

As stated above, in the *SERAP* case, the *Uwechue* case and the *Tandja* case, the Court ruled emphatically that only states and community institutions could be defendants in suits before the ECCJ involving claims of human rights abuses. The *SERAP* case involved the question of the jurisdiction of the ECCJ over complaints of human rights abuses against the Nigerian government and five Nigerian oil companies concerning pollution and associated human rights violations in Nigeria's Niger Delta. The Socio-Economic Rights and Accountability Project had in its suit complained that the defendants had violated

the right to food, to work, to health, to water, to life and human dignity, to a clean and healthy environment, and to economic and social development ... as a consequence of the impact of oil-related pollution and environmental damage on agriculture and fisheries, oil spills and waste materials polluting used for drinking and other domestic purposes, failure to secure the underlying determinants of health, including a healthy environment, and failure to enforce laws and regulations to protect the environment and prevent pollution.

One of the preliminary objections by the oil companies was that the jurisdiction of the ECCJ did not extend to disputes between individuals. In *Uwechue*, a Nigerian police officer brought an action against a former special representative of the Executive Secretary of ECOWAS, claiming a breach of his right to property, his right to work under equitable and satisfactory conditions, and his right to respect and freedom from discrimination pursuant to articles 1, 14, 15 and 28 of the African Charter. *Tandja* involved an action brought by the

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10 All references to art 9(4) should be construed to mean the text as substituted by the 2005 Protocol.

11 See ST Ebobrah 'A rights protection goldmine or a waiting volcanic eruption: Competence of and access to the human rights jurisdiction of the ECOWAS Community Court of Justice' (2007) 7 *African Human Rights Law Journal* 307 322, who also contends that 'the imprecise couching of article 9(4) and article 10(d) of the Supplementary Protocol leaves the door open for situations such as human rights actions against non-state actors before the Court'.



former President of Niger, Mamadou Tandja, against General Salou Djibo subsequent to his detention without trial following his removal from office by a *coup* mounted by a military junta led by General Djibo in 2010. Tandja alleged violations of articles 4 and 5 of the 1993 Revised ECOWAS Treaty; articles 1, 2, 3, 5, 6 and 18 of the African Charter; articles 2, 3, 8 and 26 of the International Covenant on Civil and Political Rights (ICCPR); and articles 5, 7, 8, 9, 13 and 25 of the Universal Declaration of Human Rights (Universal Declaration). In all three cases,<sup>12</sup> the ECCJ declined to assume jurisdiction over the individuals sued as defendants for human rights abuses.<sup>13</sup>

It is in *Uwechue* that the ECCJ sets out a detailed reasoning for declining the horizontal application of human rights. Two broad issues can be distilled from *Uwechue* as forming the crux of the Court's position. The first is that an unrestricted reading of article 9(4) would lead to a situation where the ECCJ replaces domestic courts in human rights cases<sup>14</sup> and will be overwhelmed by a flood of cases.<sup>15</sup> The second issue is the lack of evidence of a similar jurisdiction over individual defendants by any international or regional body whose jurisdiction is limited to states. The ECCJ further stated that in the event of a dispute between individuals on an alleged violation of human rights, the natural and proper venue is the domestic court of the state party where the violation occurred and that it is only when there is no appropriate and effective forum at the national level for seeking redress against individuals, that an action may be brought before an international court, not against the individuals, but against the signatory state for failure to ensure the protection and respect for the human rights allegedly violated.<sup>16</sup> The Court also stated that within the ECOWAS community, apart from member states, other entities that can be brought before the ECCJ for alleged violations of human rights are the institutions of the community because, since they cannot, as a rule, be sued before domestic jurisdiction, the only avenue left to the victims for seeking redress for grievances against those institutions is the Community Court of Justice.<sup>17</sup>

It is important that the ECCJ and other African REC courts of justice tilt towards a nuanced and contextual evolution of the horizontal application of human rights rather than an emphatic finality on the question of individual defendants. The principal reason canvassed in the ensuing paragraphs for a change in the jurisprudence of the ECCJ

12 It is important to note the earlier 2005 case of *Ukor v Layale* unreported Case CW/CCJ/APP/01/04, where the ECCJ adjudicated on a case involving an individual. No question of horizontal jurisdiction of the Court was raised before the Court, whose decisions were based on other grounds.

13 It is worth noting that the importance attached to this issue is such that the ECCJ *suo motu* raises this point. This is what happened in *Uwechue* (n 1 above) and again in *Tandja* (n 3 above).

14 See para 37 of *Uwechue* (n 1 above).

15 As above.

16 See paras 41-43 of *Uwechue* (n 1 above).

17 As above.

is the nature and extent of the human rights jurisdiction of the ECCJ in view of its dual mandate as a court of integration and a human rights court. It is argued that, at least, the human rights jurisdiction should be facilitative of the integration jurisdiction of the ECCJ and that, since individuals may proceed against member states for breaches of integration obligations, there is no reason why individuals should not proceed against other individuals for breaches of integration obligations. Thus, while acknowledging that *Uwechue*, *Tandja* and *SERAP* were reasoned correctly in view of their peculiar facts, it is the objective of this article to point out that there are circumstances related to the attainment of integration objectives that warrant individual defendants against whom human rights abuses may be alleged before the ECCJ. As stated above, the text of the Revised ECOWAS Treaty supports the view that there can be individual defendants before the ECCJ. In addition, the objective of a West African Economic Union requires that individuals who obstruct the attainment of this objective are challenged before the ECCJ.

It is important at this point to further consider how individual defendants may be brought before the ECCJ. As stated above, treaty provisions would be enough, even though the practice of international courts and tribunals indicates that this is not a common practice. Another way is through a referral procedure from a national court to a community court. It is therefore important to consider the relationship between the ECCJ and West African national courts within the context of the ECOWAS legal system. The role of the ECCJ is to ensure the uniform interpretation and application of ECOWAS law which is important, given the fact that were it otherwise, there could be as many as 15 national interpretations of ECOWAS law. Such interpretations could create obstacles to the attainment of a West African Economic Union because of the practical effect of different but confusing interpretations on a single subject matter.<sup>18</sup> National courts are allowed a margin of appreciation in implementing ECOWAS law as courts nearer to the people,<sup>19</sup> but in accordance with the application and interpretation of the ECCJ. While the principle of subsidiarity affirms the rights of national courts to deal with local issues, it also recognises that regional courts can in appropriate circumstances intervene to address shortcomings of national courts. To ensure the uniformity of community law, it is usual for regional courts to develop a preliminary ruling procedure that requires national courts to seek the interpretation of regional courts to enable her to discharge her adjudicative function. Such preliminary rulings bind and guide national courts. The ECOWAS legal system is no different. Article 10(f)

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18 See generally ES Nwauche 'Enforcing ECOWAS law in West African national courts' (2011) 55 *Journal of African Law* 181.

19 See generally PG Carroza 'Subsidiarity as a structural principle of international human rights law' (2003) 97 *American Journal of International Law* 38.

of the Protocol of the Community Court of Justice<sup>20</sup> envisages a situation

where in an action before a national court of a member state, an issue arises as to the interpretation of a provision of a treaty, or other protocols or regulations, the national court may on its own or at the request of any of the parties to the action refer the issue to the Court for interpretation.

Since the decisions of the ECCJ are declared to be final and conclusive by articles 15(4) and 76(2) of the Revised ECOWAS Treaty, it follows that such an ECCJ ruling binds all ECOWAS national courts on that subject. The problem with the ECOWAS preliminary ruling procedure is that it is optional,<sup>21</sup> and an ECOWAS national court may refuse to seek such clarification from the ECCJ. What is worrisome is that there is no evidence that any West African national court has engaged with the preliminary reference procedure and referred any case to the ECCJ. It is not clear whether individual parties before the national court in the referred case would become parties before the ECCJ given the bare text of article 10(f) of the Revised ECOWAS Treaty. Would they be allowed to attend and argue their case before the ECCJ or would the ECCJ merely deal with appropriate documentation? It is important to note that individual defendants are able to participate in the reference proceedings at the European Court of Justice (ECJ) once a national court makes a reference in accordance with article 96 of the Rules of Procedure of the Court of Justice.<sup>22</sup> Accordingly, it is recommended that the ECCJ preliminary reference procedure recognises the parties (including individual defendants) in the main proceedings as participants. Other relevant questions include whether the reference is limited to cases of 'human rights abuses' which govern individual access to the ECCJ, or would cases also cover integration issues? The text of article 10(f) supports the contention that national cases could deal with all issues derivable from ECOWAS treaties, protocols and regulations. In sum, the ECCJ preliminary reference procedure is not in use and we are left without the benefit of how the procedure would have assisted the horizontal application of human rights. The glaring lack of a functional and effective preliminary ruling procedure of the ECCJ strongly underscores the importance of a horizontal application of human rights by the ECCJ so that the deficiencies of national courts in addressing individual obstacles to ECOWAS integration objectives can be effectively addressed. It is also important to draw attention to the uncertainty about the possibility of the horizontal application of human rights in

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20 Inserted by the 2005 Supplementary Protocol.

21 See R Virzo 'The preliminary ruling procedures at international regional courts and tribunals' (2011) 10 *The Law and Practice of International Courts and Tribunals* 285 297.

22 See also Court of Justice of the European Union *The Court of Justice composition, jurisdiction and procedures* [http://www.ab.gov.tr/files/ardb/evt/1\\_avrupa\\_birligi/1\\_2\\_kurumlar/Court\\_of\\_Justice.pdf](http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_2_kurumlar/Court_of_Justice.pdf) (accessed 22 April 2013).

West African national courts.<sup>23</sup> What would national courts refer to the ECCJ if they do not permit individual defendants?

### 3 Nature and extent of the human rights jurisdiction of the ECCJ in comparative perspective

This section of the article critically examines the nature of the human rights jurisdiction of the ECCJ and it will be demonstrated that this jurisdiction is a stand-alone regime and not complementary to the integration objectives of ECOWAS. Accordingly, a declaration by courts like the ECCJ that there can be no individual defendants before it is an intuitive manifestation and furtherance of the conviction that their human rights jurisdiction is a stand-alone regional review of member states' human rights abuses. This conviction is oblivious of the interconnectedness of human rights and integration in their human rights jurisdiction.

A key issue to consider is whether the ECCJ human rights jurisdiction is stand-alone or is intimately connected with the integration mandate of the ECCJ. It is plausible to contend that, since the judicial enforcement of the ECOWAS human rights mandate is granted to the ECCJ which is a regional court exercising judicial competence over integration matters, it should follow that the human rights jurisdiction of the ECCJ is facilitative, at the least, of the ECOWAS integration mandate.<sup>24</sup> On the other hand, it is also possible to argue the opposite by contending that, even though the jurisdiction of the ECCJ potentially covers integration matters, the ECCJ has articulated and developed a significant competence over national human rights abuses in terms of its docket of human rights cases. To understand which position reflects reality it is important to dwell in some detail on the nature of the human rights jurisdiction of the ECCJ.

To begin with, it is important to refer to the aims and objectives of ECOWAS as contained in article 3(1) of the 1993 Revised ECOWAS Treaty,<sup>25</sup> which is to

23 Even though some doubt existed as to the horizontal application of human rights in Nigeria, this was erased in *Uzoukwu v Ezeonu II* (1991) 6 NWLR (pt 200) 708 and *Onwo v Oko* (1996) 6 NWLR (pt 456) 584. Subsequent cases, such as *Anigboro v Sea Trucks Ltd* (1995) 6 NWLR (pt 399) 35, applied sec 37 of the 1999 Constitution, and in *Salubi v Nwariakwu* (1997) 5 NWLR (pt 505) 35, the Court of Appeal interpreted sec 39(2) of the 1979 Constitution. However, the extent of the horizontal application of human rights remains uncertain. Eg, Nigerian courts have continued to hold that the right to a fair hearing is not available to an employee in a private contract of employment. See E Chianu 'Fair hearing for all Nigerian workers' (2007) 1 *CALS Review of Nigerian Law and Practice* 28.

24 See RF Opong *Legal aspects of economic integration in Africa* (2011) 126, who clearly prefers an ECCJ of insignificant human rights jurisdiction.

25 The 1993 Revised ECOWAS Treaty reviewed the Treaty Establishing the Economic Community of West Africa States 1975 (ECOWAS Treaty).

promote co-operation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among member states and to contribute to the progress and development of the African continent.

Another objective of ECOWAS is 'the removal, between member states, of obstacles to the free movement of persons, goods, services and capital and the right to residence and establishment'.<sup>26</sup> It is therefore clear from the Revised ECOWAS Treaty that ECOWAS is a regional economic community that is gradually evolving a human rights protection and promotion competence.<sup>27</sup>

If decisions of the ECCJ in *Uko*<sup>28</sup> and *Jerry Ugokwe v Federal Republic of Nigeria*,<sup>29</sup> that the ECOWAS Treaty is supreme law, are followed, it is the objectives in the ECOWAS Treaty that should define her nature. In this regard, the relevance of human rights to the objective of the West African Economic Union is found in article 4(g) of the Revised ECOWAS Treaty, which declares 'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights' as one of the fundamental principles in the pursuit of the ECOWAS objective, which is the formation of a West African Economic Union. In this regard, an important provision of the Revised ECOWAS Treaty, which defines relevant human rights that facilitate the formation of an economic union, is found in article 59 which declares that ECOWAS citizens have a right of entry residence and establishment which had been recognised long before the Revised ECOWAS Treaty in a 1979 Protocol on the Free Movement of Persons, Residence and Establishment. Clearly, the Revised ECOWAS Treaty affirmed a long-standing economic integration objective of ECOWAS. This should ordinarily mean that the protection and promotion of human rights are directly tied to the attainment of a West African Economic Union. Accordingly, it can be concluded that the ECCJ human rights jurisdiction, by the text of the Revised ECOWAS Treaty, is facilitative of the objectives of a West African Economic Union.

This is the point to ask if the ECCJ agrees in its jurisprudence that its human rights competence is facilitative of the integration objectives of ECOWAS. The following brief narrative seeks to answer this question.

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26 See art 3(2)(d)(iii) of the Revised ECOWAS Treaty. See also art 2(1)(d) of the ECOWAS Treaty.

27 In this regard, it is to be noted that that the express mandate for human rights in the 2005 Supplementary Protocol appeared as the culmination of an increased focus on human rights democracy and good governance by ECOWAS by a number of protocols. See the 1999 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security; the 2001 Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security.

28 n 12 above, 21.

29 Suit ECW/CCJ/APP/02/05.

The first decision of the ECCJ in *Afolabi v Nigeria*<sup>30</sup> revealed the complexity of the nature and extent of the ECOWAS human rights regime. By the time *Afolabi* was decided under the 1991 Protocol of the ECCJ, there were contentious issues whether individuals could proceed against ECOWAS member states over human rights issues and/or economic freedoms. Article 9(1) of the 1991 Protocol had endowed the ECCJ with jurisdiction to 'ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the treaty'. Mr Afolabi complained to the ECCJ that Nigeria's unilateral closure of her borders with the Benin Republic was a violation of the Revised ECOWAS Treaty, the 1979 Protocol on the Free Movement of Persons, and article 12 of the African Charter.<sup>31</sup> The ECCJ struck out the complaint on the grounds that under the 1991 Protocol of the ECCJ, individuals had no standing and access to the Court. There is throughout the decision an implicit acceptance that with an express endowment of direct access, individuals could bring suits of human rights abuses against member states because this implicates economic freedoms. In the aftermath of and a direct response to the denial of individual access in *Afolabi* and other jurisdictional issues, the 2005 Supplementary Protocol of the ECCJ was adopted.<sup>32</sup> At first blush, the 2005 Supplementary Protocol provides the juridical basis that the ECCJ is a stand-alone human rights court. A closer reading of the Protocol indicates the contrary as there appears to be little textual support for this position. First, the Preamble to the Protocol recounts the 'role that the Court of Justice can play in eliminating obstacles to the realisation of community objectives and accelerating the integration process' as well as 'the need to empower the Community Court of Justice to play their part in effectively ensuring that member states fulfil their obligations'. It is clear that the Preamble envisages a court of complementary dual mandate. Secondly, the cast of the human rights jurisdiction in the 2005 Supplementary Protocol is not emphatic that the ECCJ is a stand-alone human rights court. Closely related to the status of the Court is the possibility of individual defendants because a stand-alone human rights court is unlikely to recognise individual defendants. Articles 3 and 4 of the Protocol are important because of the changes they brought to individual access and human rights provisions. Article 3 of the 2005 Supplementary Protocol inserts a new article 9 into the 1991 Protocol and grants the ECCJ additional competence to 'determine cases of violations of human rights that occur in any member state',<sup>33</sup> in addition to the normal jurisdiction of the ECCJ to 'interpret and

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30 ECW/CCJ/JUD/01/04.

31 While the 1991 Protocol of the ECCJ made no mention of the African Charter, we have seen that the Revised ECOWAS Treaty refers to the African Charter.

32 See F Viljoen *International human rights law in Africa* (2010) 488; see also Ebobrah (n 11 above).

33 Para 9(4) of the 1991 Protocol as inserted by art 3 of the 2005 Supplementary Protocol.

apply the Treaty, Convention and Protocol'<sup>34</sup> and the 'interpretation and application of the regulations, directives, decisions and other subsidiary legal instrument adopted by ECOWAS',<sup>35</sup> amongst others. In addition, article 4 of the 2005 Supplementary Protocol inserted a new article 10 into the 1991 Protocol defining access to the ECCJ. The new paragraph 10(d) grants access to 'individuals on application for relief for violation of their human rights'. There is neither a qualification nor a definition of the nature and extent of this human rights competence. The first reaction of the ECCJ to the 2005 Supplementary Protocol is the decision in *Ukor v Layele*,<sup>36</sup> decided in 2005, which had an individual defendant.<sup>37</sup> Even though the case was decided on technical grounds, it is indicative of the belief that the ECCJ would entertain individual defendants. While the ECCJ has subsequently demonstrated that it would not entertain individual defendants, the initial indication of the ECCJ should not be surprising since the 2005 Supplementary Protocol encouraged the belief that individuals could be defendants in human rights suits brought before the ECCJ. If the ECCJ has in post-2005 cases excluded individual defendants, it is because of an imprecise understanding of the nature and extent of human rights and their relationship to economic freedoms and integration. While it is true that the express mandate for human rights in the 2005 Supplementary Protocol appeared as the culmination of an increased focus on human rights democracy and good governance by ECOWAS,<sup>38</sup> there is nothing, as discussed above, in the 2005 Supplementary Protocol that characterises the ECCJ as a stand-alone human rights court. The post-2005 cases reveal, on the contrary, that the ECCJ has become a *regional human rights court* with little or no reference to economic integration. This point is supported by a contextual reading of the decided or pending cases before the ECCJ. There is, it would appear from the cases, no evidence of allegations of human rights abuses in connection with integration objectives. For example, none of the cases so far adjudicated by the ECCJ concerns the 'rights of entry residence and establishment'. On the other hand, many of the pending cases before the ECCJ support the contention that the jurisdiction over non-integration national

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34 Para (9)(1)(a) 1991 Protocol of the Court.

35 See para 9(1)(b) 1991 Protocol of the Court.

36 n 12 above.

37 See Ebobrah (n 11 above) 322, who contends that 'the imprecise couching of article 9(4) and article 10(d) of the Supplementary Protocol leaves the door open for situations such as human rights actions against non-state actors before the Court'.

38 See, generally, the 1999 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security; the 2001 Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. See especially art 39 of the 2001 Protocol which promised that the jurisdiction of the ECCJ 'shall be reviewed so as to give to the Court the power to hear, *inter alia*, cases relating to the violation of human rights after all attempts to resolve the matter at the national level'.

human rights abuses is the primary concern of the ECCJ. Thus, in *The Incorporated Trustees of the Miyettiallakautal Hore Socio-Cultural Association v Federal Republic of Nigeria*,<sup>39</sup> the applicants allege a violation of their right of life and property due to the unlawful killing of the Fulani population in communal crisis in the Jos Plateau State of Nigeria. Similarly, in *Alade v Federal Republic of Nigeria*,<sup>40</sup> the plaintiff alleged a violation of the right to liberty by his arrest and continued detention. In *Aminu v Government of Jigawa State*,<sup>41</sup> the applicant relied on sections 34, 35 and 36 of the 1999 Constitution of the Federal Republic of Nigeria to allege a breach of the right to dignity, life and fair trial over abuses emanating from an allegation that the plaintiff posted an insulting message about Governor Lamido of the Jigawa State of Nigeria. Similarly, article 2 of the Constitution of Liberia 1986 is the principal basis of a complaint of a breach of the right to property and due process of the law in *Ayika v Republic of Liberia*.<sup>42</sup>

Assuming, without conceding that the ECCJ is an exclusive human rights court, it is the content and meaning of human rights that determine the nature and scope of the ECCJ's human rights jurisdiction. Since the Revised ECOWAS Treaty does not catalogue the human rights applicable before the ECCJ, it appears potentially possible for the Court to conceive of a wide corpus of human rights, including economic freedoms, and make it easier to recognise individual defendants. Of all the normative sources of human rights in ECOWAS, it is settled that the African Charter is considered as a fundamental catalogue of human rights applicable in the ECCJ. It is not clear, however, whether the African Charter is regarded as exclusive. If it is exclusive, it would mean that the ECCJ will not look to other normative sources but only to the African Charter. If it were not, the ECCJ could rightly turn to other sources, even recognising rights that are outside the African Charter, but in other normative sources which could include the constitutive norms in the Revised ECOWAS Treaty. *Dicta* from ECCJ cases clearly show that, while early cases such as *Keita v Mali*<sup>43</sup> referred to ECOWAS primary and secondary legislation as the basis of the human rights jurisdiction of the Court, subsequent cases have shown a preference for the African Charter by reason of the Revised ECOWAS Treaty. In *Ugokwe v Federal Republic of Nigeria*,<sup>44</sup> the ECCJ recognised that, even though there are no catalogued rights which ECOWAS individuals or citizens may apply, the inclusion of the African Charter in article 4 of the Revised Treaty allowed the Court to turn to the African Charter. In *Bayi v Nigeria*,<sup>45</sup> in

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39 Suit ECW/CCJ/APP/03/11.

40 Suit ECW/CCJ/APP/05/11.

41 Suit ECW/CCJ/APP/02/11.

42 Suit ECW/CCJ/APP/07/11.

43 Suit ECW/CCJ/APP/05/06.

44 n 29 above.

45 Suit ECW/CCJ/APP/10/06.



issue was the application of article 6 of the African Charter. In *SERAP v Nigeria*,<sup>46</sup> the ECCJ stated that it had competence to implement the African Charter in ECOWAS member states. In *Saidykiian v The Gambia*,<sup>47</sup> articles 1, 2, 5, 6 and 7(b) and (d) of the African Charter were in contention. In *SERAP 1*, the ECCJ stated that the ECOWAS Protocol on Democracy and Good Governance imposed on state parties an obligation to apply the African Charter.<sup>48</sup> However, while the cases discussed above reveal a preference for the African Charter, there is evidence to indicate that the ECCJ does not regard the African Charter as exclusive.<sup>49</sup> Accordingly, in a number of cases, other international human rights instruments have been applied. Thus, in *Bayi*, it was article 9 of the Universal Declaration. In *SERAP 1*, the ECCJ relied on the International Covenant on Economic, Social and Cultural Rights (ICESCR), while in *Amouzou v Côte d'Ivoire*,<sup>50</sup> ICCPR was applied by the ECCJ. Finally, in *SERAP 1*, the ECCJ further suggested that it would adhere to any international treaty which is evidence of the codification of the principle that individuals and corporations can be sued before international courts for human rights violations.<sup>51</sup> If the ECCJ is inclined to exercise some measure of discretion in the choice of the normative source of applicable human rights, it is easy to imagine that the Revised ECOWAS Treaty should be considered a credible source. If *Keita* and like cases are followed, article 59 of the Revised ECOWAS Treaty should be interpreted as conferring a human right on ECOWAS citizens, which should be sufficient to recognise individual defendants. While it is conceded that an article 59 right can be enforced against ECOWAS member states, it is important to make the point again that individual defendants can be as disruptive as states in the exercise of economic freedoms.

One consequence of the absence of a horizontal application of human rights before the ECCJ is the dual human rights regime which the ECCJ has recognised in its recent jurisprudence relating to the hierarchy between ECOWAS and West African national human rights regimes. The challenge which has confronted the ECCJ is whether the ECOWAS human rights regime is superior to national human rights regimes or the other way round. A number of examples indicate that the ECCJ prefers to ignore or sidestep this challenge. First, it would appear from *SERAP 1* that the ECCJ recognises a dual human rights order within ECOWAS. The first order is constituted by the human rights provisions of national constitutions, while the second order is the community order constituted by member states who have ratified

46 Suit ECW/CCJ/APP/08 (Preliminary Objection) (*SERAP 1*).

47 ECW.CCJ.JUD/08/10.

48 *SERAP 1* (n 46 above) para 63.

49 See ST Eboerah 'Subregional mechanisms for the protection of socio-economic rights in Africa: Reflections on the budding jurisprudence of the ECOWAS Court' (2010) 11 3 *ESR Review* 9-11.

50 Suit ECW/CCJ/APP/01/09.

51 n 46 above, para 69.

the African Charter and other international human rights instruments which the ECCJ has expressly stated are the sources of the human rights applicable in the ECOWAS region. The dual human rights legal order recognised in *SERAP 1* appears to be a reaction to the argument that allegations of a breach of socio-economic rights cannot be entertained by the ECCJ because chapter 2 of the 1999 Nigerian Constitution does not permit the justiciability of socio-economic rights. While a dual legal order appears suitable to a stand-alone human rights mandate, as interpreted by the ECCJ, it is clearly antithetical to an integration objective of an economic union where it is important that the community legal system is superior to the national legal system within an integrated economic legal order.

It would appear that a dual human rights legal order makes it easier to reject the horizontal application of human rights because the ECCJ would have to reach into member states' legal systems to enforce decisions concerning individuals. It should be remembered that one of the bases of rejecting horizontal application, as articulated by the ECCJ in *SERAP*, *Uwechue* and *Tandja*, is that the ECCJ is wary of replacing national courts in human rights cases which ultimately could lead to an avalanche of cases before the ECCJ. It is important to wonder whether the objective of a West African economic union can be realised without a clear hierarchical relationship between the ECOWAS legal order, on the one hand, and national human rights regimes on the other, with the former as the superior. Such a relationship, which is inevitable and crucial in the integration process, is facilitated by a preliminary reference procedure. In addition, permitting individual defendants direct access to the ECCJ would clarify the contours of ECOWAS law which national courts are bound to apply. Recognising the horizontal application of human rights requires a determination of this relationship which facilitates the integration process. It would be strange to imagine that a vertical application of human rights would demand any less of this hierarchical relationship.

For comparative purposes, this section of the article now turns to a consideration of the nature of the human rights jurisdiction of the East African Community Court of Justice (EACJ) and the suspended Southern African Development Community Tribunal (SADC Tribunal). Even though the EACJ and the SADC Tribunal were not endowed with a human rights jurisdiction by their enabling treaties, they developed and claimed a human rights jurisdiction indirectly. Whether they recognise the horizontal application of human rights is intricately tied to the issue of whether they are dual mandate courts or stand-alone human rights courts.

The jurisdiction of the EACJ includes the interpretation and application of the EAC treaty<sup>52</sup> and 'such other original, appellate, human rights and other jurisdiction as will be determined by the

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52 See art 27(1) of the EAC Treaty.

Council at a subsequent date'. EAC partner states are to 'conclude a protocol to operationalise the extended jurisdiction'.<sup>53</sup> There is still no protocol to deal with the human rights jurisdiction of the EACJ, even though a draft protocol exists which is a basis of ongoing negotiations.<sup>54</sup> The fact that there is no express jurisdiction over human rights has not stopped the possibility of an EACJ human rights jurisdiction. The hint of a treaty-based human rights jurisdiction appeared in *Katabazi and Others v Secretary-General of the East African Community and Another*,<sup>55</sup> where the Court stated that '[w]hile the Court will not assume jurisdiction to adjudicate human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under article 27(1) merely because the reference includes allegations of human rights violations'. This point was reaffirmed in *Attorney-General of Kenya v Independent Medical Legal Unit*<sup>56</sup> and in *Attorney-General of Republic of Rwanda v Rugumba*,<sup>57</sup> where the EACJ held that a breach of the fundamental objectives of the EAC in articles 6(d)<sup>58</sup> and 7(2)<sup>59</sup> of the EAC Treaty conferred jurisdiction on the EACJ.

Since it is now beyond doubt that the EACJ has indirectly claimed a human rights jurisdiction, it is important to point out that in the articulation of the much-awaited EACJ human rights protocol, care should be taken to ensure that some of the pitfalls that have befallen the ECCJ are avoided so that the EACJ does not by default become a stand-alone human rights court, but a dual mandate court which in due course will recognise individual defendants. For now, only state

53 See art 27(2) of the EAC Treaty.

54 See *Sebalu v The Secretary-General of the East African Community* (Reference 1 of 2010) judgment delivered on 30 June 2012. In this case, the EACJ held, *inter alia*, that the Secretary-General of the East African Community and other respondents had not discharged their obligations regarding the conclusion of a protocol to operationalise the extended jurisdiction of the EACJ.

55 (2007) AHRLR 119 (EAC 2007).

56 Appeal 1 of 2011, judgment delivered on 15 March 2012, [http://www.eacj.org/docs/judgements/Attorney\\_Gen\\_of\\_Kenya\\_IMLU-15\\_03\\_2012.pdf](http://www.eacj.org/docs/judgements/Attorney_Gen_of_Kenya_IMLU-15_03_2012.pdf) (accessed 18 October 2012): 'In these circumstances, we are of the view that the decision taken by the First Instance Division that it would not abdicate its jurisdiction of interpretation under article 27(1) merely because the reference includes allegations of human rights violations was sound, because the EACJ is the institution mandated to determine whether a partner state has or has not breached, infringed, violated or otherwise offended the provisions of the Treaty.'

57 Appeal 1 of 2012, [http://www.eacj.org/docs/judgements/AG\\_Republic-of-Rwanda\\_Vs\\_Plaxeda-Rugumba.pdf](http://www.eacj.org/docs/judgements/AG_Republic-of-Rwanda_Vs_Plaxeda-Rugumba.pdf) (accessed 18 October 2012).

58 'Good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equity, as well as the recognition, promotion of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples Rights'.

59 'The partner states undertake to abide by the principles of good governance, including adherence to the principle of democracy, the rule of law, social justice and the maintenance of universally-accepted standards of human rights.'

parties or institutions of the Community and not individuals or natural persons are envisaged as defendants before the Court.<sup>60</sup>

Like the EACJ, the absence of an express human rights jurisdiction did not stop the SADC Tribunal before suspension of the Tribunal<sup>61</sup> from holding in *Mike Campbell (Pvt) Limited v Zimbabwe*<sup>62</sup> that it is competent to hear human rights cases because of its competence to apply and interpret the treaty establishing the Southern African Development Community (SADC). The Court stated that article 4(c) of the SADC Treaty enjoins the SADC and its member states to act in accordance with 'human rights democracy and the rule of law'.<sup>63</sup> Before the suspension, it would appear that the horizontal application of human rights was not contemplated by the SADC Tribunal as a result of the combined reading of articles 14 and 15 of the 2000 Protocol on the Tribunal and Rules of Procedure (SADC Protocol). It would appear, on a general note, that the prospects of the horizontal application of human rights before the SADC Tribunal was not different from the position of the ECCJ and EACJ explored above. The possibility that the situation will be different in a future SADC Tribunal appears to have been considerably diminished because of the decision of the SADC Heads of State and Government to negotiate a new Protocol on the Tribunal whose mandate should be confined to the interpretation of the SADC Treaty and Protocols relating to disputes between member states.<sup>64</sup>

#### 4 Human rights and economic freedoms in the horizontal application of human rights in the ECOWAS Community Court of Justice

This section argues that the dual mandate of the ECCJ as a court of integration and human rights, with the latter in a more facilitative character, is a fundamental reason why the conclusive determination by the ECCJ that individual defendants cannot be sued before the court is not sustainable. The intricate relationship between human rights and economic freedoms in ECOWAS requires that individuals

60 See *Nyongo v Attorney-General of Kenya & Others* [2007] EACJ 6; *Modern Holdings v Kenya Ports Authority* (Reference 1 of 2008) ruling delivered on 12 February 2009 <http://www.eacj.org/docs/final%20%20MODERN%20HOLDINGSVS%20KENYA%20PORTS%20AUTHORITY%202.pdf> (accessed 30 April 2013).

61 The SADC Tribunal was suspended first for one year in 2010, and in 2011, the Heads of State and Government of the SADC decided to continue with the suspension. In 2012, the Summit decided to review the jurisdiction of the Tribunal.

62 [2008] SADCT 2.

63 See also arts 5, 6 & 33 of the SADC Treaty.

64 See para 24 of the Final Communiqué of the 32nd Summit of SADC Heads of State and Government held in Maputo, Mozambique, on 18 August 2012, [http://www.sadc.int/files/3413/4513/9049/final\\_32nd\\_Summit\\_Communique\\_at-August\\_18\\_2012.pdf](http://www.sadc.int/files/3413/4513/9049/final_32nd_Summit_Communique_at-August_18_2012.pdf) (accessed 18 October 2012).

should be defendants in appropriate cases in the protection of their human rights and economic freedoms. Rather than imagine that the 2005 Supplementary Protocol turns the ECCJ into an exclusive human rights court, it is plausible that it contemplates individual defendants just as it assists individuals to proceed against member states who breach their human rights in the exercise of their economic freedoms.

There is a close relationship between human rights and integration because of the fact that ordinary citizens who are beneficiaries of and participants in regional integration are also bearers of human rights. It can be argued that human rights issues are implicated when individuals complain that their economic freedoms have been curtailed by REC member states or individuals. The reverse is not the case, since there are many cases of allegations of the abuse of human rights that do not implicate economic freedoms and integration. Thus, an REC court of justice such as the escape aligning questions of human rights and economic freedom when individuals are involved. In a regional economic grouping with the objective of a customs or economic union, it is often the case that economic freedoms should trump many human rights, just as the reverse is also true. In shutting out individual defendants from its jurisdiction, the ECCJ has demonstrated a less than wholesome understanding that in seeking to ensure that the West African Economic Union is achieved, the removal of obstacles to the free movement of people, goods, services and capital significantly affects the human rights of ECOWAS citizens and that it is important that these citizens should have an opportunity to obtain redress against other citizens whose activities either create obstacles to their enjoyment of the economic union or whose activities infringe their human rights in the course of their enjoyment of their economic freedoms. A fundamental human right can define the scope of an economic freedom just as an economic freedom can also constrain the exercise of human rights. To illustrate this point, it is important to note that national peculiarities require that there are exceptions to the uniform application of economic freedoms. Thus, all ECOWAS economic freedoms underpinning the economic integration of ECOWAS contain derogation clauses which have to be justified, at least on the grounds of public policy.<sup>65</sup> Justification often requires a balancing of the economic freedom and objective of the derogation (restriction).

Such justification often involves an evaluation to determine whether the restriction serves an overall general interest, is suitable for securing the attainment of the objective which it seeks and does not go further than is necessary in order to attain its objective. It is often the case that implementing a fundamental human right is the objective which restricts an economic freedom. For example, national children's rights

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<sup>65</sup> See eg art 3(4) of the ECOWAS Supplementary Protocol A//SP.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on the Free Movement of Persons, Right of Residence and Establishment.

can be a barrier to the free movement of goods with the former put forward as a basis of restricting the movement of goods in a member state, while the same goods move freely in another member state that has no such restriction. Again, the nature of public policy in terms of national security that can be used to deny a community citizen a right of residence varies from state to state, since the national articulation of human rights is not uniform in RECs and therefore can serve as barriers to the free movement of goods, services and capital. For example, even though all ECOWAS member states are state parties to the African Charter, the manner in which the African Charter is domesticated is different and could give rise to national interpretations which affect how the ECOWAS economic freedoms are interpreted. Of equal, if not more, importance is the manner in which national constitutions and judiciaries articulate fundamental human rights. For example, while the 1999 Constitution of the Federal Republic of Nigeria does not protect socio-economic and cultural rights, the 1992 Constitution of the Republic of Ghana protects certain socio-economic rights. It is apparent, therefore, that national judiciaries are likely to interpret ECOWAS legal instruments differently were they to be regarded as having a final say on the matter.

To ensure a uniform application of economic freedoms in a common market or economic union, it is important that certain human rights underlying restrictions or defining the exercise of economic freedoms are evaluated and justified. The ECCJ is therefore a critical institution in ensuring a uniform application of economic freedoms which otherwise would be different and could thereby constitute an obstacle to the exercise of economic freedoms. If an individual complains about the breach by another individual of a national law pursuant to a nationally-protected fundamental human right but which conflicts with an economic freedom, it is crucial that the ECCJ reviews such questions of compatibility. A good example of a clash between an economic freedom and a human right in ECOWAS is provided by the facts of *Garba v Benin*,<sup>66</sup> where the applicant alleged that his right to free movement, as protected by the ECOWAS Protocol on Free Movement of Persons, Right to Establishment and Establishment, as well as his right to dignity as protected by article 5 of the African Charter, were violated because of the demand by Benin officials for gratification and physical assault respectively which could also justify a personal action against these officials who may have been acting outside the scope of their employment. Again, just like in *Afolabi*, the ECCJ shrank from a frontal resolution of the clash between the enforcement of economic freedoms and human rights in clarifying the nature of the article 59 rights with respect to actions of ECOWAS member states. The ECCJ decided the case on a technical ground of the inability of the applicant to prove the incident and to link particular police officers to the event. It may have been possible to

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66 ECW/CCJ/APP/03/09, judgment delivered on 17 February 2009.

hold such police officers personally liable for their actions. Furthermore, a reasoned judgment on the merits of the case would have been catalytic to the objective of a West African Economic Union because it would have drawn attention to state and non-state obstacles that impede the economic integration of West Africa. In this way, the understanding of the enforceability of the Free Movement Protocol would have greatly assisted the enforcement of such freedoms against individuals.

For comparative purposes, this part of the article turns to the EAC where a number of protocols are designed to facilitate the integration of the EAC which also implicates human rights issues. These protocols include the Protocol on the Establishment of the East African Community Common Market,<sup>67</sup> which provides for the establishment of an East African Community Common Market pursuant to articles 2(2) and 5(2) of the EAC treaty, which in turn envisages the East African Community Common Market as an integral part of and a transitional stage to the East African Community.<sup>68</sup> The Protocol provides in annexes for the free movement of goods, persons, labour, services and capital as well as the right of establishment and residence. These freedoms and rights appear to create obligations which EAC citizens could use as a basis of actions before the EACJ without an express human rights jurisdiction. For example, article 13(8) of the EAC Common Market Protocol provides that the right of establishment 'shall entitle ...' Furthermore, article 13(7) provides that the right of establishment shall be subject 'to limitations imposed by the host partner state on grounds of public policy, public security or public health'. Even though the possibility of the horizontal application of human rights in the EACJ appears remote, as argued above, a recent reference before the EACJ has brought to the fore the fact that resolving issues of integration involves the horizontal application of human rights. In *Alcon International Limited v Standard Chartered Bank and Others*,<sup>69</sup> Alcon sought orders to the effect that articles 27(2) and 151 of the Treaty for the Establishment of the East

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67 EAC Common Market Protocol.

68 The East African Community Common Market commenced on 1 July 2010.

69 Ref 6 of 2010, ruling delivered on 24 August 2011. See also *Alcon International Limited v The Standard Chartered Bank of Uganda* Appeal 2 of 2011, judgment delivered on 16 March 2012, where the Appeals Division of the EACJ remitted the matter back to the First Instance Division of the Court for a hearing on the merits of the case. The judgment is available at [http://www.eacj.org/docs/judgments/judgements\\_on\\_Alcon\\_16\\_03\\_12.pdf](http://www.eacj.org/docs/judgments/judgements_on_Alcon_16_03_12.pdf) (accessed 18 October 2012).

African Community together with articles 29(2)<sup>70</sup> and 54(2)(b)<sup>71</sup> of the Protocol on the Establishment of the East African Community Common Market endow an enhanced jurisdiction of the EACJ as a competent judicial authority with regard to the enforcement of and enhancement of trade and settlement of disputes for the protection of cross-border investments and that the EACJ is a competent judicial authority for the determination of cross-border trade disputes between persons from the partner states of the East African Community; that the EACJ has the jurisdiction to enforce a statutory/legal duty owed to a person from a different partner state where a public official in the home state fails to honour such duty. A number of preliminary points of law were raised on behalf of the respondents, including the fact that under article 30 of the Treaty, references must be brought only against an EAC state party or an institution of the EAC, the settlement of disputes under the Protocol is by competent institutions in the partner states, and that no protocol has been passed, as is required, to operationalise the extended jurisdiction of the EACJ to provide for original, appellate, human rights and other jurisdictions pursuant to article 27(2) of the EAC Treaty. The EACJ made no finding on the question as to whether Standard Chartered Bank, as a private party, could be a party to a reference before the EACJ and whether the Common Market Protocol could possibly enhance the jurisdiction of the EACJ without an enabling instrument. Since previous decisions of the EACJ have held that individual defendants are not recognised before the EACJ, it is likely that the Court will hold that Standard Chartered Bank cannot be a party to the case. In *Modern Holdings v Kenya Port Authority*,<sup>72</sup> the EACJ ruled that a reference concerning the Kenya Ports Authority was not properly before her because the KPA is not one of the institutions envisaged by article 30 of the EAC Treaty. Earlier, in *Professor Peter Nyongo v*

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70 Art 29(2) of the East African Common Market Protocol provides that '[f]or the purposes of complying with the undertaking by member states to protect cross-border investments and returns of investors of other state parties within their territories, state parties shall ensure (a) protection and security of cross-border investments of investors of other partner states; (b) non-discrimination of the investors of the other partner states by, according to these investors, treatment no less favourable than that accorded in like circumstances to the nationals of that partner state or to third parties; (c) that in case of expropriation, any measures taken are for a public purpose, non-discriminatory, and in accordance with due process of law, accompanied by prompt payment of reasonable and effective compensation'.

71 Art 54(1) of the Common Market Protocol provides that '[a]ny dispute between the partner states arising from the interpretation or application of this Protocol shall be settled in accordance with the provisions of the EAC Treaty'. Art 54(2) further provides that state parties guarantee that '(a) any person whose rights and liberties as recognised by this Protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and (b) the competent judicial, administrative or legislative authority or any other competent authority shall rule on the rights of the person who is seeking redress'.

72 Reference 1 of 2008 (ruling 12 February 2009). See also *East African Law Society & Others v Attorney-General of the Republic of Kenya & Others* (Reference 3 of 2008).



*Attorney-General of Kenya and Others*,<sup>73</sup> the Court struck out a reference against three individuals for lack of capacity. Given this jurisprudence, it is plausible that the EACJ is likely to hold that it will not entertain the horizontal application of human rights. It is clear, however, from *Alcon* that the notion that the integration protocols confer rights on private individuals *qua* other individuals is a strong one.

Even though highly unlikely, let us assume that the human rights jurisdiction of the SADC Tribunal is transferred to another body in the SADC leaving the SADC Tribunal seized only of integration matters. It is contended that such a tribunal will naturally gravitate towards recognising the intricate relationships between human rights and integration and address issues of the horizontal application of human rights. It is important to sketch how such a relationship arises in the SADC, and we shall proceed from the fact that the SADC is a free trade area and that the Protocol on Trade<sup>74</sup> is a key vehicle of implementation. In addition, it is envisaged that the SADC will become a customs union by 2010 and an economic union by 2018.<sup>75</sup> The Protocol on Trade contains numerous norms and standards dealing with the elimination of import and export duties, non-tariff barriers, tariff barriers, standards, quantitative import restrictions, and anti-dumping measures, to mention just a few. One potential basis of a trade dispute can be found in article 9 of the Trade Protocol which permits member states to take measures that derogate from the provisions on quantitative import and export restrictions, to the extent that such measures do not constitute a means of arbitrary or unjustifiable discrimination between member states, or a disguised restriction on intra-SADC trade. The measures must be:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws and regulations which are consistent with the provisions of the WTO;
- (d) necessary to protect intellectual property rights, or to prevent deceptive trade practices;
- (e) relating to transfer of gold, silver, precious and semi-precious stones, including precious and strategic metals;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;

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73 Reference 1 of 2006 (ruling 30 February 2007).

74 The Protocol on Trade entered into force on 25 January 2000. The implementation phase of the Protocol began on 1 September 2000 and the implementation of the tariff phase-out is supposed to lead to a free trade area in 2008. See in this regard the Communiqué of the 28th Summit of the SADC Heads of State and Government held on 16-17 August 2008, <http://www.sadc.int/fta> (accessed 13 February 2012).

75 See the SADC Regional Indicative Strategic Development Plan (RISDP) of 2003.

- (g) necessary to prevent or relieve critical shortages of foodstuffs in any exporting member state;
- (h) relating to the conservation of exhaustible natural resources and the environment; or
- (i) necessary to ensure compliance with existing obligations under international agreements.

It is evident that many human rights issues are implicated in the interpretation of this derogation clause and that the omission or acts of individuals, even if in reliance on national laws and constitutional provisions of fundamental human rights of SADC states, can be a challenge as norms and standards of the Trade Protocol are implemented. There is no reason why individuals should not be the subject of suits of allegations of breaches of human rights on the basis of the provisions of the Trade Protocol or breaches of the freedoms contained in the Trade Protocol on the basis of a number of nationally-protected human rights. Given the fact that the SADC dispute settlement mechanism does not contemplate individuals, it is possible that the lack of trade disputes is partly because it is perceived that trade disputes are inter-state disputes and not for private parties.<sup>76</sup> But for the recent suspension of the SADC Tribunal, it is a reasonable proposition that suits implicating compliance with the Trade Protocol and the exercise of human rights by individuals would have been brought before the Tribunal through the dispute settlement procedure found in Annex VI to the Protocol on Trade which provides for the settlement of disputes through a panel procedure similar to the WTO dispute settlement mechanism.<sup>77</sup> Article 20A(1)<sup>78</sup> of the Protocol on the Tribunal confers appellate jurisdiction on the SADC Tribunal with respect to any dispute relating to legal findings and conclusions established under any Protocol. Only parties to a dispute may appeal from the findings of a panel, even though a third party may appeal a panel report if they have substantial interest pursuant to the Rules.<sup>79</sup> Even though the dispute settlement procedure has not been tested because of deficiencies in the content and structure of the procedures outlined in Annex VI,<sup>80</sup> the fact remains that the panel procedure envisaged under Annex VI is not open to individuals against individuals. The likelihood that this will change could be at the instance of the SADC Tribunal. There is ample latitude for the SADC Tribunal to develop jurisprudence permitting horizontal application when it is remembered that the recognition of a human rights jurisdiction was absent in any express human rights

<sup>76</sup> n 75 above, 31.

<sup>77</sup> See generally C Ng'ong'ola 'Replication of the WTO dispute settlement processes in SADC' (2011) 1 *SADC Law Journal* 35-62.

<sup>78</sup> This provision was inserted by art 5 of the Agreement Amending the Protocol of the Tribunal of 17 August 2007.

<sup>79</sup> Art 20A(2) of the Protocol on the Tribunal.

<sup>80</sup> See G Erasmus 'Is the SADC trade regime a rules-based system' (2011) 1 *SADC Law Journal* 17.

jurisdiction in the SADC Treaty. In this regard, article 21(b) of the Protocol on the Tribunal allows the SADC Tribunal to develop its own community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of member states. It is hoped that issues such as the horizontal application of human rights will be one of the objectives of the revision of the mandate of the SADC so that, as Erasmus notes, private parties will be protected when involved in trade and doing business in the SADC region.<sup>81</sup>

Before ending this section, the article turns briefly to the experience of the European Court of Justice in the horizontal application of human rights. First, the fact that the ECJ will recognise the horizontal effect of human rights has been recognised with respect to directives issued by the European parliament. In *Kukudeveci v Swedex GmbH & Co KG*,<sup>82</sup> the European Court of Justice held that a European Union citizen could rely on general principles of European law as given expression in directives in a dispute against another European Union citizen. In this case, a German national, Mrs Kukudeveci, was able to rely on the general principle of non-discrimination on the ground of age as given expression in Council Directive 2000/78/EC.<sup>83</sup> In this case, the fundamental right in question was freedom from discrimination on grounds of age.<sup>84</sup> While academic commentary on the effect of *Kukudeveci* recognises the controversial but limited effect of the *Kukudeveci* judgment,<sup>85</sup> it represents the possibility that the ECJ could in appropriate circumstances recognise more grounds for the horizontal effect of fundamental human rights in the European Union. In this regard, the recent decision of the ECJ in *Maribel Dominquez v Centre Ouest Atlantique and Prefet de la Region Centre*<sup>86</sup> affirms the application of European Union fundamental rights in disputes between private parties.<sup>87</sup> Secondly, there is conclusive jurisprudence that the EU economic freedoms are capable of horizontal application before the European Court of Justice as it ensures the uniform interpretation of the scope of these freedoms that facilitate the goals

81 See G Erasmus 'What future now for the SADC Tribunal? A plea for a constructive response to regional needs' <http://www.tralac.org/2012/08/22/what-future-now-for-the-SADC-Tribunal-plea-for-a-constructive-response-to-regional-needs/> (accessed 18 October 2012).

82 Case C-555/07.

83 Council Directive 2000/78/EC, Establishing a General Framework for Equal Treatment in Employment and Occupation.

84 See previous related cases such as *Werner Mangold v Rudiger Helm* [2005] ECR I-9981.

85 See eg J Krzeminska-Vamvaka 'Horizontal effect of fundamental rights and freedoms: Much ado about nothing? German, Polish and EU theories compared after *Viking Line*' Jean Monnet Working Paper 11/09 (2009). See generally G Brüggmeir *et al* (eds) *Human rights and private law in the European Union: A comparative overview* (2010).

86 Case C-282/10 judgment of 24 January 2012.

87 See M de Mol 'Dominquez: A deafening silence' (2012) 8 *European Constitutional Law Review* 280.

of the European Union. For example, in *BNO Walrave and LJN Koch v Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo*<sup>88</sup> the Court stated:<sup>89</sup>

The abolition, as between member states, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of state barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy.

Again, in *International Transport Workers Federation and Finnish Seaman's Union v Viking Line*,<sup>90</sup> the ECJ entertained an action by a Finnish Line alleging a breach of its freedom of establishment by a trade union.

The lessons of the enforcement of economic freedoms by the ECJ fly in the face of the jurisprudence of the ECCJ that similar international bodies do not admit individual defendants. It is, however, a fact that the horizontal application of human rights is crucial in Africa's integration schemes that is of overwhelming importance.

## 5 Conclusion

It is inevitable that the horizontal application of human rights will continue to challenge the ECCJ and other African REC courts of justice because of the nature of regional integration, which often requires ordinary citizens to seek redress against other citizens on the basis of a human rights claim. The reluctance of the First Instance Division of the East African Court of Justice in *Alcon* in addressing issues of the enforcement of common market freedoms hints at some recognition that ultimately ordinary citizens will have their day in court against other citizens as the process of integration deepens. It is hoped that the ECCJ and other African REC courts of justice will quickly recognise that economic freedoms can be subverted by governments and individuals. The process of aligning their human rights and integration mandates is overdue if the ECCJ and African REC courts of justice as courts of integration and human rights are to make significant contributions to deepening regional integration which is still, decades later, at an embarrassingly low level. The elaboration of the ECCJ preliminary reference procedure should, at the very least, assist in this regard.

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88 [1974] ECR 1405 para 18.

89 See also *Union Royale Belge des Societas de Football Association & Others v Bosman & Others* [1995] ECR I-4921.

90 [2007] ECR I-10799.

## Achieving social justice in the human rights/intellectual property debate: Realising the goal of access to medicines

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### Summary

*What happens when the assertion of intellectual property rights by their holders impacts on the human rights of consumers, in particular, their right to access health care and health products such as medicines? Proponents of access to medicines as a human right reference the soft law of human rights and the broad ethical frameworks within which human rights understandings are situated but, paradoxically, the pharmaceutical companies that hold proprietary interests in medicines also claim human rights to their medical discoveries. They argue that the ecology of research and development on medicines is inextricably linked to the possession of exclusive rights in the form of patent and data protections. The proprietary interests of pharmaceutical companies are stringently pursued and enforced by global powers via their trade policy and otherwise. Thus, this article argues that human rights must trump those proprietary rights, for a number of reasons, and seeks to introduce a social justice perspective on the human rights/intellectual property debate. It begins by reviewing the competing paradigms of the right to health versus proprietary intellectual property rights, showing how the human rights regime has achieved superiority in theory, but inferiority in practice. It proceeds to delineate the context in which essential medicines have increasingly*

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*become endangered global public goods. This is primarily because of strong intellectual property protections afforded to pharmaceutical companies with the advent of the TRIPS Agreement, TRIPS-plus bilateral and regional trade agreements between the USA and the European Union and developing countries, and other measures designed to broaden, strengthen and lengthen intellectual property protections worldwide. The article then explores the potential for lobbying, advocacy, law reform measures and activism in achieving the objective of 'access to medicines for all', and demonstrates the extent to which human rights advocacy programmes can contribute to doing so through the delivery of rights-based education and training to targeted audiences.*

## 1 Introduction

While efforts at promoting the human right to health at the grassroots level are often directed at public education, street law programmes or as an adjunct to the delivery of health services, other efforts are aimed at influencing human rights outcomes through policy formulation and advocacy and campaigning for better laws, policies and practices. Central to efforts of conscientising and campaigning in the health context is an understanding of the role of intellectual property rights in making life-saving and life-enhancing medicines unaffordable in low- and middle-income countries. Proponents of access to medicines as a human right reference the soft law of human rights and the broad ethical frameworks within which human rights understandings are situated, but paradoxically the pharmaceutical companies which hold proprietary interests in medicines also claim human rights to their medical discoveries and argue, further, that the ecology of research and development on medicines is inextricably linked to the possession of exclusive rights in the form of patent and data protections. The proprietary interests of pharmaceutical companies are stringently pursued and enforced by global powers via their trade policy and otherwise.

This article begins by reviewing the competing paradigms of the right to health versus proprietary intellectual property rights, showing how the human rights regime has achieved superiority in theory, but inferiority in practice. The article proceeds to delineate the context in which essential medicines have increasingly become endangered global public goods, primarily because of strong intellectual property protections afforded to pharmaceutical companies with the advent of the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),<sup>1</sup> TRIPS-plus bilateral and regional trade agreements between the United States of America (USA) and the European Union (EU) and developing countries, and other measures designed to broaden, strengthen and lengthen

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<sup>1</sup> Art 8(1) Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C (1994) 33 *International Legal Materials* 81.

intellectual property protections worldwide. The article then explores the potential for lobbying, advocacy, law reform measures and activism in achieving the objective of 'access to medicines for all'. It further demonstrates the extent to which human rights advocacy programmes can contribute to doing so through the delivery of rights-based education and training to targeted audiences.

In the Sufi tradition there is a saying that 'when you hear hoofbeats, think of a zebra'.<sup>2</sup> In the context of intellectual property, a similar saying might be: 'When you encounter patent and data rights, think of monopolies and denial of care.' Thus, this contribution explores different ways of understanding and responding to the dominant intellectual property narrative about the private prerogatives of ownership, enclosure and profit maximisation, versus the resurgent counter-narrative of fighting to harness the engines of science and innovation to address the global burden of disease and to ensure equitable and affordable access to life-saving technologies for all.

## 2 Paradigm of health and human rights

This section appraises the paradigm which informs the twin concepts of health and human rights.<sup>3</sup> It reviews the right to health under international law, the relationship between health and human rights, the general nature of right-to-health obligations, and the role of non-state actors. Within this context, it explores the notion of access to medicines and whether intellectual property rights may be regarded as human rights.

### 2.1 The origins of the right to health under international law

It is instructive to explore how the notion of the right to health has evolved under international law. The first articulation of the right to health, offered by the Constitution of the World Health Organisation (WHO), is as follows:

The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.<sup>4</sup>

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2 S Friedlander *When you hear hoofbeats think of a zebra* (1992): A tract on Sufism – the Islamic mystic philosophy which promotes the idea of narrative as providing new ways of seeing things, of thinking about them, and of responding to them.

3 This section draws substantially from YA Vawda 'Access to life-saving medication in South Africa: The case for legislative reform' unpublished LLD thesis, University of KwaZulu-Natal, 2011; B Baker 'Placing access to essential medicines on the human rights agenda' in JC Cohen *et al* (eds) *The power of pills: Social, ethical and legal issues in drug development, marketing and pricing* (2006).

4 WHO Constitution, adopted by the International Health Conference, New York, 19 June-22 July 1946, and opened for signature in July 1946. This followed the Charter of the United Nations, adopted on 26 June 1945, and which, while not making specific reference to the right to health, imposes by treaty a legal

Thereafter, the Universal Declaration of Human Rights (Universal Declaration)<sup>5</sup> gave greater content to this right, by proclaiming it as a right to 'health and well-being' within the framework of a standard of living which includes food, clothing, housing, medical care and social services and security, therefore, the major determinants of health. The non-binding Declaration of Alma-Ata on Primary Health Care (Alma-Ata Declaration)<sup>6</sup> expands the definition of health to include 'complete physical, mental and social well-being, and not merely the absence of disease or infirmity', and posits that the achievement of this fundamental human right was 'a most important world-wide social goal'.

The most comprehensive articulation of the right to health in a legally-binding international treaty is contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>7</sup> which elaborates on the general rights found in the Universal Declaration.<sup>8</sup> Article 12 states:

The State Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Each state is required to achieve this through taking 'steps ... to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant ...'<sup>9</sup> Such steps shall include economic, technical and, in particular, legislative measures.<sup>10</sup> Article 12 further identifies the steps that states must take in the pursuit of right-to-health objectives, including the reduction of still-births and infant mortality; the promotion of the healthy development of the child; the prevention, treatment and control of epidemic, endemic, occupational and other diseases; and the creation of conditions to assure medical services and attention to all in the event of ill health.<sup>11</sup>

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obligation on member states to take action to achieve universal respect for human rights; <http://www.who.org> (accessed 31 January 2006).

5 Adopted by UN General Assembly Resolution 217 A (III) 10 December 1948. UN GAOR, 3rd session, Supp 13, UN Document A/810 (1948).

6 Adopted at a joint WHO/UNICEF conference held in the Soviet Union in 1978, and which defines health as 'a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity', and affirms that 'the attainment of the highest possible level of health is a most important world-wide social goal'.

7 Adopted by UN General Assembly Resolution 2200 A (XXI) 16 December 1966. Interestingly, although South Africa draws heavily on this document in its Bill of Rights, and signed the Covenant in 1994, it has not as yet ratified it.

8 R Elliot *TRIPS and rights: International human rights law, access to medicines, and the interpretation of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* (2001) <http://www.aidlaw.ca> (accessed 31 January 2006) (Canadian HIV/AIDS Network 2001).

9 Art 2 ICESCR.

10 Art 12, read with art 2 ICESCR.

11 Arts 12(2)(a) to (d) ICESCR.



To further these objectives, the United Nations (UN) established the Committee on Economic, Social and Cultural Rights (ESCR Committee) to administer the Covenant and to monitor its implementation by states, primarily through the submission of reports. Regrettably, there is no effective enforcement mechanism if states do not submit reports or fall short of their obligations under the Covenant.<sup>12</sup> However, defaulting states might suffer embarrassment in international fora if they fail to meet their obligations. In the discharge of its mandate, the ESCR Committee issues General Comments, which provide guidance on the interpretation and implementation of its provisions. Among the most noteworthy of such General Comments are those that clarify states' obligations in terms of socio-economic rights.<sup>13</sup> Most relevant to this discussion is General Comment 14, discussed further below, which contains a comprehensive interpretation of the concept 'the highest attainable standard of health'.<sup>14</sup>

## 2.2 Relationship between human rights and public health

It can be said that public health and human rights are natural bedfellows. Together with the drive for human development, 'each reflects shared individual and collective aspirations for a better life ... grounded ... in values revolving around fundamental concepts of dignity, justice, well-being and progress'.<sup>15</sup> There is evidence of the state's role in public health measures since ancient times, such as early Roman attempts to improve public sanitation, and later the protection of public health under eighteenth century European monarchs. However, it was not until after World War II, with the establishment of the WHO, that the discourse of an enforceable human right to health developed, encompassing both public and individual health perspectives.<sup>16</sup>

While the relationship between public health and human rights may seem obvious, these disciplines have not always been linked explicitly. This may be because they originate from quite different philosophical positions, have distinct language and terminology, and have been perceived to play different societal roles. Yet 'health and human rights are both powerful, modern approaches to defining and

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12 J Dugard *International law: A South African perspective* (2005) 321.

13 ESCR Committee General Comment 3, The nature of state parties' obligations (1990) UN Doc E/1991/23 <http://www1.umn.edu/humanrts/gencomm/epcomm3.htm> (accessed 31 August 2009) (General Comment 3).

14 ESCR Committee General Comment 14, The right to the highest attainable standard of health (2000) UN Doc E/C.12/200/4 <http://www1.umn.edu/humanrts/gencomm/escgencom14.htm> (accessed 31 August 2009) (General Comment 14).

15 D Tarantola *et al* 'Human rights, health and development' (2008) *University of New South Wales Faculty of Law Research Series Working Paper* 47.

16 See H Hestermeyer *Human rights and the WTO: The case of patents and access to medicines* (2007) 83-84 for a discussion on the genesis of this concept.

advancing human well-being'.<sup>17</sup> The past few decades have witnessed a burgeoning debate on the intersection between public health and human rights, primarily because of the violation of the rights of people living with HIV/AIDS, as well as the increasing focus on women's health issues and the violations of human rights in conflict-ridden areas.<sup>18</sup> The resulting convergent paradigm is increasingly influencing responses to health issues by international organisations, legal and health professionals, governments and civil society.<sup>19</sup>

Reduced to its essentials, the convergence paradigm on public health and human rights posits a synergistic intersection between the four imperatives of public health (disease and impact reduction; the promotion of healthy lifestyles; the strengthening of health systems; and the development of health-sensitive policies) and the three human rights obligations to respect, protect and fulfil the right to health.<sup>20</sup> In other words, the main strategies of public health policy may be rendered meaningless unless they are accompanied by a firm commitment to the promotion of human rights, including both prohibitions against discrimination and the avoidance of health harms and the promotion of accessible, affordable and high-quality preventative and curative health services. A good example of the convergence paradigm is the policy of HIV testing, comprehensive prevention, and access to anti-retroviral therapy as it has been adopted and rolled out in South Africa and other countries. This policy is premised on the notion of (i) expanded voluntary testing in health facilities and in communities, that respects patient autonomy and protects them through proper health information and counselling protocols; and (ii) providing treatment literacy and adherence support, prevention advice, services and technologies, and access to highly-active anti-retroviral therapy, psycho-social support and palliative care.

Furthermore, there is another reason why the convergence paradigm is important:<sup>21</sup>

Anchoring public health strategies in human rights can enrich the concepts and methods used to attain health objectives, by drawing attention to the legal and policy context within which health interventions occur, as well as bringing rights principles such as non-discrimination and the participation of affected communities in the design, implementation, monitoring and evaluation of health programs and interventions.

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17 JM Mann *et al* 'Health and human rights' in JM Mann *et al* (eds) *Health and human rights: A reader* (1999) 7. This is a seminal work which explores, *inter alia*, the 'inextricable linkage' between health and human rights.

18 S Gruskin & D Tarantola 'Health and human rights' in R Detels & R Beaglehole (eds) *The Oxford textbook of public health* (2001) 311.

19 S Gruskin *et al* 'History, principles, and practice of health and human rights' (2007) 370 *The Lancet* 449-455.

20 D Tarantola *Building on the synergy between health and human rights: A global perspective* (2000) <http://www.popline.org/node/258322> (accessed 10 May 2013).

21 Gruskin *et al* (n 19 above).

Adopting this perspective has increased attention to equitable access for vulnerable populations, including rural populations, sex workers, injecting drug users, men-who-have-sex-with-men, migrants, prisoners, people with disabilities, and others.

### 2.3 Right to health obligations of states

The human rights paradigm provides an appropriate framework for analysing the right to health and serves as a useful guide to advocacy and action on health issues. As stated previously, early human rights discourse was limited to advocacy with regard to civil liberties and state action.<sup>22</sup> The historical resistance to the justiciability of economic, social and cultural rights held sway because they were considered to be different in nature from civil and political rights. Fortunately, the narrow focus on civil and political rights came under withering criticism, and international law evolved to recognise all human rights as interdependent, individual and mutually supporting.<sup>23</sup> This shift has also been signified by the adoption of rights-based constitutions in many countries, including African ones, which recognise socio-economic rights as judicially enforceable.<sup>24</sup>

The rights set out in ICESCR have been further elaborated by the ESCR Committee,<sup>25</sup> notably in two General Comments focusing on the nature of state obligations and the content of the right to health. On the nature of states' obligations, the Committee's General Comment 3 confirms the widely-accepted position that the UN Charter, customary international law and ICESCR constitute binding legal obligations in order to realise human rights.<sup>26</sup> Regarding the content of the right to health, General Comment 14 clarifies that 'health is a fundamental human right indispensable for the exercise of other human rights' and must be understood as 'a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health'.<sup>27</sup> While not legally binding on states, these Comments are an

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22 See International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200 A (XXI) on 16 December 1966.

23 See eg S Liebenberg 'Socio-economic rights' in M Chaskalson *et al* (eds) *Constitutional law of South Africa* (1999); P de Vos 'Pious wishes or directly enforceable human rights? Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal on Human Rights* 67.

24 For discussion of these aspects of socio-economic rights, see DM Chirwa 'The right to health in international law: Its implications for the obligations of state and non-state actors in ensuring access to essential medicine' (2003) 19 *South African Journal on Human Rights* 541.

25 An expert body established in 1985 by the UN Economic and Social Council, with the objective of formulating General Comments which help define 'the normative content of the rights recognised in the Covenant'.

26 General Comment 3 para 1.

27 General Comment 14 para 1.

authoritative source of expert analysis and interpretation of legally-binding rights.

Furthermore, the Committee notes that the right to health, as with all human rights, imposes three types of obligations on state parties for the benefit of their citizens and residents, namely, to respect, protect and fulfil such rights – the last of which includes obligations to facilitate, provide and promote health services and the determinants of health.<sup>28</sup> Both negative and positive obligations are envisaged. Not only are states required to refrain from directly or indirectly interfering with the enjoyment of the right to health, but they are also required to take measures preventing third parties from so doing.<sup>29</sup> The fulfilment of these obligations requires states to take the appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right to health.<sup>30</sup> In addition, foreign state parties also have obligations to protect human rights and the right to health in other countries and to prevent third parties over whom they exercise control from violating those rights.<sup>31</sup> In particular, foreign states have obligations to help ensure access to essential health commodities elsewhere, to provide health aid via international assistance to developing countries, and to ensure that international agreements do not undermine or adversely affect the right to health of others.

In terms of enforceability, international law is generally understood to be based on a combination of customary law and consent (the law of treaties). Human rights law, however, has largely defied these narrow categories by suggesting an additional foundation – human dignity – which makes claims on all actors, regardless of custom or consent. Thus, key international instruments (the Universal Declaration, ICESCR and the International Covenant on Civil and Political Rights (ICCPR)) recognise that not only are rights derived from custom or consent, but they also acknowledge those rights derived 'from the inherent dignity of the human person'.<sup>32</sup>

#### 2.4 Right to health obligations of non-state actors

The preoccupation with state action, as is evident in the foregoing discussion, has raised the question whether human rights obligations

28 General Comment 14 paras 33-37.

29 General Comment 14 para 35.

30 General Comment 14 para 33. See also revised Guideline 6: 'Access to prevention, treatment, care and support', jointly issued by UN High Commissioner for Human Rights and UNAIDS *HIV/AIDS and human rights: International guidelines: Third international consultation on HIV/AIDS and human rights* (2002), which requires the state to, *inter alia*, legislate for safe and affordable medicines; to ensure equitable access to goods, services and information for HIV/AIDS treatment, including ARVs, diagnostics and other technologies for preventative, curative and palliative care.

31 General Comment 14 para 39.

32 C Jochnick 'The human rights challenge to global poverty' (1999) 4 *Centre for Economic and Social Rights* <http://www.cesr.org/text%20files/actors.PDF> (accessed 31 August 2004).

bind persons and institutions other than states. One consequence of a state-centric only approach is that it fails to address the roots of poverty-related violations, in particular with regard to economic, social and cultural rights that lie beyond national borders.<sup>33</sup> The singular emphasis on the role of the state is increasingly being challenged, particularly as it has often allowed non-state actors to escape sanctions for human rights violations, especially in the context of increasing privatisation of health services and the influential role of national and multinational corporations in determining formal and informal health policy.<sup>34</sup> In the real world, transnational corporate power is more ascendant than state power, especially where both developed and developing states have become captive to business interests. In an era of corporate hegemony, it makes sense to shine the spotlight on the true seats of power, and not just on increasingly constrained government bureaucracies.

Moving the conception of human rights beyond the state-centric paradigm could serve two purposes. Firstly, it confronts the dominant neo-liberal view which tends to marginalise issues of development and poverty, and provides a vision for the notion that 'entrenched poverty is neither inevitable nor acceptable'.<sup>35</sup> Secondly, it provides a legal framework within which to begin holding the most influential non-state actors accountable for their roles in creating and sustaining poverty.<sup>36</sup> This approach seeks to contextualise socio-economic rights, and to relocate them in the realm of advocacy and positive action. Furthermore, it enables rights advocates to challenge and hold accountable such significant players as multinational drug manufacturers, multilateral fora such as the World Trade Organisation (WTO) which are responsible for formulating trade rules impacting on health, as well as the World Bank and International Monetary Fund whose policies and loan conditions can have far-reaching implications for health and development.

Although ICESCR primarily addresses the human rights obligations of sovereign states, according to General Comment 14 the Convention also emphasises that other social actors, including specifically the private business sector, 'have responsibilities regarding the realisation of the right to health'.<sup>37</sup> A violation of the right to health, in this context, can occur through the direct action of private

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33 Jochnick (n 32 above) 1.

34 These comprise not only institutions such as the World Bank and International Monetary Fund, which influence government policy through aid packages and conditions, but also pharmaceutical companies and other corporations supplying the health sector, and whose pricing structures impact on the availability and accessibility of health goods and services. See also S Narula 'International financial institutions, transnational corporations and duties of states' (2011) *New York University Public Law and Legal Theory Research Paper Series Working Paper 11-59*.

35 Jochnick (n 32 above) 1.

36 As above.

37 General Comment 14 para 42.

entities insufficiently regulated by a state.<sup>38</sup> Accordingly, the failure of a state 'to regulate corporations so as to prevent them from violating the right to health of others; and the failure to protect consumers ... from practices detrimental to health, for example, by ... manufacturers of medicines' is a breach of the obligation to protect the right to health.<sup>39</sup> Foreign states are also obligated to prevent third parties, including private sector multinational corporations, from violating the right to health in other countries, and by ensuring that their own international agreements do not adversely impact on the right to health.<sup>40</sup>

Efforts to put real juridical teeth into the corporate human rights arena have been fraught with disappointment.<sup>41</sup> The most recent effort resulted in a mandate<sup>42</sup> to Professor Ruggie from Harvard University, who proposed a new Framework for Business and Human Rights in 2008, and Guiding Principles to implement the Framework in 2011.<sup>43</sup> Ruggie's efforts unfortunately merely recapitulate the legal *status quo*, which contains aspirational frameworks, but no hard substantive rules or remedial procedures.<sup>44</sup> His 2007 Mapping Report<sup>45</sup> explicitly repudiated earlier claims at the UN that human rights norms applied directly to corporations.<sup>46</sup> He conceded,

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38 General Comment 14 para 48.

39 General Comment 14 para 51.

40 General Comment 14 para 39. See also L Ferreira 'Access to affordable HIV/AIDS drugs: The human rights obligations of multinational pharmaceutical corporations' (2002) 71 *Fordham Law Review* 1133.

41 P Feeney 'Business and human rights: The struggle for accountability in the UN and the future direction of the advocacy agenda' (2010) 6 *Sur International Journal of Human Rights* 161.

42 See Human Rights Commission Resolution 2005/69 para 1(a).

43 Special Representative of the Secretary-General, Protect, respect and remedy: A framework for business and human rights UN Doc A/HRC/8/5 para 9 (2008); Special Representative of the Secretary-General, Guiding principles on business and human rights: Implementing the United Nations 'protect, respect and remedy' framework, UN Doc A/HRC/17/31 (2011).

44 For discussion of the 2008 Framework Report, see D Bilchitz 'The Ruggie framework: An adequate rubric for corporate human rights obligations' (2010) 12 *Sur International Journal of Human Rights* 199-229; Rj Anderson 'Reimagining human rights law: Toward global regulation of transnational corporations' (2010) 88 *Denver University Law Review* 183-236. For a discussion of both the 2008 Framework Report and the Guiding Principles, see JH Knox 'The Ruggie rules: Applying human rights law to corporations' (2011) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1916664](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1916664); SA Aaronson & I Higham "'Re-righting business": John Ruggie and the struggle to develop international human rights standards for transnational firms' (2011) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1922224](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1922224) (accessed 31 August 2012).

45 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises 'John Ruggie: Business and human rights: Mapping international standards of responsibility and accountability for corporate acts' para 44, UN Doc A/HRC/4/35 (19 February 2007).

46 See Sub-Commission on the Promotion and Protection of Human Rights, Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, UN Doc E/CN.4/Sub.2/2003/12/Rev 2 (2003). For the Sub-Commission's commentary on the Norms, see Commentary on the

however, that there were indirect effects mediated through the human rights duties of states to regulate private actors, and that there were soft law norms pushing corporations to respect human rights and to provide voluntary remedies for violations. His Guiding Principles were adopted by the Human Rights Council in June 2011.<sup>47</sup>

## 2.5 Access to medicines as a human right

Although General Comment 14 refuses to specify the exact health facilities, goods and services that must be delivered by states, partially because of differing health needs among populations and partially because of differing levels of development, there is a basic 'core' obligation to guarantee access to essential medicines.<sup>48</sup> Pursuant to General Comment 14, the right of equal and timely access to health facilities, goods and services includes the provision of a basic health service; appropriate treatment of prevalent disease; and the affordable supply of essential drugs.<sup>49</sup> Delivering universal access to essential medicines, as defined by the WHO, is a core, non-derogable duty of all member states, as is providing progressively improving health services and other measures to prevent, treat and control epidemic and endemic diseases.<sup>50</sup>

At the most basic level, access to medicines refers to the ability of all persons to receive the medicines necessary for the treatment of any condition afflicting them, and that these medicines are available, accessible, acceptable, and of good quality. *Availability* requires that there must be sufficient quantities of the medicine and that shortages are avoided. *Accessibility* entails physical, informational and economic access. To ensure universal access to medicines, they have to be accessible to everyone, without discrimination, especially for the most vulnerable and marginalised sections of the population. However, they must be affordable as well, so that poorer households are not disproportionately burdened by health expenses.<sup>51</sup> These obligations of accessibility and affordability might require states to be health-cognisant 'when entering into bilateral or multilateral agreements with other states, international organisations and other entities, such as multilateral corporations'.<sup>52</sup> *Acceptability* refers to a need for the observance of medical ethics and sensitivity to the cultural norms of

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Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/38/Rev 2 (2003). For a description by one of the principal drafters of the Norms, see D Weissbrodt & M Kruger 'Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights' (2003) 97 *American Journal of International Law* 901.

47 Human Rights Council Resolution 17/4 paras 1 & 6(a), UN Doc A/HRC/RES/17/4 (6 July 2011).

48 General Comment 14 para 12(a).

49 General Comment 14 para 17.

50 General Comment 14 paras 43(d) & 44(c).

51 General Comment 14 para 12(b).

52 General Comment 14 para 50.

individuals. Finally, medicines must be scientifically and medically appropriate and of good quality; the obligations on producers must be enhanced by rigorous drug registration standards; and there should be enforcement of good manufacturing practices and pharmaco-vigilance.<sup>53</sup>

The interpretive impetus provided by General Comment 14 has generated even more attention within the UN system, further clarifying the right to treatment and to medicines. There have been increased commitments internationally, particularly with respect to HIV/AIDS, including explicit treatment goals set within the Declaration of Commitment on HIV/AIDS<sup>54</sup> and the Millennium Development Goals.<sup>55</sup> Similarly, in Resolution 2001/33 of April 2001, the UN Commission on Human Rights (UNCHR) recognised that 'access to medication in the context of HIV/AIDS is one fundamental element for achieving progressively the full realisation of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.<sup>56</sup> According to this resolution, the entire international community has an obligation to 'facilitate, wherever possible access in other countries to ... pharmaceuticals or medical technologies used to treat pandemics such as HIV/AIDS' and to 'ensure ... that the application of international agreements is supportive of public health policies which promote broad access to safe, effective and affordable ... pharmaceuticals and medical technologies'. In 2002, the UNCHR adopted Resolution 2002/32, which, like Resolution 2001/33, called on states to<sup>57</sup>

pursue policies ... which would promote (a) the availability in sufficient quantities of pharmaceuticals and medical technologies used to treat pandemics such as HIV/AIDS ... (b) the accessibility to all ... of such pharmaceuticals or medical technologies and their affordability for all ...

Further crystallising the right to treatment in the HIV/AIDS context, UNAIDS and the UN High Commissioner for Human Rights held a consultation on HIV/AIDS and Human Rights in 2002, and issued a revised Guideline 6: Access to prevention, treatment, care and support.<sup>58</sup> The Commentary on the revised Guideline declares:

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53 General Comment 14 paras 12(a) to (d).

54 United Nations General Assembly Declaration of Commitment on HIV/AIDS ('Global Crisis-Global Action'), Resolution A/RES/S-26/2 (27 June 2001).

55 United Nations Millennium Declaration, Resolution A/RES/55/2 (8 September 2001).

56 Access to medication in the context of pandemics such as HIV/AIDS, Human Rights Commission Resolution 2001/33 (2001).

57 Access to medication in the context of pandemics such as HIV/AIDS, Human Rights Commission Resolution 2002/32 para 2 (2002).

58 Office of the United Nations High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS, HIV/AIDS and human rights: International guidelines: Third international consultation on HIV/AIDS and human rights, UNAIDS/02.49E (2002) (revised reprint March 2003). The World Health Assembly has added its voice to that of the UNCHR, declaring that member states should act to increase access to treatment and prevention of HIV-related illnesses



States should enact legislation to provide for ... safe and effective medication at an affordable price. States should also take measures necessary to ensure for all persons, on a sustained and equal basis, the availability and accessibility of quality goods, services and information for HIV/AIDS ... treatment ..., including anti-retroviral and other safe and effective medicines, diagnostics and related technologies for preventive, curative and palliative care of HIV/AIDS and related opportunistic infections and conditions.

In their Recommendations for Implementation of Guideline 6, UNAIDS and the UNCHR recommended that states should implement and support policies allowing the purchase of cheaper generic medicines, diagnostics and related technologies,<sup>59</sup> specifically by amending domestic legislation to incorporate to the fullest extent possible any safeguards and TRIPS-compliant flexibilities for promoting and ensuring access to medicines.<sup>60</sup> Other states, particularly developed countries, should avoid taking measures that would undermine access to HIV/AIDS treatment, including medicines, and that they should ensure that bilateral, regional and international agreements involving intellectual property issues do not impede access to treatment, including anti-retroviral and other medicines.<sup>61</sup>

## 2.6 Is intellectual property a human right?

Proponents of strong intellectual property protection argue that certain provisions in international instruments secure intellectual property protection as a human right. Most often cited is the recognition of the right to the 'protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is author'.<sup>62</sup> However, this view is not without opposition, mostly because this one clause is counterbalanced by article 15(1)(b) of ICESCR, which recognises everyone's right 'to enjoy the benefits of scientific progress and its applications'. Opponents argue that such protection is incompatible with the need to balance the interests of consumers and rights holders in circumstances where human rights and consumer interests clearly deserve priority, such as when it

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through measures, including those that ensure the provision and affordability of drugs. 'HIV/AIDS: Confronting the epidemic' Resolution WHA 53:14 (2000); 'Scaling up treatment and care with a co-ordinated and comprehensive response to HIV/AIDS' Resolution WHA 57.14 (2004); 'Contribution of WHO to follow-up of the United Nations General Assembly special session on HIV/AIDS' Resolution WHA 55.12 (2002); 'Ensuring accessibility of essential medicines' Resolution WHA 55.14 (2002); 'Intellectual property rights, innovation and public health' WHA Resolution 56.27 (2003).

59 Revised Guideline 6 para s.

60 Revised Guideline 6 para z.

61 Revised Guideline 6 para paras y & z. See 'The impact of the agreement of trade-related aspects of intellectual property rights on human rights' Report of the High Commissioner, E/CN 4/Sub 2/2001/13 (2001).

62 Art 27(2) Universal Declaration and art 15(1)(c) ICESCR.

concerns access to essential medicines.<sup>63</sup> Citing Schermers,<sup>64</sup> who holds that property rights cannot generally be included in the category of fundamental human rights, Drahos<sup>65</sup> suggests that intellectual property rights are distinguishable from fundamental human rights, in that 'human rights are of such importance that their international protection includes the right, perhaps even the obligation, of international enforcement', a claim which cannot be made for intellectual property rights. This latter view is supported by the ESCR Committee, which takes the view that 'intellectual property regimes, although they traditionally provide protection to individual authors and creators, are increasingly focused on protecting business and corporate interests and investments', and thus fall outside the ambit of human rights protection.<sup>66</sup> Accordingly, article 15(1)(b) should always be interpreted to prioritise human rights over property rights.<sup>67</sup> Even within the WTO, member states have unanimously agreed that the TRIPS Agreement should be interpreted 'in a manner supportive of WTO members' right to protect public health and, in particular, to promote *access to medicines for all*.<sup>68</sup>

Some commentators,<sup>69</sup> departing from the view that intellectual property rights are human rights, argue instead that these rights necessarily result in a more limited role in international law for human rights norms, in particular the right of access to medicines. In the light of the potential conflict between this human rights regime and the intellectual property/trade regime as exemplified by the TRIPS Agreement, and in view of the lack of a clear normative hierarchy, they contend that dispute settlement in the trade arena must default to dictates of intellectual property rights enshrined in international economic rules, and that human rights arguments can serve merely

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63 See PK Yu 'Reconceptualising intellectual property interest in a human rights framework' (2007) 40 *University of California Davis Law Review* 1039; D Matthews 'Intellectual property rights, human rights and the right to health' (2009) Queen Mary University of London Legal Studies Research Paper 24/2009; S Narula 'The rights-based approach to intellectual property and access to medicines: Parameters and pitfalls' (2011) New York University Public Law and Legal Theory Research Paper Series, Working Paper 11-60; SP Marks 'Access to essential medicines as a component of the right to health' in A Clapham & M Robinson (eds) *Swiss human rights book: Realising the right to health* (2009) 80.

64 HG Schermers 'The international protection of the right of property' in F Matscher & H Petzold (eds) *Protecting human rights: The European dimension* (1988) 565-580.

65 P Drahos 'The universality of intellectual property rights: Origins and development' in WIPO (ed) *Intellectual property and human rights. A panel discussion to commemorate the 50th anniversary of the Universal Declaration of Human Rights* <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf> (1998) 15 (accessed 31 January 2012).

66 ESCR Committee General Comment 17 (2006) follow-up discussion.

67 See P Cullet 'Patents and medicines: The relationship between TRIPS and the human right to health' (2003) 79 *Journal of International Affairs* 139 159.

68 Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 para 4 (November 2001) (our emphasis).

69 See, eg, discussion in Hestermeyer (n 16 above).

for the interpretation of the TRIPS Agreement, and not as a defence to an infringement of its provisions.<sup>70</sup>

However, a significant weight of opinion stands in favour of a more proactive role for international human rights law, as enunciated on several occasions by the ESCR Committee.<sup>71</sup> This is evident in the experiences of both established and nascent democracies. Thus, it has been observed,<sup>72</sup> both India and South Africa have demonstrated the efficacy of human rights instruments and litigation in delivering public health benefits. These successes are attributable to several factors: a strong civil society; an independent and competent judiciary; respect on the part of the state for the rule of law; and the use of empirical medical evidence to support legal submissions.<sup>73</sup>

The most celebrated decision in South African jurisprudence in this regard is the *Treatment Action Campaign* case,<sup>74</sup> in which the Court considered both domestic constitutional provisions as well as the state's obligations under international law in interpreting the right of access to health care.<sup>75</sup> In the Indian context, although health-related rights are dealt with under non-enforceable directives of policy and are not an entrenched right in the Constitution, public interest litigation has focused on the right to life provision.<sup>76</sup> Successive decisions of the Indian courts have interpreted the right to life to include the right to a life with dignity, which encompasses access to health care.<sup>77</sup>

On the question of the conflict between the two regimes, the ESCR Committee's approach is that states cannot in good faith enter into other treaties which have the effect of undermining their prior obligations to human rights. Provisions in trade agreements, such as the TRIPS Agreement, which negatively impact on the right to health, are untenable as 'there is a strong presumption that retrogressive measures taken in relation to the right to health are not

70 Hestermeyer (n 16 above) 207. The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement was adopted by the World Trade Organisation in 1994, and seeks to 'harmonise' intellectual property rights protection globally.

71 See, eg, discussion in Canadian HIV/AIDS Network (2001) <http://www.scielosp.org/pdf/bwho/v80n12/8012a10.pdf> (accessed 31 January 2006).

72 JA Singh *et al* 'Do human rights matter to health?' (2007) 370 *The Lancet* 521.

73 Singh *et al* (n 72 above) 526.

74 *Minister of Health & Others v Treatment Action Campaign & Others* (No 2) 2002 5 SA 721.

75 In this instance, the Court held that the policy of government, which restricted the use of the anti-retroviral drug Nevirapine for the prevention of transmission of HIV from mother to child to only 18 pilot sites, was unreasonable on several counts, notably that it failed to address the needs of mothers and unborn babies who had no access to these sites, and that it denied the rollout of the drug at locations where the capacity existed to do so.

76 Art 21 Constitution of India [http://india.gov.in/govt/constitutions\\_india\\_bak.php#eng](http://india.gov.in/govt/constitutions_india_bak.php#eng) (accessed 11 March 2013).

77 See eg *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 2 SCR 516; *Bandhua Mukti Morcha v Union of India* 3 SCC 161, 1984; *Consumer Education and Research Centre v Union of India* 3 SCC 42, 1995; *Consumer Education and Research Centre v Union of India* 3 SCC 42, 1995.

permissible'.<sup>78</sup> Thus, the ESCR Committee made the following call to the WTO in 1999:<sup>79</sup>

The end which trade liberalisation should serve is the objective of human well-being to which the international human rights instruments give expression. In this regard, the Committee wishes to remind WTO members of the central and fundamental nature of human rights obligations.

These obligations extend also to bilateral, plurilateral and multilateral agreements entered into by states, as well as to their participation in various international fora, which may result in similar adverse effects on human rights.<sup>80</sup> The Maastricht Guidelines, formulated by an independent group of internationally-recognised experts on economic, social and cultural rights, asserts:<sup>81</sup>

It is particularly important for states to use their influence to ensure that violations do not result from the programmes and policies of the organisations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organisations ... to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights.

### 3 Economic justifications of intellectual property supremacy

An oft-cited defence of intellectual property supremacy rests on an economic analysis of innovation incentives, whereby intellectual property rights are allegedly needed as pragmatic incentives for the large and risky investments that pharmaceutical companies make in the arduous process of inventing new medicines and improving them over time.<sup>82</sup> The economic justification for patents on medicines is utilitarian in nature – its focus is benefits arising from a temporary period of exclusive rights and from public disclosure of the invention in the patent application. This must be contrasted with the costs arising from supra-competitive pricing that typically excludes poor countries and poor patients from access to the newest medical technologies.<sup>83</sup>

78 Para 32 General Comment 14.

79 Paras 5 & 6 Statement of the ESCR Committee to the Third Ministerial Conference of the WTO, Seattle E/C 12/1999/9 (26 November 1999).

80 PK Yu 'Intellectual property and human rights in the non-multilateral era' Drake University Legal Studies Research Paper Series, Research Paper 11-04 (2011).

81 ESCR Committee Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (22-26 January 1997) para 19.

82 International Federation of Pharmaceutical Manufacturers and Associations 'The pharmaceutical innovation platform: Meeting essential global health needs' (2008) <http://www.ifpma.org/Documents/NR9565/IFPMA-PharmaInnovPlatform-Final-Nov2007.pdf> (accessed 13 March 2012).

83 A Pouris & A Pouris 'Patents and economic development in South Africa: Managing intellectual property rights' (2010) IEEE Conference on Management of Innovation and Technology <http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=05492924> (accessed 13 March 2012); S Flynn *et al* 'An economic justification for

According to the economic theory, ordinary market forces do not result in optimal levels of innovation and product or process research and development, if competitors can routinely copy and market new technologies without bearing any of the investment costs associated with the original invention. The inventor necessarily needs to recoup its sunk costs, but cannot do so in competition with copiers who market at or near the marginal cost of production. The rational response to this risk of unfettered copying and competitive failure is either not to invest in research and development at all, or to keep inventions secret, which in turn decreases the dissemination of knowledge that supports future inventive activity.

In support of its claim that pharmaceutical innovators need exclusive rights in order to recoup the costs of successful and unsuccessful research and development activities, the industry cites studies by DiMasi and others. These studies estimated that average out-of-pocket costs as of the year 2000 for a selected subset of new medicines was \$403 million pre-tax, taking into account the R&D costs of compounds abandoned during product development, and that average capital opportunity costs at an 11 per cent discount rate added \$399 million per approved drug, to give a grand total of \$803 million per successful drug.<sup>84</sup> Industry estimates expanded that estimate to \$1,3 billion as of 2005,<sup>85</sup> and *Forbes Magazine* came out with an astronomical estimate of \$4 to \$11 billion per drug as of 2012.<sup>86</sup> Countering these inflated claims, independent researchers Light and Warburton found after tax median research costs to be much lower – \$56 million plus unknown company costs of discovery – based on publicly-released information from drug companies.<sup>87</sup> These researchers do not include highly-inflated and hypothetical opportunity costs of earning potentially foregone, had the money simply been invested in index funds.

A second economic justification of the patent regime is that the adoption of intellectual property rights spurs foreign direct investment and thus economic development and industrialisation in low- and middle-income countries. The literature on this proposition is inconclusive at best, with Maskus, a leading researcher, concluding

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83 open access to essential medicine patents in developing countries' (2009) *Journal of Law, Medicine and Ethics* 184-208 <http://www.wcl.american.edu/pijip/go/fhp2009> (accessed 12 March 2012).

84 JA DiMasi *et al* 'The price of innovation: New estimates of drug development costs' (2003) 22 *Journal of Health Economics* 151-185.

85 PhRMA 'Drug development costs have increased' (2005) <http://www.phrma.org/drug-development-costs-have-increased> (accessed 13 March 2012).

86 M Herper 'The truly staggering cost of developing a new drug' *Forbes Magazine* 19 February 2012 <http://www.forbes.com/sites/matthewherper/2012/02/10/the-truly-staggering-cost-of-inventing-new-drugs/> (accessed 13 March 2012).

87 DW Light & R Warburton 'Demythologizing the high costs of pharmaceutical research' (2011) 6 *BioSocieties* 1-17 [http://www.pharmamyths.net/files/Bio\\_societies\\_2011\\_Myths\\_of\\_High\\_Drug\\_Research\\_Costs.pdf](http://www.pharmamyths.net/files/Bio_societies_2011_Myths_of_High_Drug_Research_Costs.pdf) (accessed 13 March 2012).

that FDI decisions are not based on intellectual property rights considerations, but rather on infrastructure, human capital, and regulatory issues.<sup>88</sup> Yet, another justification is that heightened intellectual property rights will spur domestic innovation but, here again, evidence to date suggests that strengthened patent rights increased foreign filings, but do not appreciably increase domestic filings.<sup>89</sup>

However, a more fundamental critique of the economic justifications of intellectual property rights is that they ignore the distortion caused by the pursuit of innovation-based monopolies, particularly with respect to pharmaceuticals. For example, the pursuit of so-called blockbuster drugs with sales in excess of \$1 billion per year distorts research in two ways. Firstly, right holders seek to game the patent system with minor variations to existing blockbusters in order to strengthen and lengthen their monopolies and, secondly, competitors seek to invent around granted patent claims in order to develop me-too versions of existing successful therapies and to expand their share of the blockbuster pie, often with little or no improvement in therapeutic performance.<sup>90</sup> Companies are motivated to rush products to the market; exaggerate safety, efficacy, and use claims; and promote them strongly before long-term health effects are well understood. In addition, to secure marketing advantages, pharmaceutical companies spend disproportionately on what are best called 'marketing studies' – highly-selective research that will enable them to make successful sales pitches to medical prescribers and/or directly to patients.<sup>91</sup> In some cases, pharmaceutical companies will invent and deceptively promote a new disease – a tactic that the literature calls disease mongering.<sup>92</sup>

In a trenchant examination of the therapeutic efficiency of existing pharmaceutical research, Donald Light finds that pharmaceutical

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88 EK Maskus 'Intellectual property rights in the global economy' Institute for International Economics, Washington DC (2000). See also L Brantetter *et al* 'Intellectual property rights, imitation, and foreign direct investment: Theory and evidence' NBER Working Paper Series 13033 (April 2007) [http://www.nber.org/papers/w13033.pdf?new\\_window=1](http://www.nber.org/papers/w13033.pdf?new_window=1) (accessed 13 March 2012).

89 J Lerner '150 years of patent protection' (2002) 92 *American Economic Review* 221-225. A recent study in middle-income developing countries, which included South Africa, also concluded that patent laws are unlikely to promote local innovation in pharmaceuticals, and that governments should look elsewhere to encourage innovation. See also CM Correa 'Pharmaceutical innovation, incremental patenting and compulsory licensing' South Centre (September 2011) [http://www.thaidrugwatch.org/download/rp\\_41\\_pharm\\_compliance\\_ccorrea.pdf](http://www.thaidrugwatch.org/download/rp_41_pharm_compliance_ccorrea.pdf) (accessed 24 March 2012).

90 A Hollis 'Me-too drugs: Is there a problem?' (2004) [http://www.who.int/intellectualproperty/topics/ip/Me-tooDrugs\\_Hollis1.pdf](http://www.who.int/intellectualproperty/topics/ip/Me-tooDrugs_Hollis1.pdf) (accessed 13 March 2012).

91 H Brody & DW Light 'Efforts to undermine public health – The inverse benefits law: How drug marketing undermines patient safety and public health' (2011) 101 *American Journal of Public Health* 399-404.

92 'Disease mongering collection' (2006) *PLoS Medicine* <http://www.ploscollections.org/article/browse?issue=info:doi/10.1371/issue.pcol.v07.i02> (accessed 13 March 2012).

investments by private companies contribute minimally to basic research, and that only a small portion of expenditure produces significant therapeutic gains (11 to 23 per cent).<sup>93</sup> More to the point, at least for low- and middle-income countries, the search for market rewards distorts research towards therapies and treatments for chronic and life-style diseases that mainly affect rich people in rich countries.<sup>94</sup> Since innovators earn little or no money on diseases primarily affecting poor people in poor countries – so-called neglected disease or WHO Class III conditions – there is insufficient research in these vital areas.<sup>95</sup> There is comparable underinvestment in antibiotics,<sup>96</sup> vaccines and other prevention technologies that patients do not take for long periods of time.

However, one of the most telling critiques of the economic justification for intellectual property rights on medicines is that the patent system and the secret, siloed research efforts that accompany it can actually interfere not only with access to needed commodities, but also with the very process of efficient and effective research and development itself.<sup>97</sup> There is growing evidence that so-called patent thickets, patents on up-stream, research platforms, and secrecy about interstitial advances and failures, interfere with an innovation ecology. This ecology would thrive with more open source and collaborative research where rewards for innovation could be divided based on therapeutic gain and advances in knowledge, instead of who gets to the patent office first and lays down the thickest and broadest carpet of patent claims. These telling critiques have prompted the exploration of non-patent-based systems for rewarding incremental and break-through innovation, including a research and development treaty, prize rewards, and other novel approaches.<sup>98</sup>

93 DW Light 'Basic research funds to discover important new drugs: Who contributes how much?' in MA Burke & A de Francisco *Monitoring financial flows for health research 2005: Behind the global numbers* (2006) 29-43.

94 ER Dorsey *et al* 'Financing of US biomedical research and new drug approvals across therapeutic areas' *PLoS One* 4(9):e7015 (2009). <http://www.plosone.org/article/info:doi%2F10.1371%2Fjournal.pone.0007015> (accessed 13 March 2012).

95 N Ford 'The enduring crisis in neglected diseases' in Cohen *et al* (n 3 above) 109-15; M Moran *et al* 'Neglected disease research and development: Is innovation under threat?' *G-Finder* (2011) [http://policycures.org/downloads/g-finder\\_2011.pdf](http://policycures.org/downloads/g-finder_2011.pdf) (accessed 13 March 2012); J Lexchin 'One step forward, one step sideways? Expanding research capacity for neglected diseases' (2010) 10 *BMC Journal of International Health and Human Rights* 1-10 <http://www.biomedcentral.com/content/pdf/1472-698X-10-20.pdf> (accessed 13 March 2012).

96 K Outtersson 'The vanishing public domain: Antibiotic resistance, pharmaceutical innovation and global public health' (2005) 67 *University of Pittsburgh Law Review* 67.

97 B Hirschler 'Drug companies learning how to share' *Reuters* 28 September 2011 <http://www.reuters.com/article/2011/09/28/us-pharmaceuticals-research-idUSTRE78R3RP20110928> (accessed 13 March 2012).

98 J Love 'Measures to enhance access to medical technologies, and new methods of stimulating R&D' (2007) 40 *University of California Davis Law Review* 679; J Love & T Hubbard 'The big idea: Prizes to stimulate R&D for new medicines' (2007) 82 *Chicago-Kent Law Review* 1519-54.

Taken all together, the litany of concerns about the merits of pragmatic economic justifications for prioritising intellectual property rights over human rights cannot hold sway.

#### 4 Concluding comment on a human rights framework

International law unequivocally establishes a fundamental right to health (or, more appropriately, a right to access health care) and access to medicines is clearly a key component of that right. Some would argue that access to essential medicines comprises a minimum core of non-derogable rights available to citizens, and that the state cannot justify its inability to provide them by resorting to the argument of resource constraints. It is increasingly being argued that these rights also extend to a variety of non-state actors, given their influence in both the determination of policy, as well as health care delivery and implementation. This has led to activists demanding that binding human rights norms apply to business entities.<sup>99</sup> Because multinational corporations operate at a transnational level, they often have the freedom to apply inferior human rights and safety standards in different countries. One contribution argues that countries would not readily relax their human rights and safety standards merely to attract investment, if corporations could be held to universal standards of conduct.<sup>100</sup> Thus, individuals and communities are expected to increasingly make demands on all these actors, in order to realise their fundamental right to health.

This has put proponents of the rights-based access movement on a collision course with defenders of the proprietary rights of intellectual property rights holders and their developed country government backers. Activists in developing countries have adopted and extended the discourse of human rights to mount successful campaigns against government intransigence and corporate greed. According to Baker:<sup>101</sup>

Although they have relied on a rhetoric of a human right to health, access to medicines, and indeed to life itself, they have implemented that rhetoric with sophisticated campaigns aimed at removing structural impediments and leveraging resources to actually increase access to medicines on the ground.

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<sup>99</sup> See Chirwa (n 24 above) 562.

<sup>100</sup> S Deva 'Human rights standards and multinational corporations: Dilemma between "home" and "Rome"' (2003) 7 *Mediterranean Journal of Human Rights* 69-97 SSRN <http://ssrn.com/abstract=637666> (accessed 31 August 2009). The author uses the Bhopal disaster as a case study to show that a 'no standards standard' in business practice fails to protect even basic human rights.

<sup>101</sup> BK Baker 'Placing access to essential medicines on the human rights agenda' in Cohen *et al* (n 3 above) 239.



## 5 Context of medicines as essential public goods

### 5.1 Why are medicines unaffordable?

Several factors have been identified as contributing to the lack of access to essential drugs and vaccines in developing countries. According to *Medicins Sans Frontières*, these include the poor quality of drugs; a lack of availability due to fluctuating production; prohibitive costs of some drugs and vaccines; and the impact of the TRIPS Agreement. This Agreement seeks to harmonise intellectual property rights and, in particular, imposes a uniform baseline of patent rules globally. By virtue of its membership of the WTO, South Africa is obliged to comply with the provisions of the TRIPS Agreement.

There is a direct relationship between the price of a medicine and its patent status. A patent is a legal title granted by the government, allowing a temporary monopoly for a specified number of years, for the production and sale of a new invention.<sup>102</sup> This entitles the patent holder to exercise exclusive rights over the manufacture, sale and distribution of the patented article, thus enabling it to set a price which, in the absence of competition, may have no bearing on the actual costs of producing the item, even when adding in the cost of research and development for it and dry hole<sup>103</sup> prospects.<sup>104</sup>

While it is true that the intervention of philanthropic institutions such as the Clinton Foundation<sup>105</sup> and the Global Fund have helped create demand by working with both drug manufacturers and government treatment plans, and thus have succeeded in lowering prices of anti-retrovirals, many other drugs remain unaffordable to developing country governments.

### 5.2 Essential public goods?

The increasing privatisation of knowledge and the products of knowledge have been a significant feature of the capitalist system from its earliest phases. It was typified by the 'enclosure movement',<sup>106</sup> the design to fence off public spaces and bring them

102 International Council of AID Service Organisations (ICASO) *Compulsory licensing and parallel importing* (1998). See also sec 25(2)(a) of the Patents Act 57 of 1978.

103 Borrowed from the oil-prospecting industry, the term 'dry hole' refers to an unsuccessful venture, such as a drug development project which does not yield a viable product. See *The free dictionary* <http://www.thefreedictionary.com/dry+hole> (accessed 20 February 2011).

104 The advisability of patenting inventions in the field of public health has been extensively debated in the literature. See, eg, FM Abbott 'The enduring enigma of TRIPS: A challenge for the world economic system' (1998) 1 *Journal of International Economic Law* 497.

105 Clinton Foundation <http://fex.enonline.net/35/agencyprofile.aspx> (accessed 30 November 2009).

106 J Boyle 'Fencing off ideas: Enclosure and the disappearance of the public domain' in A Agostino & G Ashton (eds) *A patented world? Privatisation of life and*

under private ownership and control. This culminated in according proprietary status to the products of the intellect – the recognition of intellectual property rights. In more recent times, the harmonisation and integration of intellectual property rights, through institutions such as the WIPO and WTO, signify a new wave of the enclosure movement, with intellectual property right protection now having a global reach. Protagonists of this approach have argued that the new property regime has given rise to ‘unparalleled expansion of productive possibilities’.<sup>107</sup> But for whose benefit? Life-saving medicines and medical devices, critical to the health and well-being of individuals and societies alike, have not escaped appropriation as private assets.

Medicines are thus often viewed as private commodities because of various factors, including, amongst others:

- Reigning bioethical models with their focus on patient autonomy have emphasised individual aspects of health care, reinforced by the fact that medicines are privately consumed.<sup>108</sup>
- The market pre-selects consumers of highly-priced medicines, by excluding those individuals who cannot afford them.

But medicines are – at least partially – public goods in the sense that they have significant implications for public health, are also global in their development and impact, and are prone to regulation in their development, manufacture, allocation and use.<sup>109</sup> The public dimensions of medicines are well known, directly from their role in public health vaccination measures, as well as in the treatment of epidemic and endemic diseases. The public dimension also entails the public consequences emanating from choices made in research and development of new medicines, and the profiteering surrounding lifestyle drugs which draws resources away from research into so-called ‘neglected’ diseases.

In contrast to private goods, ‘public goods’ are goods that are essentially social in character, even though (like medicines) they may be intended for private consumption.<sup>110</sup> Public goods also often have positive externalities, meaning that their broad accessibility and use benefit the public at large, not just those who use them. This public benefit is most obvious in the instance of vaccination, where herd immunity develops because of wide diffusion. However, the same dynamic can be seen with respect to the prevention and treatment of infectious diseases. Indeed, because healthier populations have increased capacity in the economic, cultural, political and self-

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*knowledge* (2006) 19.

107 Boyle (n 106 above) 20.

108 WE Parmet ‘Pharmaceuticals, public health, and the law: A public health perspective’ in Cohen *et al* (n 3 above) 78.

109 As above.

110 Knowledge Ecology International *KEI Proposal: A WTO agreement on the supply of knowledge as a global public good* (June 2008).

actualising sphere, there are positive externalities for treating chronic and even temporary disease conditions. Medicines, therefore, cannot merely be regarded as private goods.

Drug development itself has assumed a global character. It may be true that most innovation in this area emanates from laboratories in developed countries. However, developing countries make a significant contribution to the development of medicines in several ways, including sharing knowledge of indigenous plants and their properties, and controversially, being involved as research participants in clinical trials for medicines, from which they sometimes may not themselves benefit.<sup>111</sup>

A major change in the recent discourse on global health concerns the 'framing, norms, and policy approaches to addressing the problem of globally inequitable access to drugs, diagnostics, vaccines and other health technologies'.<sup>112</sup> This development is due, in no small part, to the global political and social mobilisation on the issue of access to affordable anti-retrovirals, which has fomented a re-think of the traditional approaches to understanding medicines as private goods, has focused attention on the global demand for access to health technologies for all (as opposed to merely 'neglected' diseases), and has highlighted the need for new, more inclusive governance mechanisms to manage pharmaceutical and related innovation.<sup>113</sup>

Thus, both the human rights framework and the characterisation of medicines as public goods contribute to our analysis of the intellectual property regime governing pharmaceuticals. This analysis reinforces the argument that, firstly, obligations of governments in respect of trade treaties cannot supercede their obligations to fulfil their human rights obligations – in this instance the right to access health care and essential medicines. Secondly, the 'public goods' character of medicines makes a strong argument for removing them from the realm of private commodities entitled to unfettered intellectual property rights protection.

## **6 Discussion on the potential for teaching and advocacy at the intersection of human rights and intellectual property**

Historically, training in intellectual property was offered by institutions operating within the UN system, such as the World Intellectual Property Organisation (WIPO), or patents offices in developed

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111 Parmet (n 108 above) 84.

112 S Moon 'Medicines as global public goods: The governance of technological innovation in the new era of global health' (2008/2009) II *Global Health Governance* 2.

113 Moon (n 112 above) 13.

countries. Such training has not been ideologically neutral, and has been criticised because developing country examiners of patents and other forms of intellectual property tend to adopt the biases and priorities of their developed country trainers.<sup>114</sup> More recently, a much more balanced approach to the training is being undertaken with, for example, the United Nations Development Programme (UNDP) dedicating resources and personnel to this task, in collaboration with international non-governmental organisations (NGOs) such as the South Centre.<sup>115</sup>

In the African context, intellectual property was (and to a large extent still is) taught and researched as a speciality area, focused predominantly on the corporate perspective, as opposed to a 'developmental' perspective. The latter approach seeks to situate the effects of intellectual property laws and policies in the developing country context, with specific attention to their public health and public interest dimensions. South African intellectual property practice is singularly focused on the private law aspects – the protection and enforcement of the rights of intellectual property rights holders.<sup>116</sup> Some university courses are beginning to address this deficiency, most notably at Master's level.<sup>117</sup> However, these courses are generally aimed at post-graduate students or public sector employees. No course previously catered for the training, participation or perspectives of activists and advocacy specialists in the area of intellectual property rights and their impact on the accessibility of medicines.

In an effort to increase knowledge about intellectual property and human rights framework and to capacitate participants to engage in country and regional campaigns to overcome intellectual property barriers and to promote access to medicines, the authors of this article developed an intensive two-week short course that was supported by the Open Society Institute and delivered at the University of KwaZulu-Natal in Durban, South Africa.<sup>118</sup> In addition to focusing on economic, legal and regulatory issues affecting access to medicines,

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114 See CD Bierbeck & S Roca *An external review of WIPO technical assistance in the area of co-operation for development* (August 2011) [http://www.wipo.int/edocs/mdocs/mdocs/en/cdip\\_8/cdip\\_8\\_inf\\_1-annex1.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_8/cdip_8_inf_1-annex1.pdf) (accessed 13 March 2012); P Drahos 'Trust me: Patent offices in developing countries' (November 2007) Centre for Governance of Knowledge and Development Working Paper <http://www.cgkd.anu.edu.au> (accessed 13 March 2008).

115 UNDP/South Centre 'Intellectual property enforcement and access to essential medicines' Regional Consultation, 22-23 June 2011, Pretoria, South Africa, Final Report (on file with authors).

116 See YA Vawda 'Intellectual property: Putting the "public" back into "private" law' (January-February 2008) *De Rebus* 75.

117 The University of Pretoria's Centre for Human Rights, eg, offers a one-week short course on 'Human rights and access to medicines' <http://www.chr.up.ac.za/index.../human-rights-a-access-to-medicines.html> (accessed 24 March 2012).

118 Since 2008, the UKZN School of Law has offered a short course on Intellectual Property and Access to Medicines, training a cross-section of groups: academics, community activists, government decision makers, and advocates for social justice. Details may be sourced at <http://ipatm.ukzn.ac.za/Homepage.aspx>.

the course also devoted a full third of its curriculum to the development of strategic access to medicines campaigns by its participants.

The UKZN Intellectual Property and Access to Medicines short course has, in its five years of existence, trained over 65 participants drawn initially from most regions of Africa, but has more recently focused on Eastern and Southern Africa. These countries are clearly diverse with respect to climatic, economic, linguistic, cultural, religious and social differences, and with respect to their legal systems. However, they all have significant commonalities – widespread poverty, under-development, poor health, high mortality and poor development indices, scarcity of skills, fragile health and other infrastructure, and unaffordably high prices for essential medicines. In addition, many of these countries have legal and regulatory regimes which provide strong intellectual property protection for medicines and other related products. The impact of intellectual property rights on access to medicines was palpable, and could grow worse in the future if countries were to accede to efforts by the pharmaceutical industry and their rich country surrogates to seek wider, stronger and longer intellectual property protections and enhanced intellectual property enforcement measures. Thus, the potential for advocacy in this area is enormous, and the challenges no less daunting. Campaigners for access are often viewed as threats to state security, and are met with repression, including apparently culturally and legally-sanctioned homophobia.<sup>119</sup>

The potential for successful advocacy using the perspectives, skills and knowledge gained in training courses such as the UKZN one, coheres around four specific areas:

- 1 *Impact on policy and law making through community-based actions and campaigns.* The best example of this is the strategy of the Treatment Action Campaign of South Africa (TAC), in moving government to roll out HIV/AIDS anti-retroviral treatment, first to expectant mothers and their babies, and then to the general population of the HIV-infected from 2004 onwards. Graduates of the UKZN course have been involved in grassroots campaigns relating to stock-outs of medicines, demands for faster roll-out of the HIV treatment programme, the adoption of safer medicines, and earlier initiation of treatment.
- 2 *Law reform measures through participation in the judicial and public policy process.* Examples abound, but notably the victory of persons living with HIV/AIDS in Kenya who succeeded in moving the High Court to suspend certain provisions of anti-counterfeiting legislation, as it threatened their access to generic medicines. Earlier, the TAC had used the South African Competition Commission to challenge high drug prices for anti-retroviral

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119 See L Duff 'Is Africa homophobic?' *SANGONeT Pulse* 19 March 2012 <http://www.ngopulse.org/article/africa-homophobic> (accessed 24 March 2012).

medicines, resulting in multiple licences to generic companies. In November 2011, drawing on the expertise of UKZN course graduates, the TAC and Doctors without Borders launched a campaign to reform South Africa's patent legislation, to utilise the 'flexibilities' available in the TRIPS Agreement and the Doha Declaration<sup>120</sup> to make the law more access-friendly. Course graduates have also been involved in similar campaigns to reform patent legislation in Uganda to maximise the availability of TRIPS-compliant flexibilities.

- 3 *Development of national, regional and international solidarity through co-ordinated action, support and campaigns.* Here the current international campaign to extend the time period within which least developed countries must become TRIPS compliant is noteworthy, and that campaign has involved multiple graduates of the UKZN course.
- 4 *Capacitating academics to understand intellectual property law through 'developmental' lenses, as much of law school teaching is based on traditional, corporate-biased theory and practice.* The course enables participants to challenge conventional notions of the benefits and limitations of intellectual property protection. Thus far, academics from the Universities of KwaZulu-Natal and Zululand (South Africa), Makerere University (Uganda), the University of Malawi and the National University of Lesotho have benefited from the course.

One significant outcome generated by this course is the emergence of a pan-African solidarity among the participants, which persists beyond the duration of the course. The intensive interaction over two weeks yields a strong camaraderie, and participants develop a deeper understanding of their respective realities, challenges and prospects for change. They continue to offer one another guidance and support in their work, albeit on an informal basis.

Advocacy efforts such as those spawned by the UKZN Intellectual Property and Access to Medicines course speak directly to issues of social justice, by capacitating individuals and organisations to effectively analyse, understand and engage with complex issues affecting the daily lives of people across Africa and much of the developing world. It seeks to do so by focusing on the human right to health and access to essential medicines. In so doing, such courses are making a significant contribution to developing capacity and expertise on the African continent, while consolidating collaboration with northern partners.

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120 WTO Declaration on the TRIPS Agreement and public health (14 November 2001) [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm) (accessed 20 February 2013).

## **7 Conclusion**

The interests of achieving social justice require that a counter-narrative be presented to the dominant narrative which promotes intellectual property rights protection at all costs – even at the expense of the right to access essential medicines.

The human rights paradigm enables the articulation of such a counter-narrative. It is only when human rights are respected in word and deed, when the value of medicines as public goods is acknowledged, and when the erosion of the ‘commons’ is arrested, that social justice will prevail.

## Power and constraints in the Constitution of the Republic of South Africa 1996

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### Summary

*This article starts with the trite proposition that a constitutional democracy functions optimally when adequate power is afforded to elected representatives on condition that the power is exercised in accordance with constitutional checks and balances. The article emphasises the importance of the constitutional constraints on the exercise of public power. Section 1 of the South African Constitution presents the fundamental premises of the Constitution and sets out a vision of the type of society that the Constitution seeks to attain. The meaning of the rule of law and notions of responsive, accountable and open governance are explored through case law dealing with PAJA and the concept of legality. The ultimate thrust of these judgments is to ensure rationality, propriety and respectful governance. While they constrain the exercise of power, they do so in a manner that accords with the vision set out in section 1 of the Constitution. The article examines the duty to give reasons and analyses some instances where there is cynical compliance with the constitutional obligation to provide reasons and how this detracts from broader constitutional objectives. The Public Protector plays a vital role in ensuring the proper exercise of public power. The article examines two investigations by the Office of the Public Protector. In the PetroSA investigation, the Public Protector simply capitulated and surrendered in the face of power by adopting an irrationally-narrow interpretation of its mandate. In the SAPS lease investigation, a different Public Protector*

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*properly investigated and two high-profile functionaries lost their jobs. The consequences for the office of the Public Protector and the effect that these investigations have on the project of realising the type of society promised in section 1 of the Constitution are examined. In the conclusion, questions are asked as to why the jurisprudence of the Constitutional Court and Supreme Court of Appeal are being scrutinised when they have sought, more than other institutions, to attain the objectives of section 1 of the Constitution.*

## 1 Introduction

One of humankind's great endeavours is to try and establish a system of governance that allows us to regulate our public and private affairs in a manner that is fair and just, and that takes cognisance of our strengths and flaws. With all its imperfections, the best that we have been able to come up with is the notion of a constitutional democracy which, while affording power to elected and accountable rulers, simultaneously imposes a system of checks and balances to minimise the abuse of power. The various manifestations of this system are far from perfect, but from the perspective of ensuring proper governance, it is generally better than the alternatives.

Tribe and Landry describe constitution making as an opportunity to structure the future. It is about laying a framework for the creation of a new nation, and 'to compose the atmosphere in which the politics of the future is to be composed'.<sup>1</sup> That is precisely what the drafters of the South African Constitution<sup>2</sup> sought to do. It is no coincidence that, at an individual level, section 1 of the Constitution entrenches human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism. At a structural level, it emphasises the supremacy of the Constitution, the rule of law, regular elections, and a multi-party system of democratic government, as prerequisites to ensure accountable, responsive and open governance. The pact that we (the people) have made with the rulers – both present and future – is that they can govern in our name, provided they rule in a manner that respects individual human rights, and in accordance with the fundamental structural safeguards that ensure accountable, responsive and open governance. Both these individual rights-based facets and structural facets are interrelated and integral to the broader objective of proper governance. If either aspect is materially undermined, the constitutional order will ultimately eviscerate. Everyone who assumes public power acknowledges that he or she should exercise that power in a manner that respects fundamental human rights, and abides by the structural precepts of the Constitution. It is that demand of the Constitution

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1 LH Tribe & TK Landry 'Reflecting on constitution making' (1993) 8 *American University Journal of International Law and Policy* 627 630.

2 Constitution of the Republic of South Africa, 1996.

that power be exercised within the constitutional constraints to which I will refer as appropriate checks and balances.

In short, section 1 is a *précis* of the fundamental premises of the Constitution, and represents the vision of the type of society we should become. We constantly need to ask whether we are journeying towards this vision. If we depart or digress significantly, we will endanger the entire constitutional project.

The drafters of the Constitution put in place a number of mechanisms to ensure that public power is exercised, both substantively and procedurally, in a manner that accords with the vision outlined in section 1. We have one of the most expansive bills of rights in the world. It operates, in part, to constrain government from unjustifiably violating our rights and, in part, it demands that government act so as to deliver us from our inegalitarian past by progressively realising the socio-economic rights that will ultimately free the potential of all. The principle of legality obliges government to act within its powers and, amongst other things, to act rationally. The principles of participatory, representative and direct democracy are entrenched in the text of the Constitution to ensure that there is an ongoing dialogue between the people and the rulers. An effective, efficient and independent judiciary, functional and independent institutions supporting democracy (these are known as 'chapter nine institutions'), free, independent and an able media, and a vibrant and alert civil society, are all indispensable to ensuring that there are appropriate checks and balances on the exercise of public power. It is only if these institutions function adequately that the required balance envisaged in the Constitution can be achieved. The corollary is that if any of these become dysfunctional, the balance is upset – often to the prejudice of society – as each is meant to pull its own weight and contribute to the strengthening of the constitutional democracy.

In a lecture that I delivered to commemorate the life of Dr Beyers Naude, I argued that both power and vulnerability are in equal measure transitory concepts.<sup>3</sup> Institutional longevity is only guaranteed if legitimate, and if government is transparent, open, accountable and just. I digress briefly to talk about the circle of life – the challenge facing those exercising public power is to appreciate that, in terms of the circle of life, their current state of powerfulness is impermanent, and when exercising power they need to have an eye to the future: How would their successors handle the precedent that they have set when they, the current holders of power, are in a position of powerlessness? Equally, damaging institutional integrity to achieve personal or short-term political objectives will almost inevitably be counter-productive. Bending the will of an independent constitutional body to do the bidding of those in power is corrosive.

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3 K Govender 'Appraising the constitutional commitments to accountable, responsive and open governance and to freeing the potential of all: A tribute to Dr Beyers Naude' (2011) 26 *South African Public Law* 343.

The best safeguard is to ensure institutional integrity and growth, and not to be dependent on the subjective good sense of the individual in power.

## 2 Jurisprudence on responsive governance

This article will assess the jurisprudence on responsive and accountable governance, and then assess how the obligation to supply adequate reasons is being discharged.<sup>4</sup> Finally, two separate investigations by the Office of the Public Protector, a constitutional body tasked with investigating maladministration,<sup>5</sup> will be assessed. The objective is to learn lessons about accountable, responsive and proper governance, from these instances, keeping in mind that, to date, the judiciary has held the government to the constitutional promise of responsive, accountable and proper governance and that the latter has struggled more than it should to meet this obligation.

Section 1 of the Constitution identifies accountable, responsive and open governance as one of the founding values of the South African state. It also entrenches the supremacy of the Constitution and the rule of law. In an intriguing argument, Mureinik submitted in 1993 that the Constitution<sup>6</sup> required responsive government which implied participation by the governed and accountability to the governed.<sup>7</sup> Participatory democracy and accountable governance will, at the very least, require that persons are afforded the opportunity to participate in the decision-making process, prior to the decision being made and for reasons to be provided by the decision maker in justification of the decision. The development of the concept of legality, which stems from the rule of law, has provided additional safeguards for the review of decisions which fall beyond the reach of administrative action, as narrowly defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

Section 33(2) of the Constitution entrenches the right of everyone whose rights have been adversely affected by administrative action to be given written reasons for the action. PAJA, the national legislation enacted to give effect and activate section 33, was meant to balance the right to lawful, reasonable and procedural fair administrative action and the right to reasons, on the one hand, and an efficient administration, on the other. Section 5 of PAJA enables persons, within 90 days of becoming aware of the administrative action, to request reasons for the action. Unusually, it is a right activated upon

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4 This section was added at the recommendation of one of the reviewers.

5 Sec 182(1) Constitution.

6 He was in fact referring to the Constitution of the Republic of South Africa 200 of 1993 (interim Constitution), but his observations apply with equal force to the final Constitution.

7 E Mureinik 'Reconsidering review: Participation and accountability' in TW Bennet *et al* (eds) *Administrative law review* (1993) 18.

request. In the quest to ensure responsive and accountable governance, the palisade of qualifications<sup>8</sup> that have to be met before the rights in PAJA can be claimed have been systematically lowered by the courts.

A good illustration of this is the reasoning of the Constitutional Court in *Joseph v City of Johannesburg*,<sup>9</sup> where various aspects of the definition of administrative action in section 1 of PAJA had to be considered. The applicants were tenants of a block of flats, Ennerdale Mansions, owned by Mr Nel, and they received their electricity supply from City Power, an organ of state. City Power disconnected their electricity supply without providing any prior notice of the disconnection to the tenants. The applicants argued that their rights had been materially and adversely affected by the termination and as a consequence, they contended that City Power was required to treat them procedurally fairly in terms of section 3 of PAJA. In order to access this right to procedural fairness under PAJA, the applicants had to first establish that the termination was administrative action. City Power contended that the tenants had no contractual relationship with it and, as no rights of the applicants were affected by the termination, they were not entitled to the right to procedural fairness as contained in section 3 of PAJA.<sup>10</sup>

It is correct that there was no formal contractual arrangement between City Power and the tenants (which could give rise to a right), while a contract existed between City Power and the property owner, Mr Nel. The tenants were therefore unable to rely on any private law contractual rights. They accordingly had to prove that they had a public law right to the electricity supply which had been disconnected, which required that they had to contend with the convoluted definition of administrative action in PAJA. In other words, the tenants were required to demonstrate that a decision of an administrative nature had been taken by an organ of state exercising a public power or performing a public function in terms of legislation, and that such a decision adversely affected their rights, and had a direct external legal effect. In addition, the action could not fall within the list of exclusions.<sup>11</sup>

The Court endorsed earlier comments to the effect that the term 'direct, external legal effect' that appears in the definition of administrative action must be given a broad interpretation and 'serves to emphasise that the administrative action impacts directly and immediately on individuals'.<sup>12</sup> The Court went on to hold that a

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8 This description of the jurisdictional facts that need to be satisfied before the rights can be claimed comes from Nugent JA in *Greys Marine Hout Bay v Minister of Public Works* 2005 10 BCLR 931 (SCA) para 21.

9 2010 3 BCLR 212 (CC).

10 *Joseph* (n 9 above) para 28.

11 See subsecs (aa) to (hh) of the definition of 'administrative action' under sec 1 of PAJA.

12 *Joseph* (n 9 above) para 26.

finding that a right had been materially and adversely affected would, of necessity, imply that there had been a direct, external legal effect.

The Court clarified that the term 'materially and adversely affected' means exactly that – it does not mean that a right need necessarily have been breached. It does, however, mean that the decision must have had a significant and not trivial effect on the right. In this case, disconnecting the tenants' electricity supply undoubtedly had a significant impact on the tenants and thus *they* were materially and adversely affected by the decision to terminate.

Although it is now clear that *the tenants were affected*, the main issue was whether any *rights* of the tenants were adversely affected. The tenants relied on the right of access to adequate housing,<sup>13</sup> the right to human dignity,<sup>14</sup> and asserted certain contractual rights.<sup>15</sup> The Court could quite credibly have concluded that the disconnection of the electricity supply materially and adversely impacted on the negative aspect of the right to housing, thus requiring notification to have been given to the tenants.<sup>16</sup>

However, the Court took a broader view of the relationship that exists between a public service provider and members of a community. One of the key functions of local government is to meet the core needs of its inhabitants and to provide the necessary services such as water and electricity. This function or obligation is derived from the Constitution<sup>17</sup> and from legislation. One such law is section 73 of the Municipal Systems Act 32 of 2000 (Systems Act), which requires that the municipality gives priority to the basic needs of the local community and ensures that all members have access to at least the minimum level of basic municipal services.<sup>18</sup> Thus, the Court concluded that there was a constitutional and statutory obligation to provide basic services, including electricity, to the tenants.

Taking a purposive approach, the Court held that the notion of 'rights' includes not only vested private law rights, but also legal entitlements that have their basis in the constitutional and statutory obligations of government.<sup>19</sup> The Court concluded that when City Power supplied electricity to Ennerdale Mansions, it was fulfilling a constitutional and statutory obligation and, when the tenants received the electricity, they had a public law right to it. As the termination of

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13 Sec 26 Constitution.

14 Sec 10 Constitution.

15 *Joseph* (n 9 above) para 12.

16 See *Jaftha v Schoeman* 2005 2 SA 140 (CC), referred to in *Joseph* (n 9 above) para 32.

17 Sec 152(1)(b) Constitution.

18 'Basic municipal services' means 'a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment' (sec 1 of the Systems Act).

19 *Joseph* (n 9 above) para 42.

the service materially and adversely affected this right, City Power was obliged to act procedurally fairly prior to terminating the service.

The tenor of the judgment is unequivocal: PAJA must be interpreted in a manner that achieves the broader objectives of open, respectful and good governance and gives effect to the spirit and purport of section 33 of the Constitution.<sup>20</sup> The Court specifically noted that the Preamble to PAJA refers to the need to create a culture of accountability, openness and transparency, sentiments which are rooted in section 1 of the Constitution. This translates into a duty on government to be responsive, respectful and fair when discharging its statutory obligations. Interpreting the jurisdictional facts narrowly would not be conducive to these objectives, hence the decision to broadly interpret the various jurisdictional facts. In *Joseph*, the Constitutional Court signalled that PAJA, despite the unnecessary and excessive caution displayed by the drafters, must be interpreted in a manner that advances the constitutional objective of responsive and open governance. These messages, and not just the immediate outcome or result of the cases, must be appreciated and understood by organs of state as they interpret the constraints on their jurisdiction and the scope and ambit of their powers.

Further, PAJA requires that adequate reasons be given for administrative action that materially and adversely affect the rights of any person.<sup>21</sup> Administrative action may be set aside if the action itself is not rationally connected to the purpose for which it is taken, the purpose of the empowering provision, the information before the administrator or the reasons given for it by the administrator.<sup>22</sup> Supplying reasons enables this assessment to be made. Both the tests for rationality and adequacy require that there be a logical coherence between the findings of law and fact, the objectives and purposes of the empowering legislation and the final conclusion arrived at by the functionary.<sup>23</sup>

In *Wessels*,<sup>24</sup> which is discussed in greater detail later in this article, the High Court appeared to accept the view that, if the obligation to give reasons was restricted to instances where rights were being diminished or deprived as opposed to being determined (application cases), PAJA would probably be unconstitutional. This must be correct, given the broad interpretation of the jurisdictional facts in the *Joseph* judgment and the necessity to be responsive, respectful and fair. It seems that the judicial interpretation of PAJA has dragged the Act closer to the vision and spirit of section 33 read with section 1 of the Constitution, despite the efforts of the legislature to superimpose

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20 As above.

21 Sec 5 PAJA.

22 Sec 6(2)(f)(ii) PAJA.

23 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 4 SA 490 (CC).

24 *Wessels v Minister of Justice and Constitutional Development* 2010 1 SA 128 (GNP).

a spate of qualifications which have to be satisfied before the right to lawful, reasonable and procedural administrative action can be claimed. However, neither section 33 of the Constitution nor PAJA extends beyond actions that can be classified as administrative.

While the right to just administrative action in section 33 of the Constitution was meant to be the principal vehicle to ensure responsive and accountable governance, the concept of legality was pressed into service to ensure oversight over the exercise of public power that fell outside the purview of section 33. Our law has travelled a most remarkable journey since 2000 to remedy this *lacuna* and, through the principle of legality, it has effectively considerably extended the reach of review for rationality. In *Fedsure*,<sup>25</sup> the Constitutional Court noted that the principle of legality, so far as it related to administrative action, was contained in the right to just administrative action. The principle of legality is also implicit in the Constitution, insofar as it relates to the rule of law,<sup>26</sup> and this principle of legality, which is implicit in the Constitution, applies to legislation and to executive acts that do not constitute administrative action.<sup>27</sup> In *Pharmaceutical Manufacturers*, the same court found that, as part of the rule of law, executive or legislative decisions must be 'rationally related to the purpose for which the power is given, otherwise they are in effect arbitrary and inconsistent with this requirement'.<sup>28</sup> Even though this review for rationality was meant to be a fairly deferential standard and one which the legislature or executive should quite easily satisfy, it has developed into a generic category which now includes many of the grounds of review that are contained in PAJA, provided that the test laid down by the Constitutional Court in the *Democratic Alliance* case is met.<sup>29</sup>

In *Ryan Albutt*,<sup>30</sup> Ngcobo CJ commenced his analysis of the argument that the President had acted irrationally in processing amnesty applications and by not affording the victims an opportunity to be heard, by stating that it is now axiomatic that all exercises of

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25 *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 1 SA 374 (CC) 45.

26 *Fedsure* (n 25 above) para 58. The Constitutional Court was referring to the interim Constitution, but its comments apply with equal force to the final Constitution.

27 *Fedsure* (n 25 above) para 59.

28 *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of SA* 2000 2 SA 674 (CC) 85.

29 See C Hoexter 'The rule of law and the principle of legality in South African administrative law today' in M Carnelley & S Hoctor (eds) *Law, order and liberty: Essays in honour of Tony Mathews* (2011) 55. The Constitutional Court judgment in *Democratic Alliance v President RSA* is discussed below (see n 37).

30 *Ryan Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC).

public power must comply with the Constitution and with the concept of legality which is inherent in the rule of law.<sup>31</sup>

President Mbeki appointed a multi-party pardon reference group to advise him on whether to grant special pardons to persons who had committed offences with a political motive or objective and who had not participated in the Truth and Reconciliation Commission (TRC) process. The President made it clear that, while he would be guided by the recommendations of the reference group, he would be exercising an independent opinion as to whether or not pardons should be granted. In doing so, he undertook to have regard to the objectives of the Constitution, including those dealing with reconciliation and nation building and to take cognisance specifically of the criteria and principles that underpinned the TRC process.

A request by the victims to be heard by the reference group before decisions were made was refused and the victims subsequently sought to interdict the process from continuing without the participation of the victims. The non-governmental organisations (NGOs) (the respondents) acting on behalf of the victims argued, inter alia, that the decision not to hear the victims was irrational. The Constitutional Court agreed with the respondents that the rationality of the decision was in question: It was not within the constitutional jurisdiction of the Court to determine whether the means chosen were the most appropriate or reasonable in the circumstances. It had to restrict itself to determining whether there is a rational link between a constitutionally-permitted objective and the means chosen to achieve that objective.<sup>32</sup> In this case, the professed objectives in pardoning certain 'political prisoners' were national reconciliation and national unity which were to be achieved after having taken cognisance of the spirit and objectives of the TRC process. Shutting the victims out of such a process was irrational because their exclusion meant that the professed objectives of national unity and national reconciliation could not rationally be achieved by the method of only hearing the version of the offenders, as it was firmly established that the participation of the victims was crucial to the TRC process and truth telling and acknowledgment of the sacrifices made by the victims were central facets of the process. From a factual and practical perspective, not hearing the victims would make it difficult to determine whether the crimes had been committed with a political objective, which was in fact the first hurdle in pardoning in terms of this specific process.<sup>33</sup>

While the majority judgment expressly left open the issue of whether the victims in other categories of pardon should also be heard before a decision is made,<sup>34</sup> it will be a high-risk strategy not to

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31 See *Affordable Medicines Trust & Others v Minister of Health & Others* 2006 3 SA 247 (CC) para 49; *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 2 SA 674 (CC) para 20.

32 *Ryan Albutt* (n 30 above) para 51.

33 *Ryan Albutt* (n 30 above) para 70.



do so. The principles of participatory democracy, responsive and respectful governance will rarely be satisfied if someone who has a vital interest or right in the outcome of the proceedings is shut out. The concurring judgment of Froneman J, building on earlier judgments,<sup>35</sup> emphasised that our Constitution requires our democracy to be both representative and participatory. However, Froneman J noted that the mere fact that the pardon reference group consisted of members of various political parties did not, in this case, adequately satisfy requirements relating to a representative democracy.<sup>36</sup>

Subsequent to the *Ryan Albutt* case, the differences between reviews of administrative action under PAJA and reviews of executive action under the principle of legality have narrowed considerably. The decision opened the door to more creative approaches to the review of executive action in terms of the principle of legality.

In *Democratic Alliance v President RSA*,<sup>37</sup> the Supreme Court of Appeal (SCA) had to consider whether President Zuma's decision to appoint Mr Simelane as National Director of Public Prosecutions (NDPP) was in accordance with the principle of legality and with the requirements of the National Prosecuting Authority Act 32 of 1998 (NPA Act). In terms of the NPA Act, the NDPP must be appropriately qualified, and be a fit and proper person having regard to his experience, conscientiousness and integrity. Prior to his appointment, the Ginwala Commission of Inquiry had made adverse comments about the integrity of Mr Simelane. There were other instances of courts also calling Mr Simelane's integrity into question.<sup>38</sup> The Public Service Commission also recommended that disciplinary proceedings be instituted against Mr Simelane. President Zuma indicated that he had firm views about the suitability of Mr Simelane's appointment and stated that he did not engage fully with the Ginwala Commission report as he was of the view that it was a fact-finding enquiry that was primarily concerned with the suitability of the previous NDPP, Adv Pikoli, for office. The President formed the view that the comments made about Mr Simelane could not be construed as intended to disqualify him from holding public office in future.

Navsa JA reflected on the duty to act openly, responsively and accountably and specifically endorsed the view that under the constitutional order, those that exercise public power must justify their decisions as opposed to simply exercising the power. That is what is required in a constitutional democracy.<sup>39</sup> In Mureinik's

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34 *Ryan Albutt* (n 30 above) para 75.

35 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 6 SA 416 (CC) para 121; *Matatiele Municipality & Others v President of the RSA & Others* (No 2) 2007 6 SA 477 (CC) para 40.

36 *Ryan Albutt* (n 30 above) para 90.

37 2012 1 SA 417 (SCA).

38 *Democratic Alliance* (n 37 above) para 10.

39 *Democratic Alliance* (n 37 above) para 67.

memorable phrase, the interim Constitution and, by implication, the Constitution, signalled a departure from a culture of authoritarianism to a culture of justification.<sup>40</sup> The Constitutional Court<sup>41</sup> subsequently confirmed the decision of the SCA and found that the failure to fully engage with the concerns about Mr Simelane's integrity was irrational. It stressed that the rationality review was an evaluation of the relationship between means and ends.<sup>42</sup> It accepted that both the process by which the decision was made and the decision itself must be rational.<sup>43</sup> Although the mere fact that relevant considerations were not taken cognisance of would not in and of itself be sufficient to set aside the exercise of executive power, the failure to take relevant considerations into account would be part of the means to achieve the objectives of the empowering statute. If the failure impacted on the rationality of the entire process, then the decision may be rendered irrational.<sup>44</sup> On the facts of this case, the Court took the view that there was no rational relationship between the means and the ends: The NPA Act demands that the appointee be a fit and proper person who is experienced, conscientious and of integrity. The Ginwala Commission made adverse comments about the integrity and honesty of Mr Simelane. The President's decision to ignore these 'red flags' coloured the rationality of the entire process and rendered the final decision irrational.

In the light of the courts' increasingly robust approach to the review of executive action, and its expansion of the concept of rationality, concerns regarding the separation of powers have arisen. There is concern (largely in political circles) as to whether courts are overstepping the bounds of judicial authority. In an effort to deal with concerns about the separation of powers, the Court suggested a threefold enquiry when it was alleged that the executive had ignored relevant factors. Firstly, it must be determined whether the facts not taken account of were relevant. If the answer is in the positive, then the second enquiry is whether the failure to consider the material, which amounts to the means, is rationally related to the purpose of the empowering provision. Thirdly, if it is not, then the issue is whether not taking the relevant consideration into account taints the entire process with irrationality and renders the final decision irrational.<sup>45</sup>

These developments in the judicial review of executive action culminated in the incorporation of a 'reasons' requirement in non-administrative decision making. This latest development is apt, given the importance of adequate reasons in ensuring responsible

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40 E Mureinik 'A bridge to where? Introducing the Bill of Rights' (1994) 10 *South African Journal on Human Rights* 32.

41 *Democratic Alliance v President of the RSA* 2012 12 BCLR 1297 (CC).

42 *Democratic Alliance* (n 41 above) para 36.

43 *Democratic Alliance* (n 41 above) para 34.

44 *Democratic Alliance* (n 41 above) para 39.

45 *Democratic Alliance* (n 41 above) para 39.

governance. Mureinik argued that responsive government means 'fostering (a) participation and (b) accountability, which is to say, the responsibility of government to justify its decisions to those whom it governs'.<sup>46</sup> By supplying reasons, government justifies its decisions and opens its thinking process to those affected by the decision – thus enabling them to understand why the decision was taken. Reasons serve to counteract the 'nepotism and unfair discrimination which lurks in every corner'<sup>47</sup> of the administration.

In the light of these comments, it is important in this context to consider the case of the *Judicial Service Commission v Cape Bar Council*, which considered the duty to give reasons for action other than administrative action.<sup>48</sup> This issue had been raised in the earlier High Court decision of *Wessels*,<sup>49</sup> where the Court held that the duty to provide reasons formed part of the concept of legality. Providing explanations for decisions opens up the process and enables an appropriate assessment to be made as to whether the decision is rational or not. In *Judicial Service Commission v Cape Bar Council*, there were three vacancies in the Western Cape and the Judicial Service Commission (JSC) deemed it appropriate to make one appointment only and did not fill the other two vacancies despite there being applicants who were eminently suited for appointment. It was accepted that the non-appointment of the judges did not amount to administrative action and therefore the decision could not be reviewed under PAJA.<sup>50</sup> However, the non-appointment could be assessed under the principle of legality.

Section 178 of the Constitution regulates the composition of the JSC and requires that either the President or the Deputy President of the JSC be present when appointments are made. As section 178(7) of the Constitution provides, firstly, for the President of the SCA to be present or, if he is unable, that the Deputy President appear as his alternate, it was clear that because neither was present when these decisions were taken, and there was no justification therefor, the JSC was not properly constituted. This meant that an invalidly-constituted JSC could not take valid decisions. The Cape Bar Council also argued that the failure to make appointments and leave the posts unfilled when there were eminently suitable candidates was irrational. The only reason provided by the JSC for not filling the posts was that none of the other candidates received a majority of votes. The JSC argued that it was not obliged to give reasons and, as the voting was done through a secret ballot, it was not in a position to supply a justification for its decision.

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46 E Mureinik 'Reconsidering review: Participation and accountability' (1993) *Acta Juridica* 35 46.

47 Olivier JA in *Transnet Ltd v Goodman Bothers (Pty) Ltd* 2001 1 SA 853 (SCA) 42.

48 *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115 (14 September 2012).

49 *Wessels* (n 24 above).

50 *Judicial Service Commission* (n 48 above) para 20.

The Court held that, while there was no express statutory or constitutional obligation on the JSC to provide reasons for its decision, if regard is had to the broader objectives and visions of the Constitution, such an obligation can clearly be implied. The JSC had to act rationally and, as an organ of state, it had to act in accordance with the values of transparency and accountability contained in section 195 of the Constitution.<sup>51</sup> According to the Court, it would be entirely cynical to say to an applicant that he or she could demand that a body exercising public power does so rationally, but that there is no obligation on that body to provide reasons. A person would in those circumstances have to accept the say-so of the public body that it acted rationally. On the facts of this case, the Court held that there was an obligation to provide reasons and that the reasons provided in this case were not sufficient.<sup>52</sup> In terms of this judgment, the principle of legality and rationality now requires that adequate reasons be provided. While the Court made it clear that this does not necessarily mean that all decisions of the JSC have to be supported by reasons,<sup>53</sup> the obligation on the JSC to act rationally would, in most instances, require some justification being provided for decisions taken.

The scope of government's responsibility has been clearly demarcated and organs of state need to acquire the discipline to meet the standard set by the Constitution as this standard has been interpreted by the courts.

### **3 Organs of state falling well short of the standard required**

Section 217 of the Constitution makes it imperative for an organ of state in the national, provincial or local sphere to contract for goods and services in a manner that is fair, equitable, transparent, competitive and cost-effective. However, organs of state are not prevented from implementing a procurement policy providing for categories of preferences in the allocation of contracts, and the protection or advancement of persons or categories of persons previously disadvantaged by unfair discrimination.<sup>54</sup> The section requires the enactment of national legislation prescribing a framework to implement the policy of preference to previously-disadvantaged persons. The Preferential Procurement Policy Framework Act of 2000 (PPPFA) has therefore been enacted.

Section 2 of the PPPFA draws a distinction between contracts above the prescribed amount and contracts below the prescribed amount. In respect of contracts above the prescribed amount, a maximum of ten

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51 *Judicial Service Commission* (n 48 above) para 43.

52 *Judicial Service Commission* (n 48 above) para 45.

53 *Judicial Service Commission* (n 48 above) para 51.

54 Sec 217(2) Constitution.

points may be allocated for the specific goals identified in the PPPFA, while in respect of contracts below the prescribed amount, a maximum of 20 points may be allocated for the specific goals. The specific goals relate to contracting with people who were historically disadvantaged by unfair discrimination on the basis of race, gender, sex or disability, or for the purposes of implementing the Reconstruction and Development Programme. The points allocated must be out of a total of 100, and the person scoring the highest points must be allocated the tender. In tenders for contracts above the prescribed amount, a maximum of ten points may be assigned to historically-disadvantaged individuals, while a maximum of 90 points must be assigned for price.<sup>55</sup> In tenders for smaller contracts (those below the prescribed amount), a maximum of 20 points may be allocated to historically-disadvantaged individuals, and a maximum of 80 points may be assigned for price. Thus, the PPPFA and the regulations adopt a fairly rigid system, in order to ensure that price is allocated the overwhelming segment of the points, but also that equity issues are not ignored.

The legal norms regulating procurement are thus contained in the Constitution, and are re-emphasised in legislation passed by Parliament. Given the pressure on the fiscus to respond to the numerous challenges facing us in our pursuit to improve the quality of life of all, the logic unpinning the constitutional provisions and the law is that it is against the nation's interests for the country to be paying much more for goods and services than that which is fair and equitable. Parliament prescribed the balance to be achieved between advancing previously-disadvantaged communities, and ensuring that we receive value for our rand, with the balance still weighing heavily in favour of economic concerns.

In *Minister of Social Development and Others v Phoenix Cash and Carry-PMB CC*,<sup>56</sup> the SCA re-iterated that the five principles of fairness, equitable treatment, transparency, competitiveness and cost-effectiveness must inform all aspects of the tender process. In a frank judgment, the Court directly questioned the legitimacy of the process that led to the appellants being denied the tender and, in a damning indictment, indicated that from its experience drawn from matters before the Court, the values of section 217 are more honoured in the breach than in the observance.

Bids were invited to supply food hampers to indigent families in KwaZulu-Natal and in the Eastern Cape. The price of the service offered in the bid submitted by the appellant, Phoenix Cash and Carry, was approximately 40 per cent less than that submitted by the successful tenderer. Despite offering the lowest price by a large margin, the appellant was unsuccessful. In response to the appellant's

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55 Preferential Procurement Regulations GN R725, GG 22549, 10 August 2001.

56 2007 9 BCLR 982 (SCA).

request for reasons, the Department indicated that it had evaluated the bids and that the appellant was unsuccessful.<sup>57</sup>

- 1 Your client is not entitled as of right to be awarded the tender.
- 2 The Department evaluated all bids and awarded to the entities listed in annexure A.
- 3 The bids of the entities listed in annexure A satisfied the requirements of the tender.
- 4 The Department exercised its prerogative in awarding the tender to the entities in annexure A. In other words, the Department exercised its discretion not to award the tender to your client and did so after consideration of all bids that were submitted.

Subsequently, the Department attempted to supplement its so-called reasons by stating that the appellant had not complied with certain prerequisites, including the submission of audit statements. The Court found that the Department, in excluding the appellant's bid, had elevated form above substance. Had it properly appraised the documents submitted, it would have concluded that the material issues dealing with financial viability had been dealt with, even though no audit statements had been submitted. Accordingly, the Court held that the process was fundamentally flawed, and set aside the decision. A process that emphasises form over substance could have the effect of facilitating corrupt practices, by providing an excuse not to consider meritorious tenders, and by excluding them on technicalities. This is often inimical to fairness, competitiveness and cost-effectiveness.

Subsequently, when the litigation commenced, further reasons were submitted. The reasons submitted can hardly be classified as reasons. Reference to exercising its prerogative is irrational, as the Department does not possess prerogative power. The hint of arrogance inherent in the statement is unbecoming. No mention is made of why this particular decision was reached. This is particularly jarring when the context is considered: The successful tenderer charged the Department a bid price that was 40 per cent more than the appellant's bid price. The Department has a constitutional and statutory duty to ensure that the procurement process is fair, equitable, transparent, competitive and cost-effective. The purpose of supplying reasons is to properly explain why a particular decision was arrived at, and not to re-state the conclusion reached. The reasons submitted are not just inadequate, but border on being contemptuous of the applicant. It is almost as if the legal advisors of the Department are saying: 'We are dispensing a largess to which you have no right and we therefore do not have to explain our actions.' Rather than getting an explanation for the decision, the Court found that after receiving the reasons, Phoenix Cash and Carry was

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57 *Echoes of JSC v Cape Bar Council.*

'understandably perplexed at not having succeeded in its bid'.<sup>58</sup> The response further, according to the Court, betrayed a 'fundamental misconception of the function to be performed by the adjudicator of the tender'.<sup>59</sup> The reasons supplied manifest an attitude that can accurately be referred to as cynical compliance with constitutional and legislative obligations to provide reasons.

The case in question was, however, decided on the basis that the appellant in *Phoenix Cash and Carry* had been wrongfully excluded from the evaluation process, and had not been treated procedurally fairly. The Department was ordered to set aside the tender and to commence the process afresh. If lessons are being learnt from cases of this nature and behavioural changes occur, then administrative morality may in fact change. This is less likely to occur if the determining criterion, as far as the administrator is concerned, is whether the unsuccessful applicant is going to challenge the decision in court. Administrative morality is more likely to occur if there is genuine engagement and a commitment to uphold the values of the Constitution during the administrative process. The lessons that cases like *Phoenix Cash and Carry* teach are that the decision-making process has to be procedurally fair, substance must not be sacrificed for form, the enabling Acts and the relevant provisions of the Constitution must be applied, a lawful and proper decision must be made timeously, and adequate reasons must be supplied at the end of the process, upon request. It is a process that starts with receiving the applications, and which ends with the supply of reasons. The administrators must be capacitated to appreciate this and to act accordingly. To make the decision and not to provide adequate reasons is tantamount to exercising the power, but not abiding by the legal and constitutional constraints attendant upon the exercise of the power. This is the very antithesis of the proper and accountable exercise of public power required in the Constitution as interpreted by the courts. The courts have spoken clearly about their concerns, and both the executive and legislative branches need to engage with this issue in a more meaningful and committed manner. It is not solely about the rights of the single applicant, but much more about fostering a culture that would enhance and strengthen the democracy. The establishment of an advisory council, as envisaged in section 10(2) of PAJA, by the Minister of Justice and Constitutional Development, would be a useful starting point, and would allow for members of the public and administrators to be informed of how constitutional and statutory obligations are to be discharged. It would allow for the lessons taught by cases like *Phoenix Cash and Carry* to be learnt by all, and would hopefully decrease the likelihood of similar improper conduct occurring.

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<sup>58</sup> *Phoenix Cash & Carry* (n 56 above) para 10.

<sup>59</sup> *Phoenix Cash & Carry* (n 56 above) para 23.

#### 4 Investigations by the Office of the Public Protector

I turn now to consider decisions made by the Office of the Public Protector (OPP),<sup>60</sup> and the impact that these decisions may have on ensuring accountable and responsive government. OPP is an institution that is constitutionally empowered to investigate any improper conduct in state affairs or in public administration.<sup>61</sup> Given its mandate, an effective and competent OPP is central to the objective of achieving accountable and responsive government.

In about 2005, the *Mail & Guardian* published a series of articles dealing with transactions between PetroSA, a public body, and Imvume Holdings, a South African oil company.<sup>62</sup> These transactions were subsequently dubbed 'Oilgate'. The essence of the allegations by the *Mail & Guardian* was that millions of rands of public money had been diverted from PetroSA to the African National Congress (ANC) through Imvume Holdings.

An arrangement was reached that PetroSA would provide an advance payment of \$2,3 million (R15 million) to Imvume Holdings, which in turn was meant to be used to pay a supplier, Glencore, for a consignment of oil. This amount was accordingly transferred from PetroSA to Imvume Holdings. According to bank records, Imvume Holdings transferred R11 million to the ANC a few days later. Significantly, Imvume Holdings did not transfer the money to Glencore, as had been agreed, and PetroSA was then obliged to pay the sum of R15 million directly to Glencore. PetroSA denied any knowledge of the subsequent transfer from Imvume to the ANC, and the ANC denied any wrongdoing. The net result was that PetroSA paid \$13 million for a cargo that was originally priced at \$10,2 million. The allegation was that within a few days of the R15 million advance being made to Imvume Holdings, it paid R11 million to the ANC. Imvume subsequently defaulted on repaying the R15 million to PetroSA. Certain non-ANC members of parliament referred these allegations to the Public Protector.

In his report, the then Public Protector reasoned that when the money reached the account of Imvume Holdings, it ceased to be 'public money', and became 'private money'. As the jurisdiction of the Public Protector is restricted to public money, the report concluded that its investigatory mandate stopped when the money reached Imvume Holdings. Hence, it concluded that it could not investigate

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60 The Office of the Public Protector is one of the institutions established in terms of ch 9 of the Constitution, to support constitutional democracy. Its powers are enumerated in sec 182 of the Constitution, and in terms of the Public Protector Act 23 of 1994.

61 Sec 182(1) Constitution.

62 These facts are obtained from the judgment of the SCA in this matter; *The Public Protector v Mail & Guardian Ltd* 2011 4 SA 420 (SCA).



the relationship between Imvume Holdings and the ANC, and the subsequent transfer of funds from Imvume to the ANC.

The *Mail & Guardian* challenged the legality of the Public Protector's report. The SCA was scathing in its rejection of the reasoning of the Public Protector.<sup>63</sup> The substance of the complaint, according to the Court, was the propriety of the initial conversion of public funds into private money, and not the propriety of the payment of private money from Imvume Holdings to the ANC. This simple proposition appeared to elude the then Public Protector. The mandate of the Public Protector is to investigate any alleged 'improper or dishonest act, or omission ... with respect to public money'.<sup>64</sup> The conversion of public money into private money, according to the Court, occurs through bilateral transactions of payment and receipt.

Both the improper payment and improper receipt of public money was quintessentially an improper act with respect to public money. By misunderstanding this, the Public Protector misdirected himself and concluded that he could not investigate the transaction between Imvume Holdings and the ANC. Key questions were not asked of PetroSA, such as the purpose of the advance payment, and why PetroSA did not make the payment directly to Glencore in the first place. The damning conclusion of the Court was that 'the investigation was so scant as not to have been an investigation, and there was no proper basis for any of the findings that were made'.<sup>65</sup> In an interesting preamble to the judgment, the Court reflects on the importance of the OPP. It describes it as the last defence against bureaucratic oppression, and against corruption and malfeasance. Importantly, it states that 'if that institution falters, or finds itself undermined, the nation loses an indispensable constitutional guarantee'.<sup>66</sup> The Court reminds the OPP that the office is declared to be independent and impartial, and these words mean what they say and 'fulfilling their demands will call for courage at times'.<sup>67</sup> The subtext appears to be that this quality was lacking in this instance. The Court's denunciation was as stark as it could possibly be. Reports and reasoning of this nature by chapter 9 institutions must be of concern. It communicates to those exercising power that the oversight over them will be non-exacting and weak. It is self-constraining in that the chapter 9 institutions themselves internally limit the scope and ambit of their investigatory and adjudicatory jurisdiction, and finally it communicates to the public that these institutions lack the independence and robustness required to assert

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63 *Mail & Guardian Ltd* (n 62 above) para 101.

64 Sec 6(4)(a)(iii) Public Protector Act 1994.

65 *Mail & Guardian* (n 62 above) para 116.

66 *Mail & Guardian* (n 62 above) para 6.

67 *Mail & Guardian* (n 62 above) para 8.

their mandate. These perceptions could fundamentally impair the effectiveness of these institutions.

Ultimately, the constitutional structures – the courts in this case – corrected the flawed reasoning of the OPP in *Mail & Guardian Ltd*.

Juxtapose the outcome just discussed with a report by the present Public Protector, Adv T Madonsela. In 2011,<sup>68</sup> a resurgent and confident OPP found that the South African Police Service (SAPS) under General Bheki Cele and the Department of Public Works had acted unlawfully in entering into a long-term R500 million lease agreement with Roux Shabangu. The Public Protector found the process that preceded the signing of the agreement to be fatally flawed, and that both the SAPS and the Department of Public Works had failed to comply with the Constitution, the Public Finance Management Act 1 of 1999, the Treasury Regulations, and various supply chain management rules and policies. She concluded that the parties had engaged in maladministration, and had dealt with public funds in a reckless manner. This is a stinging indictment of the SAPS and of the Department of Public Works by an office that was set up to support the constitutional democracy. Various findings and recommendations were made, including the setting aside of the lease agreement. The report has practical and symbolic significance. At a practical level, public officials should not unlawfully and unjustifiably enrich others at taxpayers' expense, and at the expense of the most marginalised in society. At a symbolic level, the manner in which government deals with these findings would be an indication of whether there is the discipline to govern within the confines of the Constitution and the rule of law. A board of inquiry under Judge Jakes Moloi set up to investigate the allegations against General Cele concluded that he was unfit to hold office, and questioned the propriety of the relationship between General Cele and Mr Shabangu.<sup>69</sup> On 12 June 2012, President Zuma, citing the findings of the inquiry, dismissed General Cele.<sup>70</sup> President Zuma's actions in dismissing the Minister of Public Works, and by suspending the National Commissioner of Police and setting up a disciplinary hearing, are probably amongst the most significant acts that the executive has taken to contribute to the legitimacy and importance of chapter 9 institutions. It sent out an unequivocal message that these reports will have consequences.

An independent adjudicator, competent counsel, the requirement to answer relevant questions, effective cross-examination, an objective evaluation of the evidence, and an application of the law and logic all contribute to a process geared to ferreting out the truth. General Cele

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68 Govender (n 3 above) 352-353.

69 <http://ewn.co.za/en/2012/05/25/Reports-arise-about-the-axing-of-Cele> (accessed 31 March 2013).

70 <http://www.news24.com/SouthAfrica/News/Bheki-Cele-fired-20120612> (accessed 31 March 2013).

discovered that the judicial process is not susceptible to political sloganeering, obfuscation, and vague and empty answers. When he was called to account in a judicial process, he was found wanting. The Board of Inquiry validated the Public Protector's findings, and after giving General Cele his day in court, found against him decisively. General Cele has rejected the report, and is seeking to have it set aside.<sup>71</sup>

Suddenly, the message that is now being communicated to those exercising public power is that the OPP will conduct proper and competent investigations, and that the reports will have consequence and officials will be held accountable. The OPP is now playing the role that the court in PetroSA urged it to. Adv Madonsela reported that in the 2011/2012 year, the OPP had received 2 290 complaints.<sup>72</sup> Public confidence in this institution appears to have grown considerably, and so has the confidence of the OPP to tackle misconduct in the public sector. A buoyant and confident OPP is exactly what the Constitution envisages as a counterweight to the exercise of public power. This will serve to re-invigorate, not just the Office of the Public Protector, but also all chapter 9 institutions. Unequivocally, the report on the police lease agreements has raised the bar for all chapter 9 institutions, and we are entitled to expect a similar standard from all of them – in the discharge of their mandate. If they function optimally, they have the capacity to ensure the proper exercise of public power. If they do not, they fail to justify the reason for their existence.

## 5 Conclusion

It remains a matter of concern that the efficacy of some constitutional institutions depends so heavily on the individuals leading them. It is vital that the institutions themselves command respect, irrespective of who the incumbents are at any given time. The Constitutional Court has acquired institutional and reputational respect, and is highly regarded for its measured and generally consistent jurisprudence that is relevant to our context.

After losing a number of high profile cases, the government has in fact announced that it wanted to conduct a review of the judgments handed down by the Constitutional Court. According to the formal terms of reference, published by the Department of Justice on 26 March 2012,<sup>73</sup> the review was to undertake a comprehensive analysis of all the decisions published by the Constitutional Court and the Supreme Court of Appeal since the advent of democracy in South Africa. A key concern is whether the jurisprudence emanating from

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71 <http://www.iol.co.za/dailynews/news/sack-cele-says-inquiry-1.1304795> (accessed 31 March 2013).

72 *The Mercury* 28 August 2012 4.

73 [http://www.justice.gov.za/m\\_statements/2012/20120326](http://www.justice.gov.za/m_statements/2012/20120326) (accessed 31 March 2013).

these courts advances the values and principles embodied in the Constitution. The terms of reference direct that specific attention be paid to the manner in which socio-economic rights have been enforced, and the extent to which the principles contained in section 1 of the Constitution have been developed and promoted. In addition, the review will assess the extent to which these decisions have been properly implemented by the executive and administration, as well as other factors that have impeded access to justice, such as costs and delays. This all appears to be perfectly innocuous.

In the context of statements made by senior members of the ruling party, however, the review may be cause for concern.<sup>74</sup> In an opinion piece written by the Deputy Minister of Correctional Services, Ngoako Ramathlodi, it is argued that the ANC had made fatal concessions in the 1994 negotiations leading up to the democratic constitutional dispensation. He stated that the consequence of these fatal concessions is that while the black majority may enjoy political power, they are denied economic power. He argued that the economy is still controlled by the white minority, which is protected by a judiciary, which he identified as one of the forces against transformation. The premise of his argument is that 'the black majority enjoys empty political power while forces against change reign supreme in the economy, judiciary, public opinion and civil society'.

Deputy Minister Ramathlodi's opinion piece is short on specificity, and there is very little reference to supporting evidence to back the sweeping denunciation of the judiciary. It is unclear whether the 'fatal concessions' refer to the carefully-constructed founding values contained in section 1 of the Constitution. The major concern with the argument is that it appears to be advocating a fundamental abrogation of the core principle that power is granted subject to it being exercised in accordance with the substantive and procedural constraints contained in a supreme Constitution enforced by independent courts. It appears that the Deputy Minister is arguing for some other system, which does not constrain government as much. It is the premise of this article that South Africa's constitutional democracy achieves the appropriate balance between power and constraints. It is the task of those exercising public power to act in accordance with the checks and balances such as the imperative of responsive and respectful governance, as opposed to fundamentally altering the Constitution so as to make the exercise of public power easier and less responsive and accountable. It is hoped that the views of the Deputy Minister do not prevail in this regard.

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74 <http://www.timeslive.co.za/opinion/commentary/2011/09/01/the-big-read-anc-s-fatal-concessions> (accessed 31 March 2013).

## Strange bedfellows: Rethinking *ubuntu* and human rights in South Africa

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### Summary

*Can an African ubuntu moral theory ground individual freedom and human rights? Although variants of ubuntu moral theory answer in the negative, asserting that the duties individuals owe the collective are prior to individual rights (since African thought places more emphasis on the collective), Metz's recent articulation in this Journal of an African ubuntu moral theory promises to ground the liberal ideal of individual liberty. I pursue three distinct lines of argument in establishing the claim that Metz's project fails to convince – that individual freedom and rights cannot be successfully grounded in a moral theory that already regards some extrinsic value (that is, communal harmony) as the most fundamental moral value. First, I suggest that Metz's attempt to ground human rights in his ubuntu moral theory raises the problem of where the fundamental value lies in his theory. That is, in seeking to integrate two potentially-conflicting and non-instrumental values in his theory, Metz substantially modifies his original ubuntu ethical principle in such a way that the communitarian/ubuntu status of the theory is undermined. Second, I argue that, even if Metz's theory were sufficiently communitarian/ubuntu-like, it could not possibly ground individual freedom as a non-instrumental value. Third, I argue that Metz employs a tendentious reading of the concept of human rights; in particular, that he erroneously construes rights as duties. Since this last argument rests on a subtle distinction between individual rights and duties, I try to suggest how the distinction can be made in spite of the fact that these concepts are strongly related. Although I do not directly address Metz's treatment of specific human rights issues in South Africa, throughout I contend that these theoretical lapses cast enormous doubts on his overall project.*

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## 1 Introduction

Respect for basic human rights is a very important feature of the modern world. This is in part due to the fact that they are politically salient and there are pragmatic reasons why people deeply care about them. A moral theory that fails to adequately capture the importance we attach to these rights would be considered by many as inadequate. Communitarian moral theories are often seen as exemplifying this theoretical deficiency. Consequently, proponents of variants of the theory have been burdened with the responsibility of accounting for the importance we attach to basic human rights and thus resisting the charge of collectivism – the accusation that such theories cannot sufficiently account for individual rights and liberties – that has been persistently laid at their door.<sup>1</sup> Yet, trying to account for human rights within a normative system that fundamentally prizes some communal or relational good over individual ones is like attempting a trick the aim of which is to eat one's cake and have it. Metz's recent contribution to the debate strikes me as one such attempt.<sup>2</sup> He insists that, although other available alternatives of African *ubuntu* moral theory are susceptible to the charge of collectivism, his preferred version can do the trick.

Notwithstanding my frivolous analogy, I believe that reading Metz's article is worthwhile and repays close philosophical attention. It represents one person's search for a distinctively African communitarian approach to morality that is suitable for public policy formulations on matters that are pertinent to South Africa, and perhaps Africa as a whole. Yet, disagreements there are bound to be when a moral theory is advertised in the public space as a panacea to conflicts and problems of monumental proportions. This article is an attempt to articulate some of my disagreements with Metz's attempt to 'construct an ethical principle that not only grows out of indigenous understandings of *ubuntu*', but also 'clearly accounts for the importance of individual liberty' and 'serves as a promising foundation for human rights'.<sup>3</sup> I think that ultimately Metz fails to deliver on these promises. I pursue several distinct but interrelated lines of arguments in establishing three central claims. In the first section, I argue that there are good reasons to doubt the communitarian status of Metz's *ubuntu* moral theory – I explore what it means for a theory to be truly communitarian and then express

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1 See, eg, Gyekye's defence of moderate communitarianism as better equipped in adequately accounting for individual freedom and rights than its rival, extreme communitarianism, in K Gyekye *Tradition and modernity: Philosophical reflections on the African experience* (1997); see also JO Famakinwa 'The moderate communitarian individual and the primacy of duties' (2010) 76 *Theoria* 152-166 for an insightful criticism of Gyekye's view.

2 T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532.

3 Metz (n 2 above) 534.

some doubts about whether Metz's theory counts as one. In the second section, I argue that Metz has not successfully shown that individual freedom is compatible with an *ubuntu* ethic. My strategy is to explore three options available to Metz for establishing the compatibility of the two and argue that each one presents new problems for his *ubuntu* moral theory. In the final section, I cast doubts on the initial appeal of Metz's account of human rights. My contention is that Metz's account controversially proposes that rights are represented as duties.

## 2 The communitarian status of Metz's *ubuntu* moral theory

In its simple form, Metz's variant of the moral theory of *ubuntu* is unquestionably communitarian. But Metz has not offered us a simple theory; there are several layers of intuitions that have shaped the development of what is now his preferred *ubuntu* moral theory.<sup>4</sup> My immediate aim is to examine in some detail some of his recent philosophical commitments with a view to determining whether the theory in its current expression still retains its communitarian pedigree.<sup>5</sup> I think that we have reason to suspect that it does not. In particular, I argue that a moral theory is sufficiently communitarian if it adequately captures the basic tenets of communitarianism. One such core aspect of communitarianism is its construction of the individual moral agent as necessarily embedded in a network of relationships. I take this to be the foundational claim about the causal dependence of the individual on the community. Alternatively, a communitarian theory should fully capture the value of community as a non-instrumental good. Implicit in this claim is the view that, in any hierarchical ordering of values, community should rank higher than other alternatives.<sup>6</sup> To be more specific, then, my view is that on both

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4 See T Metz 'Toward an African moral theory' (2007) 15 *Journal of Political Philosophy* 321-341 for the original expression of Metz's *ubuntu* moral theory. Since then, the theory has been developed and sometimes modified to include, eg, an account of human dignity, human rights, etc. The following publications represent the development in Metz's and modification of his original intuitions about a distinctive African moral theory: T Metz 'Human dignity, capital punishment, and an African moral theory' (2010) 9 *Journal of Human Rights* 81-99; T Metz 'African conceptions of human dignity: Vitality and community as the ground of human rights' (2012) 13 *Human Rights Review* 19-37; T Metz 'Developing African political philosophy: Moral-theoretic strategies' (2012) 14 *Philosophia Africana* 61-83; T Metz 'African values, human rights and group rights: A philosophical foundation for the Banjul Charter' in O Oche (ed) *African legal theory and contemporary problems: Critical essays* (2013) (forthcoming).

5 Compare Ramose's criticism of the African status of Metz's *ubuntu* moral theory in MB Ramose 'But Hans Kelsen was not born in Africa: A reply to Thaddeus Metz' (2007) 26 *South African Journal of Philosophy* 347.

6 In characterising the core commitments of communitarianism, I rely on Bell's threefold distinction of communitarianism as expressing a metaphysical claim regarding the communal nature of the self, normative claim about community as

core aspects of communitarianism, Metz's favoured *ubuntu* theory is to be found wanting; indeed, it seems to veer dangerously in the direction of the liberal tradition.

Metz's project on *ubuntu* begins with a critical survey of the available literature with the aim of articulating not the prevailing view of morality among Africans, but instead a justified moral principle that is faithful to values found in sub-Saharan Africa. In order to do this, he explores the term *ubuntu* and the associated maxim 'a person is a person through other persons'. And having considered and rejected a variety of expressions of this maxim as an ethical principle, Metz settles for one according to which 'an action is right just insofar as it produces harmony and reduces discord; an act is wrong to the extent that it fails to develop community'.<sup>7</sup>

Along the way to arriving at this favoured principle, Metz explicitly claims that the aim of morality is not individual well-being or self-realisation. On his account, the fundamental moral value that a moral agent ought to promote inheres in certain kinds of relationships rather than in anything internal to the individual.<sup>8</sup> However, since promoting certain kinds of relationships, in particular friendly ones, may sometimes justify sacrificing individual freedom and other basic human rights, Metz introduces a deontological constraint to the theory. 'A moral theory that focuses *exclusively* on promoting good outcomes however one can', Metz cautions, 'has notorious difficulty in accounting for an individual right to life, among other human rights.'<sup>9</sup> Consequently, he suggests an alternative way of responding to value that requires moral agents to 'prize' and 'honour' harmonious relationships as opposed to promoting these values as much as they can. Yet, while integrating a deontological constraint may be an attractive feature of the theory, it is worth noting how an original intuition has been modified.

In this connection, there are three important points I wish to make. First, it is worth pointing out that in the original statement of the ethical principle it seems that the moral agent is obliged to do the good – that is, promote harmonious relationships – everywhere. Now, it appears that sometimes the good is not worth doing. More importantly, the moral agent within the *ubuntu* moral system has moral reasons to refrain from doing the good, and these reasons derive not necessarily from her valuation of community, but from facts about some inherent value in the individual – that is, specific entitlements the protection of which assures the individual's well-

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the fundamental value and methodological claim about the importance of communal context in moral and political reasoning – the last of which is omitted since it is less relevant for my present aims. See D Bell *Communitarianism and its critics* (1993).

7 Metz (n 2 above) 334.

8 Metz (n 2 above) 334; T Metz 'Ubuntu as a moral theory: Reply to four critics' (2007) 26 *South African Journal of Philosophy* 369.

9 Metz (n 2 above) 540.



being. So, although the theory still retains its commitment to the view that morality is other-regarding, it seems to imply that there is some non-instrumental value inherent in individuals rather than relationships, and this value is worth pursuing for its own sake.<sup>10</sup>

Second, and relatedly, it appears that there are now two, rather than one, non-instrumental values in Metz's *ubuntu* theory. Alternatively, it is not entirely clear that we should still regard friendly relationships as the *sole* fundamental moral value a moral agent ought to promote. If the view that harmonious relationships are constitutive of the good and the claim that basic individual rights ought to be respected are accurate, then it seems that there are two normative aims worth pursuing. Further, it does not seem entirely true that the morally-right action is one that promotes harmonious relationships as per Metz's statement of the original *ubuntu* ethical principle. To adequately reflect the recent modifications of the theory, it appears that Metz's preferred version of an African ethical principle should be modified such that the morally-right action is the one that produces harmony and/or exhibits respect for human rights. But Metz has not done so – which may suggest that he still regards harmony in relationships as the sole fundamental moral value, in which case it is unclear how his theory can fully account for individual freedom and other basic liberties.

Third, and further, not only does the theory in its more recent appearance equally prize two distinct moral values, but it also prizes two competing – insofar as they are potentially conflicting – non-instrumental values. Although it is maybe the case that these aims sometimes coincide, it is nevertheless true that they do diverge. In fact, the need for Metz to incorporate a deontological constraint in this *ubuntu* moral theory is born out of the recognition that the goal of achieving harmony may sometimes be at variance with the aim of upholding individual freedom and other human rights.<sup>11</sup> If I am right, then it follows that Metz has now fragmented the fundamental moral aim in a way that gravely undermines the original statement of the favoured principle. Yet, his theoretic romance with human rights does not end there.

Having integrated the deontological constraint, Metz could not miss the theory's potential to ground human rights in spite of its communitarian leanings – something he pursues in a roundabout way by first providing an account of human dignity. In his view, the available *ubuntu* conceptions of human dignity in Southern African thought are inadequate. More specifically, a view of human dignity grounded in relationships or in communal belonging is inadequate

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10 See Metz (n 8 above) 383 for the claim that the basic moral reasons for acting are extrinsic rather than intrinsic. For a defence of a version of *ubuntu* that holds that the basic moral reasons for acting are intrinsic and thus advocates individual well-being as the fundamental moral aim, see J van Niekerk 'In defence of an autocratic account of *ubuntu*' (2007) 26 *South African Journal of Philosophy* 364.

11 I return to these issues later.

because if dignity inhered in relationships or 'were a function of actually being in community', then a person in solitary confinement 'would counter-intuitively lack a dignity'.<sup>12</sup> For a more promising conception, Metz proposes that<sup>13</sup>

one is to develop one's humanness by communing with those who have a dignity in virtue of their capacity for communing.<sup>14</sup> That is, individuals have a dignity insofar as they have a communal nature, that is, the inherent capacity to exhibit identity and solidarity with others ... it is not the exercise of the capacity that matters for dignity, but rather the capacity itself.

I want to draw attention to something rather odd in the preceding passage that further deepens my suspicion that more recent expressions of the *ubuntu* theory under consideration reflect a radical shift from the original simple statement of the ethical principle. It is odd that a theory that originally locates the fundamental moral value in certain kinds of relationships would opt against the conception of dignity as inhering in such relationships. The reason why I consider this odd is that, since dignity is non-instrumentally valuable, grounding dignity in something besides what the theory says is constitutive of the good immediately identifies two potentially-conflicting non-instrumental values – one that is extrinsic (that is, inheres in relationships) and another that is intrinsic. This reiterates my earlier point that Metz's *ubuntu* theory in its fully-fledged version seems to incorporate two distinct and conflicting moral values. But there is a further source of worry.

In the first instance, my misgiving about the communitarian status of the theory relates to how the view that human dignity resides in an individual's *unexercised capacity* for community theoretically represents the moral agent. It seems to me that grounding dignity in a yet-to-be-realised capacity for community represents the individual as existing in principle outside the network of relationships that constitutes community. The mere possession of that capacity sets the individual apart from the community, insofar as having that capacity expresses the promise of the individual's subsequent entry into

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12 Metz (n 2 above) 543. It is not entirely clear, and Metz does not say, why a proponent of that view cannot happily bite the bullet and admit that dignity cannot be had outside of the network of relationships that constitute a person's identity, since whatever individual attributes a person may have are dependent on facts about the community. However, for a more appropriate response, see, eg, A MacIntyre *After virtue* (1984) 173, who argues that communal roles remain even in isolation, and C Taylor *The ethics of authenticity* (1991) 33, who contends that even in such isolated states, 'dialogue continues within us'.

13 Metz (n 2 above) 544. I shall suggest shortly that merely having such a capacity does not by itself suggest that an individual has a communal nature.

14 I should point out that the suggestion here that 'one is to develop one's humanness by communing' strikes me as odd for a theory that emerged out of a careful review and denouncement of *ubuntu* moral theories that hold individual wellbeing and self-development as the fundamental value. Metz seems to have, without any warning and argument, reverted to the view that the aim of morality is self-development.

community. In resisting the view that dignity is a matter of 'actually being in community', Metz implicitly represents the individual as necessarily occupying a place outside of those relationships that constitute community. This view of dignity thus produces a subject who in principle is able to impinge his will on the community from without. Not surprisingly, then, Metz is keen to emphasise the role individual choice plays in the eventual exercise of that capacity. Here is Metz, 'part of what is valuable about friendship or communal relationships is that people come together, and stay together, of their own accord'.<sup>15</sup> The image, then, is of autonomous individuals who, through practical reasoning in something akin to a Rawlsian original situation, have chosen *of their own accord* to live with others in community.

But why is such a representation of the individual moral agent problematic? In order to fully answer the question, we must first recognise that Metz's reason for claiming that what is special and valuable about a human being is the *capacity for community* is primarily to capture the communal nature of the self. That is to say, he seems to recognise that for his moral theory to be genuinely *ubuntu* or communitarian, he must integrate the metaphysical claim about the causal dependence of the individual on the community. What has emerged, however, is the complete opposite: that is, that the distinctive *capacity* that gives humans dignity cannot be causally dependent on the community since any actual community must presuppose it. By offering an account of dignity that is independent of communal belonging or relationships, it appears then that Metz not only cannot account for the communitarian belief that the individual is causally dependent on the community, but also, he rather ingenuously shows support for the view that the community is causally dependent on the individual – in particular, it is merely the outcome of individual choice.<sup>16</sup>

But that is not all. With the Kantian capacity for individual choice an essential part of the definition of the individual, it is not entirely clear that it is the capacity for community that is doing the important work in grounding human dignity, even on Metz's account. Indeed, it

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15 Metz (n 2 above) 584.

16 It is worth pointing out how this feature of his theory sets Metz apart from African and Western communitarians, even though his theory is supposed to be communitarian. Eg, Menkiti maintains that individual facts, like dignity, are dependent on communal ones when he explicitly claims that in the African communitarian normative system 'the reality of the communal world takes precedence over the reality of the individual life histories, whatever these may be' (IA Menkiti 'Person and community in African traditional thought' in RA Wright (ed) *African philosophy: An introduction* (1984) 171). See also J Kenyatta *Facing Mount Kenya* (1965) 180; and LS Senghor *On African socialism* (1964) 49 93-94. Among Western communitarians, similar views are held. Eg, Taylor contests the idea of the individual as independent of society in C Taylor 'Atomism' *Philosophy and the human sciences: Philosophical papers* (1985) 2. On his part, MacIntyre (n 12 above) 250 is opposed to the idea of individuals voluntarily entering into community with already established interests.

is worth pointing out that Metz seems to rather disturbingly construe the capacity for freedom as playing a fundamental role in grounding human dignity. And he construes the capacity for community as essentially including the freedom to exercise it as one deems fit. He thus insists on 'one's ability to decide for oneself with whom to commune and how' and is keen to emphasise that that capacity for freedom ought not to be restricted.<sup>17</sup> One way to see this is to recognise how the capacity for freedom underlies the capacity for community, in the sense that whether or not the latter capacity is exercised is ultimately a function of the former capacity. Metz anticipates this criticism and writes:<sup>18</sup>

Although a person does need a Kantian ability to make voluntary decisions in order to engage in communal relationships, they are not one and the same thing; for one could make deliberative choices that have nothing to do with one's identity and solidarity with others.

However, this response fails to convince since it sidesteps the real issue. The real issue is not whether the capacity for freedom (that is, making individual choices) and the capacity for community are one and the same thing. Instead, it is about which one is more fundamental for dignity – in explaining what is special about humans and distinguishing them from non-human animals.<sup>19</sup> And Metz's answer is not the simple one that it is the capacity for community, but rather it is that capacity constituted by the capacity for voluntary decisions. So what makes us special and gives us dignity is not merely our capacity for community. Instead, it is the capacity for a *freely-chosen* community. Here is Metz again, 'what is valuable about friendship or communal relationships is that people come together, and stay together, of their own accord'.<sup>20</sup> What has emerged then is that the capacity for freedom is what underlies and gives value to the capacity for community. It is in this sense that the capacity for freedom seems to be doing more work in Metz's account of dignity than he acknowledges.

Even so, Metz will likely object that a communitarian moral theory need not endorse the conception of the individual as causally dependent on the community in the way I have been suggesting. He could argue that his project is really about the substantive moral aim of valuing communal harmony by which individuals ought to live. Thus, the argument concludes, the theory is sufficiently

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17 Metz (n 2 above) 584.

18 Metz (2010) (n 4 above) 94.

19 In accounting for human dignity, Metz specifically asks: 'What is it that makes us (typically) worth more than members of the mineral, vegetable and animal kingdoms?' Metz (2012a) (n 4 above) 19. Perhaps, implicitly aware that some non-human animals also arguably have a basic capacity for community, he is keen to emphasise *freely-chosen* communal relationships as more valuable and thus as the basis for dignity. This is why I think the capacity for freedom is doing more work in grounding dignity in Metz's theory than he seems to have realised.

20 Metz (n 2 above) 584.

communitarian. Yet, while it is true that on Metz's theory, honouring friendly relationships is a moral goal, what the analysis so far has revealed is that it is not the only non-instrumental value worth valuing – individual liberty and basic human rights are also taken to be non-instrumentally valuable. It seems to me that this tacit acknowledgment of individual freedom as equally valuable as communal harmony further casts doubt on the theory's claim to being communitarian.

I have two reasons for so thinking. First, if I am right that more recent expressions of the theory integrate two potentially-conflicting moral aims, then it does not follow straightforwardly that moral reasons for acting always derive from our valuation of community. Indeed, in certain borderline cases where these aims conflict, moral agents can have reasons for acting that derive neither from their valuation of harmony nor the aim of reducing discord. Since respecting human rights is something worth doing morally, and doing so sometimes goes contrary to realising harmony, it seems that moral agents can have reasons other than community-based ones for acting. Thus, it is not a straightforward matter that this is a substantive theory that prioritises communal harmony. Second, the valuation of individual choice and freedom seems to implicate the liberal commitment to a plurality of moral outlooks or conceptions of the good such that the theory seems to counter-intuitively undermine the substantive moral reasons it proposes by justifying moral outlooks that do not recognise honouring community as a non-instrumental value. Such a theory is anything but communitarian. Indeed, Metz's theory strikes me as more liberal than communitarian despite the claims to the contrary. This is because if we take him seriously by truly upholding the value of individual choice and recognising a plurality of conceptions of the good, then it seems to me a belief in a theory that regards relationships as the bearer of the fundamental moral value would be merely optional.

However, perhaps Metz's *ubuntu* theory cannot be neatly placed in a liberal or communitarian scheme. Perhaps this seemingly *equal* valuation of the individual choice and community is a unique feature of the theory, setting it apart from the extremes of liberalism and communitarianism. In what follows, I argue that, in attempting to incorporate the value of individual freedom within a single normative system that already prizes communal harmony as the fundamental moral value, Metz's *ubuntu* theory is caught in the horn of dilemma.

### 3 Collectivism and individual freedom

One of Metz's aims is to show that his version of an *ubuntu*-inspired moral theory is impervious to the charge of collectivism. As he

articulates it, the criticism is that such a theory with its<sup>21</sup>

uncompromising majoritarianism or extreme sacrifice for society ... is incompatible with the value of individual freedom that is among the most promising ideals in the liberal tradition.

I should add that for a theory that already takes communal harmony to be the fundamental moral value, the criticism is even more acute. In this section, I intend to motivate the claim that Metz's *ubuntu* theory fails to adequately deal with the criticism.

Let me quickly clarify this aim. Although I argued in the previous section that Metz's theory is less communitarian than it purports to be, here I am claiming that even if the theory was sufficiently communitarian, it could not successfully resist the charge of collectivism – the criticism that individual liberty and communal harmony are incompatible.

Of course, the onus is on Metz to show that communal harmony and individual freedom are indeed compatible. But what would this compatibility amount to? It could not possibly mean that these values never conflict, since his integration of the deontological constraint into the theory is precisely to resolve such conflict. So by compatibility, Metz must have meant that his theory can either (i) incorporate both values while offering some criteria of ordering between them; or (ii) equally value communal harmony and individual freedom as non-instrumental goods, in which case it eschews any such ranking of moral values. Suppose then that Metz can tackle the problem and show that the values of communal harmony and individual freedom are compatible in either sense within his *ubuntu*-inspired moral theory. I suggest that there are three possibilities – I consider each in turn and outline the costs for his theory. I argue that each option represents a *cul-de-sac* and that consequently Metz has not convincingly shown that his theory is resistant to the charge of collectivism.

### 3.1 First horn: Individual liberty trumps harmony

Consider, for instance, the right of a gay person in a community that deeply abhors homosexuality and sees it not only as totally opposed to its established values (for instance the value of procreation), but also as a threat to the moral health and overall harmony of the community. The individual has the right to freedom of sexual expression, an entitlement the upholding of which would be in tension with communal values and harmony. In a world in which human rights are valued, it seems that the right to express one's sexuality in ways that fall outside the dominant hetero-normative paradigm would remain valid and can be insisted on, even if doing so would hurt relationships or result in a substantial division in the community. Admittedly, there are cases in which this specific conflict

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21 Metz (n 2 above) 533.

may not arise – for instance, if this form of sexual expression is consistent with communal values.<sup>22</sup>

Assuming then that there are conflicts between the values of harmony and individual freedom and that an agent must act, a moral theory that requires us to value these goods equally does not take us beyond the original conflict; it merely reproduces it. This is so because at the root of the conflict is our desire to regard these goods as equally valuable in themselves. If this is right, then it seems there is a rational compulsion on a theory that seeks to integrate both moral aims to provide a clearly-defined way of ordering these values in the event of a conflict. One possibility is to prioritise individual freedom over harmony. In this way, the theory retains the two values within the *ubuntu* normative system even though one of them – harmony – is merely instrumentally valuable. (In the above case, the freedom of the gay person ought to trump communal harmony and values.)

This may initially strike some as different to Metz's view, seeing that he at various times clearly regards communal harmony as the fundamental moral value. He repeatedly emphasised that the fundamental moral value worth pursuing for its own sake is friendly relationships. Thus, we are enjoined to '*prize or honour such relationships*',<sup>23</sup> and elsewhere he adds that one becomes a moral person insofar as one *honours communal relationships*, '*prizes identity and solidarity with other human beings*' and that '*an individual realises her true self by respecting the value of friendship*'.<sup>24</sup> Moreover, in an earlier work, Metz claims that '*as opposed to well-being or self-realisation, this account of ubuntu posits certain relationships as constitutive of the good that a moral agent ought to promote*'.<sup>25</sup> Yet, it is not at all obvious that Metz is entirely opposed to ranking individual freedom above communal harmony. The deontological aspect of the theory seems to work in part because individual freedom is so ranked. It implies that when these values are paired against each other, individual freedom should trump harmony.

In any case, it matters less whether Metz actually believes individual freedom should always trump harmony since my argument is that if he were to take this option, which clearly values the liberal ideal of individual freedom, then there are huge costs for his theory. One such cost is that it can only value harmony instrumentally – that is, relative

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22 Disregard for the rights of gay and lesbian persons is a pervasive feature of many African communities and, interestingly, these attitudes and practices are justified on grounds of protecting communal harmony and safeguarding against whatever is divisive and harmful to communal harmony. If Metz is right, then there are grounds – specifically community-based ones – for withholding an individual's freedom to sexual expression.

23 Metz (n 2 above) 539.

24 Metz (n 2 above) 540 (my emphasis). Once again, this last interpretation of the maxim seems to commit Metz to the view that respecting the value of friendship is merely a means to realising oneself, something he explicitly denies. See, eg, his response to Van Niekerk (n 10 above) 382.

25 Metz (2007a) (n 4 above) 334.

to individual freedom, the aim of achieving harmony is merely subsidiary. This supposition would ultimately render null and void the original ethical principle which obliges moral agents to promote harmony and reduce discord. Relatedly, this option completely strips the theory of any remaining claim to being communitarian since it would now appear that the fundamental moral value worth pursuing for its own sake is individual freedom. If I am right about my earlier claim that the theory cannot capture the causal dependence of the individual on the community, then, by prioritising individual freedom over harmony, it cannot possibly capture the communitarian belief that achieving harmonious community is the fundamental moral aim. What is more, this option would make the theory degenerate into a version of liberal theory, in which case the charge of collectivism does not even begin. Any attempt then to defend the theory against that charge would amount to a fictitious exercise.

### 3.2 Second horn: Harmony trumps individual liberty

Again, if compatibility means that a single normative system merely integrates two potentially-conflicting values, then, assuming that we are faced with a conflict, another way to order these values is to prioritise harmony over individual freedom. In this case, considerations of communal values and harmony should trump the individual's right to sexual freedom. In the original statement of the *ubuntu*-inspired ethical principle, Metz seems to have done this by explicitly endorsing the principle that 'an action is right just insofar as it produces harmony and reduces discord; an act is wrong to the extent that it fails to develop community'.<sup>26</sup> Once again, this option may retain the value of individual freedom alongside communal harmony. However, in cases where individual freedom conflicts directly with harmony, this option would imply that the moral agent does the right thing in promoting harmony.

I should note again that, although this is one way of integrating the two values within a single normative system, this does not seem to adequately characterise Metz's position since, as already indicated, he has incorporated a deontological constraint in the theory barring moral agents to promote harmony by way of undermining individual freedom. Yet, there are costs *should* Metz take this option. One obvious one is that the theory would be unable to fully capture the value we place on individual freedom – that is, it cannot account for it as non-instrumentally valuable. I think it is fairly uncontroversial to regard most, if not all, basic human rights as valuable in themselves. In the rights to life, dignity, freedom, and so forth, are enshrined basic goods that are desirable in themselves, not merely as a means to some more fundamental value such that when that more fundamental value cannot be secured, protecting these rights would be optional. Alternatively, these rights may be violated in the promotion of that

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<sup>26</sup> Metz (2007) (n 4 above) 334.



fundamental value. The Universal Declaration of Human Rights (Universal Declaration) and the South African Bill of Rights, which rights contained therein Metz discusses extensively, assume this much. If this were not the case, then not only would the obligations they impose require further justification, but also the very fact of having them would be counterproductive.

A moral theory that values individual freedom merely instrumentally is inadequate and would be the ideal target of the charge of collectivism. Should Metz take this option, his theory would be unable to fully account for individual freedom. Moreover, taking this option would fall far short of Metz's own promise to go beyond what other *ubuntu* proponents have said on the matter.<sup>27</sup> And they are all generally agreed that the value of individual freedom is only secondary. So, should Metz take the option under consideration, then his theory would be no better than the ones he disapproves of. Indeed, the charge of collectivism is in part the criticism that if communitarian and *ubuntu*-inspired moral theories acknowledge individual rights, they do so instrumentally. Moreover, an instrumental valuation of rights fly in the face of the supposition that rights represent basic moral goods that are desirable in themselves – something I claimed is implicit in the South African Bill of Rights and the Universal Declaration.

I should reiterate that, although each of the horns considered so far seems not to fully capture Metz's position on the matter of the compatibility of harmony and individual freedom, my claim is that there are potentially-damaging costs for the theory should he opt in favour of either. What then fully captures Metz's account of the compatibility between these values?

### 3.3 Third horn: Harmony and individual liberty are equally valuable

Let us suppose that the two previous options do not sufficiently reflect Metz's view. In that case, a more plausible representation of his view would be that he fragments the fundamental moral aim in a way that permits honouring both values. That is, Metz's view is that moral agents should equally value harmony and individual freedom. Indeed, this strikes me as Metz's strategy, not only in entertaining two conflicting values in one single theory, but also in tackling the charge of collectivism. One reason motivating this characterisation of Metz is that he proposes what appears to be conditions under which moral

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27 Metz (n 2 above) 533 clearly promised to do better than other 'self-described adherents to *ubuntu*' who have 'done little to dispel such concerns' – that is the idea that an *ubuntu*-inspired theory cannot adequately value individual freedom. In this connection, he quotes GM Nkondo 'Ubuntu as a public policy in South Africa' (2007) 2 *International Journal of African Renaissance Studies*, who sees an *ubuntu*-inspired theory as expressing 'the supreme value of society, the primary importance of social or communal interests, obligations and duties over and above the rights of the individual'; Metz (n 2 above) 533.

agents would have reason to either sacrifice the aim of promoting harmony or the aim of respecting individual liberties.

The first condition is captured in the deontological constraint. Here Metz cautions against promoting harmony at all costs. He specifically claims that when doing so would violate an individual's legitimate rights, we are to refrain from doing so. According to Metz:<sup>28</sup>

[A]n instruction to promote as many communal relationships as one can in the long run would permit a doctor to kill an innocent, relatively-healthy individual and distribute her harvested organs to three others who would otherwise die without them, supposing there would indeed be more of such relationships realised in the long term. A moral theory that focuses exclusively on promoting good outcomes, however one can (which is teleological), has notorious difficulty in accounting for an individual right to life, among other basic rights.

So we seem to have a condition that pairs the values of harmony and individual liberty together in such a way that whenever promoting harmony threatens individual liberty, we ought to sacrifice the former. That way we honour the latter, which honouring implies that we do not use immoral means to promote the relevant value. But in honouring harmony, an equal valuation of individual freedom is encouraged. It seems then that the theory can account for the value of individual freedom.

Yet, Metz also provides a condition under which harmony should trump individual freedom. In this case, when individual freedom poses a threat to communal harmony, the former can be justifiably limited. Consider, for instance, his example of how a right may be justifiably limited. Metz tells us that 'it might not degrade human dignity, and hence might justifiably limit a right, to lock an innocent person in a room in order to protect others from a virulent disease he is carrying'.<sup>29</sup> It seems then that in this instance communal harmony clearly trumps individual freedom. All these seem to suggest that we cannot possibly regard one value as more fundamental than the other since the priority relation between them runs in both directions. That is, there may be justification for prioritising either value depending on the conditions.

Does this way of *equally* honouring both values within a single framework settle the debate over the incompatibility between individual freedom and communal harmony? I suspect that it does not. One reason for my suspicion revolves around the fact that these conditions Metz proposes do not necessarily represent two different conflicts. Are these different conflicts – one in which the agent has strong moral reasons to prioritise individual freedom and another in which the agent has strong moral reasons to prioritise communal harmony? I do not think so. That is, the proposal that we should respect basic human rights when promoting harmony threatens them

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28 Metz (n 2 above) 540.

29 Metz (n 2 above) 542.

(that is, the case of the doctor versus the innocent) does not suggest a different conflict to the proposal that we should prize communal harmony when individual freedom threatens it (that is, the case of the diseased individual versus the community). It seems to me that whenever promoting communal harmony poses a threat to individual freedom, an equal threat is directed in the way of the former – in which case the scenarios Metz describes pick out one and the same conflict.

The point I wish to make here is that for a theory that equally values individual freedom and communal harmony, the implication is that whenever these values go head-to-head, a moral agent has equally valid reasons to honour both values. This means that every instance of conflict between individual freedom and communal harmony presents the moral agent with two equally valid, but potentially conflicting, principles for acting, namely (i) we ought to restrict individual freedom;<sup>30</sup> and (ii) we ought to sacrifice communal harmony.<sup>31</sup>

The first principle suggests that a moral agent should act in such a way as to prize harmony, which effectively means restricting individual freedom. Since the moral agent must act, upholding the first principle would amount to violating the second. On the other hand, the second principle requires the moral agent to honour communal harmony by upholding individual freedom – which basically means that we are to sacrifice communal harmony. However, in doing so, the agent would be violating the first principle – that is, going against equally valid reasons requiring the agent to uphold individual freedom. The problem is that in doing precisely what Metz's *ubuntu* moral theory obliges, the moral agent would be violating some valid principle within that theory. And that violation would be justified by the same theory. But that is not all. It seems that if the moral agent is to abide by the first and second principles, then in many instances the agent could not possibly act. Rather than violate either principle, the agent may have strong moral reasons to refrain from acting.

I find these features of Metz's *ubuntu* moral theory to be deeply incoherent. It seems to justify not only the violation of its own principles, but also inaction, even though it is developed in the first place as a theory to guide the action of moral agents. In fragmenting fundamental moral aim into two distinct and equally valid aims, this *ubuntu* moral theory reveals an internal incoherence.

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30 Partly implied by the claim that communal harmony is the fundamental moral value. Metz has to claim this, otherwise, as I indicated earlier, it would imply that individual freedom should always trump communal harmony, in which case the latter turns out to be merely an auxiliary aim of morality. This, I argued, would completely strip the theory of its final claims to communitarianism.

31 Implied by the deontological constraint of the theory.

But perhaps the accusation of incoherence is unfair. Perhaps Metz could be more charitably read as suggesting that whether we restrict individual freedom or promote communal harmony should be determined on a case-by-case basis. In specific cases, the theory will provide one obvious principle that will guide the moral agent. So Metz's example of an innocent person with a virulent disease who can be justifiably locked up so as to protect the health of the community provides one clear principle – we ought to restrict individual liberty *in this particular case*. A moral agent would not be violating any valid principle within the preferred *ubuntu* moral theory since the only thing the agent has moral reason to do *in this case* is to promote the health of the community. While this strategy evades the charge of incoherence, it comes with its own unique problems as well. For one thing, it undermines Metz's own aim of developing a principle or basic norm that is intended 'to account for what all permissible acts have in common as distinct from impermissible ones'.<sup>32</sup> Here it seems that whether some act is morally permissible depends entirely on the particular case we are considering and the principle may vary depending on whether the case requires the moral agent to restrict individual freedom or sacrifice communal harmony. Well, every moral theory, except for consequentialism, at some point requires judgment to apply. It is a matter of debate about how far one can go.

Even so, it seems to me that a theory that seeks in conflict situations to adjudicate between these values on a case-by-case basis should be fairly precise about how to go about it. In the event of conflict between harmony and individual freedom, why should we restrict individual freedom in one case and not in another? On what basis should we decide on whether a particular case requires us to sacrifice harmony? Any acceptable response to these questions, it seems to me, must appeal to something other than the values themselves. Since the theory equally values these goods, it must appeal to some higher value or more fundamental principle in discriminating between cases in which individual freedom is to be restricted and cases in which communal harmony is to be sacrificed. Metz has not provided any clear guidance in this regard and so would benefit from a substantial revision. But, more importantly, in appealing to some higher or more fundamental value in resolving the conflict between equal values, I suspect that the overall substance of the theory would have changed significantly. This is because that higher value need not be communal harmony, in which case the Metz's original aim of showing that his theory takes communal harmony to be the fundamental moral value would be undermined.

By way of summary, then, there are three possible ways for accounting for the compatibility between communal harmony and individual freedom – each with huge costs for Metz's *ubuntu* theory. These range from the entirely losing the *ubuntu*-communitarian

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32 Metz (2007) (n 4 above) 321.

substance of the theory (first horn), failure to account for basic human rights as non-instrumentally valuable (third horn), to the theory betraying a deep-seated incoherence (third horn) by justifying the violation of one its own moral principles in any instance action.

#### 4 Human rights and their violations in Metz's *ubuntu* theory<sup>33</sup>

I think that Metz rightly grounds human dignity in a non-variable feature of the human being (that is, some human capacity) so that human rights, which are subsequently grounded on human dignity, are, by extension, grounded in a non-variable quality, thus enabling the theory to capture the intuition that human rights are equal among persons and not had in degrees. Even so, the emerging account of human rights and what constitutes their violation strikes me as problematic.

On first approximation, it seems to me that human rights are protections of intrinsic rather than extrinsic goods. Perhaps some may find this controversial. So, for those who do not already share this intuition, it is worth spelling out that rights are installed primarily as protections of certain goods (for instance, life, security, privacy, freedom, and so on) in the individual holding the relevant right, and these goods pertain to facts about the individual's constitution. To my mind, this effectively precludes suggestions to the effect that human rights are installed as protections of basic extrinsic value, in particular certain kinds of relationships. I read Metz as making such a claim. In his view, human rights are fundamental protections against enmity and unfriendly relationships.<sup>34</sup> My aim is to contest this notion of human rights and the corollary that human rights violations are instances of 'substantial division and ill-will'.<sup>35</sup>

One reason why that construal of human rights is objectionable is that it obscures the distinction between the relational nature of the concept and the basic good a right is meant to protect. By the relational nature of the concept, I mean that basic rights typically entail a duty on the part of another, thus placing the right holder and duty owner in some form of relationship. Yet, we can distinguish the (nature of) relationship between right holders and duty owners from the particular good that the right is meant to protect. The view that human rights are fundamentally protections against enmity blurs this distinction by focusing merely on the relationship between right holders and duty owners and insisting that basic rights are installed to protect against certain kinds of relationships, namely, unfriendly ones.

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33 I lack the space to treat each of the human rights (issues) that Metz addresses in his article (n 2 above). Even so, what I say here about his construal of rights is applicable to his treatment of the relevant rights.

34 Metz (n 2 above) 546.

35 Metz (n 2 above) 548.

In doing so, however, it conveniently downplays the specific entitlements that are central to notions of rights and quite simply fails to recognise that a legitimate right claim can be made, even when doing so would result in enmity between the right holder and the duty owner. An individual's right to freedom of sexual expression, for example, remains a valid entitlement that can be insisted upon even if doing so would not promote harmonious relationships or would result in substantial division among members of the community.<sup>36</sup>

Another reason why the submission that human rights are protections against ill-will and enmity is objectionable is that it construes the relevant individual entitlements as instrumentally valuable, their value being merely a function of whether or not they contribute to the aim of reducing discord or enmity – something that Metz should be denying if he is to adequately account for human rights as non-instrumentally valuable. Of course, upholding basic human rights may sometimes coincide with realising friendly and harmonious relationships. But there are borderline cases as well. In such cases where these aims diverge, it appears that one of the two aims must be prioritised. I think that while a state of affairs characterised by the absence of enmity is more desirable than the reverse, a legitimate rights claim would remain so and must be upheld even when doing so could result in, or deepen, widespread animosity and ill-will. It seems to me that it is only in this way that we can fully account for the value of individual freedom and human rights. Such rights embody intrinsic goods that are worth valuing in themselves, not merely because they are consistent with communal harmony.

Does this mean that human rights are not defeasible? I make no such claim. There are instances in which individual rights are justifiably limited. My view is that on such occasions it is not the case that individual freedom and rights are valued instrumentally. This is because any justification for restricting certain liberties must appeal to other more fundamental ones. That is, human rights are only justifiably limited when they are in conflict with other more fundamental rights. However, the restriction of individual rights on grounds of communal harmony cannot be justified.

Let me explain. Suppose that a certain employer installs an e-mail-monitoring system at work. Employees may understandably feel aggrieved. But supposing we were to restrict the employer's right to install an e-mail-monitoring system at work, it seems to me that doing so would be justified by appealing to the employees' right to privacy, in which case the conflict is between the basic liberties – one liberty is justifiably restricted for another. Although a right is limited, a much stronger right is upheld. Suppose, however, that we were to restrict the employer's action on the grounds that doing so would promote

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<sup>36</sup> For a detailed view of human rights as heavily focused on privileges of a rights holder, see RB Brandt 'The concept of a moral right' (1983) 80 *Journal of Philosophy* 44.

harmony or reduce the overall negative feeling in the workforce. In this case, my view is that the individual right is being treated as merely instrumentally valuable since here it is paired against some other kind of value, which is regarded as more fundamental. The point here is that in order to fully value human rights as non-instrumental goods, they must always trump other kinds of value whenever a conflict arises. But individual rights may be justifiably overridden when it is in conflict with other fundamental rights.

Rather curiously, Metz agrees with me on the preceding point when he says that 'only some stronger right can outweigh these "negative" rights to be free from interference'.<sup>37</sup> But if this is the case, then it implies that under no circumstances should communal harmony trump an individual's negative rights. What follows is that Metz's theory seems to imply that individual rights rank higher than communal value and so should always trump the latter (second horn above). As I argued earlier, there are huge costs for Metz's theory should he regard individual freedom as the most fundamental value – one of which is that the theory's final claim to being communitarian is completely lost.

Further, in characterising rights as protections against certain kinds of relationships, in particular unfriendly ones, I suspect that Metz may have disingenuously accounted for the duties individuals (and the state) owe each other rather than on the basic entitlements individuals have.<sup>38</sup> Of course, it is true that talk of rights evokes corresponding duties. My point, however, is that it matters where one puts the emphasis. Focusing on the duties individuals owe each other can easily obscure the fact that basic human rights are to a certain degree conflicting notions. For instance, if each individual were to fulfil their duties towards others, then the opportunities for friendship and goodwill opens, whereas emphasis on individual entitlements may not necessarily be compatible with harmony and goodwill.<sup>39</sup> It is all well and good when a communitarian theory enjoins individuals to fulfil their duties towards one another. In fact, this is precisely what is expected of such theories – they typically prioritise duties over rights precisely because this is conducive to and consistent with the

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37 Metz (n 2 above) 548.

38 Metz's discussion of rights focuses almost entirely on duties of individuals and the state. See, eg, his treatment of the human rights to socio-economic goods where he claims that 'with regard to solidarity ... the state must do what it can to improve their quality of life, and to do so for their sake consequent to a sympathetic understanding of their situation' Metz (n 2 above) 550. It is easy to see how a sympathetic understanding of the situation of the poor can generate a duty on the part of the state and subsequently contribute to overall harmony, but this does not suggest any entitlement on the part of people. Can the citizens also justifiably insist on their entitlements even if this disturbs the peace and harmony?

39 The rights to liberty and privacy, eg, have tags built into them barring others in the first instance to keep their distance and thus do not necessarily provide a fertile ground for the flourishing of friendly relationships. To put it simply, a negative right is the right to be left alone and to do one's bidding.

communitarian aim of promoting communal harmony.<sup>40</sup> Yet, rights and duties are distinct notions.<sup>41</sup>

One way to fully distinguish between rights and duties is to consider the latter from the perspective of the rights holder. This is because they are in the first instance the rights holder's basic privileges. The recognition that others have a duty not to interfere, for example, is dependent on the fact that such rights are in the first place entitlements or privileges a rights holder should enjoy. In this sense, there can be rights (for example negative ones) in the sense of entitlements even when there is no one to perform certain duties. That is, my right to life does not disappear if there is no one with a corresponding duty not to interfere (admittedly, what may disappear is the need to assert such a right, but the entitlement remains). Conversely, the notion of duties can be best appreciated in the first instance from the perspective of the duty owner. If I am right, then since Metz's original promise was to demonstrate how his preferred version of *ubuntu* moral theory can account for the central *liberal ideals* of *human rights* and *individual freedom*, not necessarily accounting for the duties we owe each other, this emphasis on duties strikes me as inadequate.

Finally, if rights as entitlements are privileges, then they are valuable for the well-being and flourishing of the rights holder. In other words, from the perspective of the rights holder, asserting her basic rights to life, freedom, privacy, etc is an important way to ensure her well-being and flourishing. From the perspective of the rights holder, asserting a right is a matter ensuring her well-being or flourishing. For example, recognising and asserting my right to freedom are vital to my well-being and development for I could not possibly flourish as an individual in conditions of enslavement or the absence of freedom. So, it appears that at least from the perspective of the rights holder, human rights can be grounded in self-regarding concerns. In contrast, Metz thinks that human rights are more plausibly grounded in other-regarding concerns.<sup>42</sup>

However, it seems to me that duties are more appropriately grounded in other-regarding concerns. My duties towards others derive primarily from facts about the other – facts about the other's entitlements or needs, for instance. But my rights are in the first

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40 Menkiti, eg, writes that African communitarian societies are organised around the requirements of duty. In his words, 'in the African understanding, priority is given to the duties which individuals owe to the collectivity, and their rights, whatever these may be, are seen as secondary to their exercise of their duties' (Menkiti (n 16 above) 180). See also Metz (2007) (n 4 above).

41 In private correspondence, Metz denies this distinction, arguing that to have a right just is to have a duty of a sort. My claim is that rights and duties are related but nevertheless distinct. For a detailed discussion of the distinction between rights and duty, see J Donnelly 'Human rights and human dignity: An analytic critique of non-Western conceptions of human rights' (1982) 76 *The American Political Science Review* 303.

42 Metz (n 8 above) 384.



instance entitlements I recognise and assert for my flourishing. I suspect that it is this belief that rights are grounded in other-regarding concerns that ultimately leads Metz to, I think erroneously, emphasise duties rather than basic rights. If I am right that human rights are more plausibly grounded on self-regarding concerns, then there are damaging implications for Metz's *ubuntu* moral theory, namely, that in its current expression, the theory seems to imply that reasons for acting are at once other-regarding and self-regarding. This strikes me as incoherent. Yet, in making this point, I am only reiterating, albeit in a slightly different manner, an earlier point: that, in trying to accommodate two potentially-conflicting non-instrumental values – or two potentially-conflicting principles – Metz's *ubuntu* theory exposes an internal tension.<sup>43</sup>

Indeed, it is rather curious that a theory which explicitly claims that the fundamental moral value is *extrinsic* (that is, resides in something outside of the individual, namely, relationships) should proceed to define human dignity as an *intrinsic* moral value (that is, specific to the constitution of the individual and independent of relationships), and subsequently ground human rights on this intrinsic value. Such a theory betrays several levels of incoherence. At one level, it seems to claim that the moral value moral agents ought to promote is both intrinsic and extrinsic – and this despite obvious claims denying that moral value is intrinsic.<sup>44</sup> At another level, the incoherence has to do with the fact that when there are conflicts between advancing either value, the moral agent in advancing one must, necessarily, undermine the other. But if moral agents do the right thing in undermining either of these moral values, then the theory itself must somehow justify sacrificing some value it regards as valuable in itself.

But that is not all. In the event of a conflict, a moral agent experiencing conflicting motivations with regard to the relevant moral values may have to appeal to something other than the values themselves in adjudicating between them, in which case either value is insufficient to motivate agents to act and a third alternative value would have been introduced to the theory. Alternatively, on the pains of undermining either value one would justifiably refrain from acting altogether – something that itself is deeply disturbing for a theory that is supposed to guide agents in acting.

## 5 Conclusion

Can an African *ubuntu* moral theory successfully ground individual freedom and human rights? I have discussed three distinct arguments in establishing the claim that Metz's goal of grounding the liberal ideals of individual freedom and rights in his *ubuntu* moral theory fails

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43 See Metz (n 8 above) 15-16.

44 Metz (n 8 above) 383.

to convince. My first suggestion was that Metz's attempt to ground human rights in his *ubuntu* moral theory raises the problem of where the fundamental value lies in his theory. That is, in seeking to integrate two potentially-conflicting and non-instrumental values in his theory, Metz substantially modifies his original *ubuntu* ethical principle in such a way that the communitarian/*ubuntu* status of the theory is undermined. Second, I argue that even if Metz's theory were sufficiently communitarian/*ubuntu*-like, it could not possibly ground individual freedom as a non-instrumental value. Third, I argued that Metz employs a tendentious reading of the concept of rights; in particular, that he erroneously construes rights as duties. I argued that, although they are related, these notions are nevertheless distinct.

All this leads me to suggest that an *ubuntu* ethic is not entirely suitable for grounding public morality. Perhaps for more industrialised and globalised societies, in which the liberal ideals of freedom and human rights are of paramount importance in shaping public morality, an *ubuntu* ethic can only play a much more restricted role than it did in pre-industrialised African societies.

## Courts and the enforcement of socio-economic rights in Malawi: Jurisprudential trends, challenges and opportunities

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### Summary

*Socio-economic rights are of special significance in a developing country such as Malawi. The framers of the Malawian Constitution included the right to development in the country's Bill of Rights. The right to development is not only included as a self-standing right, but is also a conduit for the guarantee of equal access to a range of other socio-economic rights. Regrettably, the record of judicial enforcement of these rights subsequent to 1994 is disappointing. Only in a few cases, largely focusing on a narrow range of rights such as property, work, economic activity and, to a lesser extent, education, have courts directly and significantly dealt with socio-economic rights. Such consideration has also been deficient as courts have failed to develop the content of the rights and to define the nature of the obligations of both the state as well as non-state actors in relation to socio-economic rights. There has been little or no attempt to apply norms of international human rights law and comparable foreign case law. Worse still, in some related cases, courts have stated that they will not deal with any issues that raise policy considerations as such matters are outside the province of judicial competence. This is a problematic approach that could stultify the development of socio-economic rights jurisprudence. The Masangano case, however, offers some hope as it represents the first real attempt to address key socio-economic rights issues such as access to food, clothing, adequate housing and healthcare, albeit in relation to prisoners. While the final decision ultimately turned on cruel, inhuman and degrading*

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*treatment or punishment, the High Court of Malawi made some definitive affirmations of the guarantee of a number of these key rights and presented a first real attempt to fashion a time-bound remedy, that also required the state to take positive steps in allocating sufficient resources for the realisation of socio-economic rights for prisoners. The Masangano case represents a good stepping stone upon which courts can stand in developing more systematic and sophisticated jurisprudence on socio-economic rights in Malawi.*

## 1 Introduction

Socio-economic rights are empowerment rights: They allow socially-vulnerable and marginalised individuals and groups to use the legal process in order to obtain the satisfaction of their essential socio-economic needs.<sup>1</sup> Socio-economic rights empower people who are subject to the jurisdiction<sup>2</sup> of a state to demand that that state acts reasonably and progressively to ensure that all enjoy the basic necessities of life.<sup>3</sup> In so doing, these rights enable citizens to hold government accountable for the manner in which it seeks to pursue the achievement of social and economic welfare and development.<sup>4</sup> In this regard, Davis has urged that socio-economic rights and the obligations they impose go to the heart of the developmental state.<sup>5</sup> Liebenberg, similarly, states that these rights are central in ensuring that significant sections of the population, especially the socially and economically vulnerable, are able to develop to their full potential, to realise their life plans and to participate as equals in the political, economic, social and cultural spheres in a constitutional democracy.<sup>6</sup> In other words, socio-economic rights impose both negative and positive state duties<sup>7</sup> to realise individual rights to material goods, which enable both human survival and the individual pursuit of the

1 See M Pieterse 'Resuscitating socio-economic rights: Constitutional entitlements to healthcare services' (2006) 22 *South African Journal on Human Rights* 473 477.

2 It is necessary to point out here that this discussion does not restrict the enjoyment of socio-economic rights to 'citizens' in a narrow sense of those entitled to hold a passport of the state concerned. As will become apparent in subsequent paragraphs, I take the view that socio-economic rights are applicable to nationals as well as non-nationals.

3 *Mazibuko & Others v City of Johannesburg & Others* 2010 4 SA 1 (CC).

4 *Mazibuko* case (n 3 above) para 59.

5 DM Davis 'Adjudicating the socio-economic rights in the South African Constitution: Towards "deference lite"?' (2006) 22 *South African Journal on Human Rights* 301 302.

6 See S Liebenberg & B Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution' (2007) 23 *South African Journal on Human Rights* 335 337.

7 There is of course a growing school of thought, to which the author is party, that holds that in appropriate cases, non-state actors also have positive obligations in respect of socio-economic rights.

good life.<sup>8</sup> Thus, as Mbazira urges, the realisation of socio-economic rights serves to ameliorate the conditions of the poor and heralds the beginning of a generation that is free from socio-economic need.<sup>9</sup> Such realisation guarantees people entitlements that enable them to attain a series of interrelated capabilities which enable the pursuit of individual value choices and which are often impeded or restricted by material deprivation.<sup>10</sup>

Given this background, it is clear that these rights play or should play a central role in Malawi as a developmental state. As I have observed elsewhere, Malawi faces a number of socio-economic problems, such as a fast-growing population that in turn exerts substantial pressure on limited land and natural resources; high unemployment levels; corruption in government and in public administration; a general lack of fiscal discipline in the public service; heavy dependence on outside balance of payments support; low levels of education and training opportunities; a poor state of health services compounded by an HIV/AIDS pandemic that is not yet under control; heavy dependence on agriculture and exports of a few agricultural commodities which are largely in raw (unprocessed) form; low-level productivity in small-scale farming and a vast gap between small-scale and estate agriculture with respect to product range and productivity; and vulnerability to external political and economic shocks.<sup>11</sup> These socio-economic problems exemplify the need for an emphasis on socio-economic rights that empower and enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic welfare and development.

The character of Malawi as a developmental state and the centrality of socio-economic rights in its constitutional design, are recognised in the Preamble of the Constitution of the Republic of Malawi of 1994 (Constitution), where it is explicitly provided that one of the purposes for adopting the Constitution was the quest 'to guarantee the welfare and development of all the people of Malawi'.<sup>12</sup> In this regard, a

8 As above. See also DI Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 27 39-60; S Fredman *Human rights transformed: Positive rights and positive duties* (2008) 3 9-18; S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 2 8-10 31; JP Ruger 'Toward a theory of a right to health: Capability and incompletely theorised agreements' (2006) 18 *Yale Journal of Law and the Humanities* 273 293-304.

9 C Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009) 3.

10 See M Pieterse 'The interdependence of rights to health and autonomy in South Africa' (2008) 125 *South African Law Journal* 553 554. See also AK Sen *Development as freedom* (1999); M Nussbaum *Women and human development: The capabilities approach* (2000).

11 See RE Kapindu 'Policies, aspirations, or rights? A case for mainstreaming socio-economic rights in the Malawi growth and development strategy (MGDS)' (2011) 14 *Yale Human Rights and Development Law Journal* 34.

12 Preamble, Constitution of the Republic of Malawi, 1994.

range of socio-economic rights are either guaranteed in the Bill of Rights (chapter IV), or recognised in the Directive Principles of National Policy in chapter III. In his seminal article on the constitutional protection of socio-economic rights in Malawi, Chirwa locates the Malawian Constitution in the model that bifurcates the scheme for the protection of socio-economic rights into those rights that are 'entrenched' in the Bill of Rights, including the rights to family life, education, culture and language, property, economic activity, development and fair and safe labour practices, on the one hand, and those that are simply recognised as goals in chapter III.<sup>13</sup> These include the rights to health, food and nutrition. However, as I shall demonstrate, it would appear that with a more innovative and robust interpretation of these rights, this bifurcation should have a minimal effect in the judicial enforcement of socio-economic rights in Malawi.

In recent years, Malawi has witnessed some budding jurisprudence in the area of socio-economic rights that is explored and analysed in this article. It is evident, however, that socio-economic rights litigation has thus far been generally confined to a narrow range of economic rights, namely, labour rights, the right to work, the right to economic activity and to pursue a livelihood and, to a very limited extent, the right to education. Many other key socio-economic rights, such as access to housing, access to water, access to food, and others, that could conceptually have been litigated almost 20 years after the adoption of the Constitution, have remained judicially unexplored.

This article starts by critically examining some of the cases that thus far have been litigated. It explores the possible reasons for the lack of socio-economic rights jurisprudence in the key socio-economic rights, such as access to healthcare, access to housing and access to food. The article investigates the conceptual approaches that Malawian courts have adopted over the years, some of these flowing from decisions that did not directly implicate socio-economic rights, and concludes that such conceptual approaches could possibly be a major reason why socio-economic rights jurisprudence in the country has experienced little growth since 1994. The article concludes with recommendations on some measures that can be taken to further the judicial enforcement of socio-economic rights in Malawi.

## **2 Status and extent of socio-economic rights guarantees in Malawi**

The Malawian Constitution is not regarded widely as containing a comprehensive set of guarantees of socio-economic rights. For

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<sup>13</sup> DM Chirwa 'A full loaf is better than half: The constitutional protection of economic, social and cultural rights in Malawi' (2005) 49 *Journal of African Law* 207 212.

instance, as earlier noted, Chirwa classifies the Malawian Constitution into a model that bifurcates the inclusion of these rights into entrenched rights, on the one hand, and Directive Principles of State Policy, on the other, a model that he suggests ensures only 'half a loaf' of guarantees.<sup>14</sup> It is true that at face value, this bifurcation is evident: the rights to family life, education, culture and language, property, economic activity, development and fair and safe labour practices are clearly and separately guaranteed as entrenched justiciable rights under the Bill of Rights, whereas the rights to health, food and nutrition, and environmental rights are only included as non-binding directive principles of national policy.<sup>15</sup>

Mbazira laments 'the failure to include socio-economic rights in a comprehensive manner in the 1994 Malawi Constitution',<sup>16</sup> observing that<sup>17</sup>

[t]he only socio-economic rights expressly protected in the Bill of Rights are the right to education; the right to participate in cultural life of one's choice; the right to freely engage in economic activity, to work and pursue a livelihood; and the right to development.

He points out that '[t]he rights which are currently not protected include the right to the highest attainable standard of health, the right to water, the right to education, the right to food, the right to social security and the right to housing'. He argues that<sup>18</sup>

Malawi is not alone in treating these rights in this manner; the same treatment is reflected in a number of constitutions of African countries, which give some protection to these rights in the Bill of Rights and recognise others as directive principles of state policy.

One setback with Mbazira's analysis, though, is that he does not engage with the significance of section 30 of the Constitution that guarantees a wide-ranging right to development. Section 30(1) provides:

All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right.

Further, section 30(2) states:

The state shall take all necessary measures for the realisation of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.

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14 As above.

15 Sec 13 Constitution.

16 C Mbazira 'Bolstering the protection of economic, social and cultural rights under the Malawian Constitution' (2007) 1 *Malawi Law Journal* 220 224.

17 Mbazira (n 16 above) 221.

18 As above.

In addition, section 30(4) provides that '[t]he state has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility'.

It is evident from these provisions that this right, to a significant extent, protects a number of the rights that Mbazira argues are unprotected. At a minimum, it guarantees equal access to these specific rights. Further, in terms of section 30(4), the Constitution clearly requires that government policies must be justified in accordance with the responsibility of the government to 'respect' the right. This means that any person with sufficient interest may bring a claim to court challenging any government policies that do not meet the test of equal access to the various socio-economic rights identified in section 30.

In addition to the specific negative responsibility to 'respect' the right to development under section 30(4) of the Constitution, an interpretation of the responsibility of government in respect of this right and other socio-economic rights guaranteed in the Bill of Rights ought to be informed by other enforcement provisions under the Constitution. Section 15(1) of the Constitution, for instance, provides for a duty on the part of government and, where applicable, non-state actors as well, to 'respect' and 'uphold' all the rights under the Bill of Rights. In addition, section 46(3) provides that where a court finds that the rights or freedoms conferred by the Constitution 'have been unlawfully denied or violated, it has the power to make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms'. Read together, it is submitted that these provisions provide a proper framework, not only for the negative enforcement of the various socio-economic rights guaranteed under the Bill of Rights, but also to ensure that government upholds its positive obligations that are 'necessary and appropriate to secure the enjoyment of' socio-economic rights.

The significance of the right to development has been recognised by other commentators. Notably, Chirwa has observed that this right is particularly significant in the Malawian context as 'it provides an avenue for protecting many socio-economic rights not expressly recognised in the Malawian Constitution',<sup>19</sup> and that regrettably '[t]he potential of this right is yet to be exploited'. Gloppen and Kanyongolo, agreeing with Chirwa's analysis, further state that the right 'provides a basis for marginalised groups to challenge policies and claim equal access to resources and services'.<sup>20</sup>

Gloppen and Kanyongolo further argue that although the Constitution of Malawi bifurcates socio-economic rights in the above-mentioned fashion, it is worth noting that section 14 requires that, in

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19 Chirwa (n 13 above) 224.

20 S Gloppen & FE Kanyongolo 'Courts and the poor in Malawi: Economic marginalisation, vulnerability, and the law' (2007) 5 *International Journal of Constitutional Law* 258 265.



interpreting the Constitution, courts are entitled to have regard to the Directive Principles of National Policy provided for in section 13 of the Constitution. In that respect, they argue that 'a]n activist judiciary could thus give the directive principles significant jurisprudential force'.<sup>21</sup>

Gloppen and Kanyongolo's argument is consistent with the approach adopted by the High Court of Malawi in the case of *Gable Masangano and Others v Attorney-General and Another (Masangano case)*.<sup>22</sup> In response to the erroneous argument by the Attorney-General that socio-economic rights were non-justiciable under the Constitution and that they were only non-binding principles of national policy under section 13 of the Constitution, the Court stated:

The reference to section 13 of our Constitution on principles of national policy and section 14 of the same Constitution on the application of the said principles of national policy that they are directory in nature as a basis for saying that the present matters are non-judiciable does not provide a sound basis for the argument. In any event, section 14 of the Constitution further provides that '[c]ourts shall be entitled to have regard to them in interpreting and applying any provisions of this Constitution or any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of this Constitution'.

Gloppen and Kanyongolo's argument also resonates with the approach adopted by the Supreme Court of India which has recognised the significance of directive principles of national policy in the enforcement of socio-economic rights. Thus, for instance, in *Olga Tellis and Others v Bombay Municipal Council*,<sup>23</sup> the Supreme Court of India stated:<sup>24</sup>

Social commitment is the quintessence of our Constitution ... Therefore, Directive Principles, which are fundamental in the governance of the country, must serve as a beacon light to the interpretation of the constitutional provisions ... The Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country ... The Principles contained in articles 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights.

What this means, therefore, is that in our understanding of the content of the socio-economic rights under the Bill of Rights, we ought to consider and, where necessary, apply, the directive principles of national policy. Thus, for instance, in our understanding of section 30 that provides for, among other things, equal access to education (as part of the right to development), and section 25 that generally guarantees the right to education, we can observe that, although none of these provisions mentions anything about free and

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21 As above.

22 Constitutional Case 15 of 2007 (HC, PR) (unreported).

23 AIR 1986 SC 180.

24 n 23 above, para 73.

compulsory basic education, section 13(f) in the directive principles provides that<sup>25</sup>

[t]he state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at [providing] adequate resources to the education sector and [devising] programmes *in order to make primary education compulsory and free to all citizens of Malawi.*

Consequently, in ascribing content to the right to education, a court would be entitled to interpret the right to education under section 25 as including the entitlement of every person in the country to free and compulsory primary education as clarified by directive principle 13(f) under the Constitution. Such an interpretation would also be in line with the minimum core content obligations of Malawi under article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) that provide for free and compulsory primary education.<sup>26</sup>

In view of these analyses, it is submitted that with a more innovative and robust approach to the interpretation of socio-economic rights under the Malawian Constitution, particularly having regard to section 30 of the Constitution, the bifurcation in the inclusion of socio-economic rights provisions should have a minimal effect in the judicial enforcement of socio-economic rights in Malawi. Hansungule has taken note of the potential comprehensiveness of the socio-economic rights guarantees under the Malawian Constitution when compared to most constitutions in Africa. He states:<sup>27</sup>

Though sporadic and provided for in 'pick and choose' fashion, Malawi's socio-economic rights provisions stand out strikingly compared to the ... constitutions in fellow African states. In the region, Malawi loosely compares to South Africa ... in as far as constitutionalising socio-economic rights is concerned.

### 3 Malawian courts and socio-economic rights: An overview

Since the adoption of the Constitution in 1994, Malawian courts have on various occasions been presented with the opportunity to pronounce on the question of the justiciability of this cluster of rights under the new Constitution. Most of these cases revolved around the

<sup>25</sup> My emphasis.

<sup>26</sup> Committee on Economic, Social and Cultural Rights The right to education (art 13) 12 August 1999 E/C.12/1999/10 (General Comments) para 57.

<sup>27</sup> M Hansungule 'Conceptual and international legal framework for the protection of economic, social and cultural rights' paper presented at the Symposium on the Role of the Judiciary in the Enforcement of Economic, Social and Cultural Rights in Mangochi, Malawi, 28-29 September 2011 (on file with author).

rights to economic activity, to work and to pursue a livelihood under section 29 of the Constitution.<sup>28</sup>

In the case of *Nseula v Attorney-General*,<sup>29</sup> the issue before the Court related to the declaration as vacant of the seat of the applicant, a Member of Parliament, by the Speaker of Parliament on account of his alleged floor-crossing in Parliament in terms of section 65(1) of the Constitution. The main point of the state's argument was that the decision of the Speaker of Parliament was immune from judicial scrutiny based on parliamentary privilege. The Court held:

There is an acceptance of the existence of immunities, privileges and powers of the House. Others are not in the purview of the courts, others are. What a court cannot do under the Constitution is to allow the National Assembly to masquerade behind powers and privileges of Parliament where there is a violation of human rights. Where there is a violation of rights of a citizen, be it to a member of the House or not, courts will on the generality of provisions in our Constitution be seized of the case if only to vindicate the rights of the citizen protected under the Constitution which the citizen alleges have been violated either by legislation or legislative action, resolution or decision. Mr Nseula was elected by his constituency to fulfil certain constitutional functions. He has a constitutional right to perform the duties. This is work. Under article 29 of the Constitution he is entitled to engage in economic activity, to work and to pursue a livelihood. Under article 28(1) his position in Parliament entitles him to a salary and pension – property – for which he cannot be arbitrarily deprived. In my opinion there is a threat or violation of fundamental rights. The only institution under our Constitution that can protect his rights if he claims his rights have been violated is this court, not Parliament. When there is such a threat to a citizen's rights, human or otherwise, it is idle to plead privilege or immunity of Parliament.

The Court held that the powers of the Speaker were reviewable where there was a violation or a threat of violation of a constitutional right. The Court found that there was at least a threat of such violation in respect of the right to work and the right to property and, based on such violation, it was idle to plead parliamentary privilege in this case.

The *Nseula* case is also significant in another sense. It demonstrates that, in some cases, socio-economic rights can have an instrumental function in the construction and nurturing of constitutionalism in a democratic society. By piercing the veil of parliamentary privilege, it was demonstrated that these rights can be invoked as a basis for tempering with the constitutional principle of separation of powers in Malawi.

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28 As Gloppen & Kanyongolo observe: 'Since the entry into force of the 1994 Constitution, despite the various forms of social rights protection enshrined in that text, civil and political rights cases still dominate and, to the extent that litigation involves social rights, it deals with employment and education rights of non-poor litigants, rather than health, housing, water, or other social rights critical to transforming the lives of marginalised groups' (Gloppen & Kanyongolo (n 20 above) 269).

29 Civil Cause 63 of 1996 (HC, PR) (unreported).

Another interesting decision, premised on the right to economic activity and to pursue a livelihood under section 29, was *Stanton v City Council of Blantyre (Stanton case)*.<sup>30</sup> In this case, the plaintiff had received a restriction order from the City of Blantyre preventing him from supplying meat to his customers because all livestock had to be slaughtered at an approved slaughter house. The defendant justified its action on the grounds that the situation was created and governed by the city's by-laws. The by-law in issue, it was argued, was intended to protect the health of residents of the city and not to stifle economic activity. The issue before the court was whether by-law 6(3) of the City of Blantyre (Food) By-Laws 1975 was *ultra vires* the Local Government (Urban Areas) Act and, importantly for the purposes of this article, whether the provisions violated the plaintiff's right to economic activity under the new Constitution, and consequently were null and void. Chimasula-Phiri J found that the provisions of by-law 6(3) were not compatible with the spirit of the new constitutional order. It violated the plaintiff's constitutional right to freely engage in economic activity. Chimasula-Phiri J stated:<sup>31</sup>

Why should business organisations be forced to use Cold Storage [State] abattoir or slaughter-house if they have their own comparable facilities elsewhere? I consider this to be an unreasonable restraint on trade. What is even more shocking is that preference is given to imported meat and meat products. The only condition is compliance with health certificates. Why can similar provisions not be applied to meat and meat products of animals or birds slaughtered outside the city council's jurisdiction? The provisions of by-law 6(3) are not compatible with the spirit of the current constitutional order. I hold the view that by-law 6(3) indirectly violates the plaintiff's constitutional right to freely engage in economic activity.

This case is significant for a number of reasons: First, it is illustrative of the point that courts have been alive to the fact that, in appropriate cases, national legislation, by-laws and policies have to be refashioned to comply with the socio-economic rights obligations of the government under the new Constitution. Secondly, the case demonstrates that the socio-economic rights obligations of the government under the Constitution require that certain common law rules, in this regard the rules relating to trade competition, should be revisited and appropriately developed to comply with the spirit and letter of the Constitution. This approach is consistent with the obligation of the courts to develop the common law in a manner that is consistent with the principles and provisions of the Constitution in terms of section 10(2) thereof. Thirdly, the case also demonstrates, consistent with the language of section 15(1) of the Constitution, that the Bill of Rights applies to private law matters as well. Fourthly, the case stands out as the first decision in which law was declared unconstitutional and therefore invalid based on its conflict with the

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30 [1996] MLR 216 (HC).

31 *Stanton* (n 30 above) 220-221.

Malawian government's socio-economic rights obligations under the Constitution.

Another case where the right to economic activity was implicated was *State v The Minister of Finance and Another, Ex parte Golden Forex Bureau Ltd and Others (Golden Forex Bureau case)*.<sup>32</sup> The Court held that the Exchange Control (Forex Exchange Bureaux) Regulations, 2007, promulgated by the Minister of Finance in terms of the Exchange Control Act,<sup>33</sup> substantially affected fundamental rights under the Constitution, including the right to economic activity under section 29 of the Constitution. The Court, adopting with approval its earlier decision in the *Stanton* case, found that the Exchange Control (Forex Exchange Bureaux) Regulations 2007 violated this right and consequently that such regulations were unconstitutional. The Court held that the respondents had failed to demonstrate that the regulations constituted a limitation that was reasonable, justifiable and necessary in an open and democratic society and acceptable by international human rights standards in terms of section 44(2) of the Constitution. In addition, the Court found that a further ground for the unconstitutionality of the regulations was founded on the provisions of section 58(2) of the Constitution. That section prohibits Parliament from delegating 'any legislative powers to any persons whose effect would be to substantially and significantly affect fundamental rights and freedoms recognised in [the] Constitution'. The very fact that these regulations affected various fundamental rights meant that it was unlawful for them to be adopted.

Malawian courts have also had occasion to adjudicate on issues relating to property rights. Arguably, the most important among these is *Attorney-General v The Malawi Congress Party and Others (Press Trust case)*.<sup>34</sup> In that case, government passed legislation reconstructing the Press Trust (Corporation), a giant economic entity in Malawi. In the process of this reconstruction, the original trustees of the Press Trust were replaced with new ones. The High Court held that the Press Trust (Reconstruction) Act had the effect of expropriating and arbitrarily depriving the original trustee, former President of Malawi, Dr H Kamuzu Banda, and the Malawi Congress Party of private property. It reasoned that that by taking away the property from the original trustees and vesting it in the new trustees appointed under the Act, the original trustees were deprived of ownership rights over the trust property, as well as their right to manage the affairs of the trust. The Supreme Court of Appeal overturned this decision, holding that no such violation of the right under section 28(1) of the Constitution had occurred, that the Press Trust was a public trust created for the benefit of the people of Malawi, and that even if there had been an infringement, it would be

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32 Civil Cause 163 of 2007.

33 Cap 45:01 of the Laws of Malawi.

34 MSCA Civil Appeal 22 of 1996 (unreported).

justifiable as a limitation under section 44(2) of the Constitution. The Supreme Court held the view that a trustee administering trust property had no property rights of his own in the trust property.

The *Press Trust* case is a major decision that dealt with complex issues relating to the right to property under section 28 of the Constitution. Had the High Court decision been upheld, essentially the Press Trust, whose assets comprise a very significant proportion of the country's gross national product, would have remained private property and in private control. The Supreme Court of Appeal shifted such control into the public sphere by upholding the constitutionality of the Press Trust Reconstruction Act. Whilst the decision itself does not openly purport to do so, it had, in essence, the effect of the nationalisation of property. In a rather thinly-veiled comment, the Supreme Court of Appeal noted that '[t]he government of Malawi has clearly taken the view that the regulation and control of such an important economic giant is necessary in an open and democratic society, especially since the other constitutional conditions were satisfied'. The Court proceeded to hold that appropriate principles for the limitation of the right to property had been satisfied, without specifically commenting on the plausibility of the argument that the large size of the Press Trust Corporation was in and by itself sufficient reason for regulation which, in this case, effectively entailed a government take-over. Thus, the decision presented a watershed moment in Malawi's socio-economic landscape.

In the case of *State v The Registrar, Malawi College of Health Sciences, Ex Parte Emmanuel Gondwe (Gondwe case)*,<sup>35</sup> the Court had to deal with the right to education. The applicant had failed to acquire his diploma in the health sciences after failing in a key subject. He argued that, in breach of his right to education and the right to administrative justice under the Constitution, the respondent had standardised his grades downwards, leading to his failure in the subject. Commenting on the applicant's contention that his right to education had been violated, the Court stated:<sup>36</sup>

It is apposite that the right to education does not entitle anybody to a certification of successful completion without fulfilling the predetermined criteria. At the minimum, the Constitution guarantees the right to access such education. In that vein, the mere administration of examinations designed to assess the academic acumen and other relevant competencies of the students does not of itself infringe such a right. Rather, where there are allegations of unreasonableness or *mala fides* in the implementation of such an assessment exercise, then issues of fairness in the exercise of such access to education come into play. In such a scenario, the exercise of such a public duty becomes amenable to judicial review as a matter of right. It was considered necessary to explain these matters in the light of the prayers which the applicant seeks, which continually refer to a breach of his right to education.

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35 Miscellaneous Civil Cause 16 of 2008 (Lilongwe District Registry) (unreported) *per* Kachale J.

36 As above.

The Court also noted that, in connection with the education policy in public institutions, 'where public resources are in play, the learning institution has to balance the need for academic proficiency with the equally important consideration of ensuring maximum utilisation of scarce resources'.

A major deficiency that one notices in these cases is that courts did not seize the opportunity to clearly articulate the nature and content of these rights, as well as the obligations that these rights engender. The analysis by the courts from a socio-economic rights perspective was not particularly engaging. For instance, in the *Stanton* case where the Court nullified city by-laws on account of their inconsistency with section 29 of the Constitution, the Court simply stated, in a few words, that by-law 6(3) had the effect of creating an unfair monopoly in Cold Storage Company (then a state-owned company) as an abattoir in the city of Blantyre, and that therefore this constituted an unreasonable restraint on trade, thereby constituting an indirect violation of the right to economic activity and to pursue a livelihood under section 29 of the Constitution. However, one would have thought that considering the seriousness of a decision that nullifies law, the learned judge ought to have provided a deeper and more elaborate analysis of the nature of the obligations that are imposed by section 29 of the Constitution. The Court ought to have expansively defined the content of the rights in issue, and explained why the limitations and/or restrictions were not justifiable in terms of section 44(2) of the Constitution. Indeed, in terms of section 11(2)(c) of the Constitution, the Court should have considered international law and comparable foreign case law. For instance, the question of the right to a livelihood was dealt with in the case of *Olga Tellis and Others v Bombay Municipal Council*, where the Court expansively interpreted the right to life to include the right to a livelihood. The Court observed:<sup>37</sup>

The sweep of the right to life conferred by article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live ... what makes life livable, must be deemed to be an integral component of the right to life.

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37 Para 55.

Thus, the Court ought to have emphasised the significance of the right to a livelihood by stressing that it is vital in order to make 'life livable' and that a denial thereof would seriously implicate human dignity.

In addition, the Court could have examined a range of General Comments of the Committee on Economic, Social and Cultural Rights (ESCR Committee) that have stressed the importance of the minimum core content obligations to ensure the satisfaction of minimum essential levels of each of the socio-economic rights.<sup>38</sup> A consistent minimum core obligation that spans across the entire range of the socio-economic rights guaranteed under ICESCR is the obligation of non-discrimination. The principle of non-discrimination was evidently violated in the *Stanton* case. The same arguments can be said of the *Golden Forex Bureau* case above.

Similarly, in *Gondwe*, whilst the Court observed that the applicant had argued that his right to education had been violated, instead of defining the content of the right, the Court dwelt on clarifying what that right did not entail, based on the peculiar facts of the case. Further, the Court could have drawn inspiration from General Comment 13 of the ESCR Committee on the right to education. The Court could have observed that whenever decisions are taken that limit or restrict access to education, such decisions must be viewed in a serious light considering that 'education is both a human right in itself and an indispensable means of realising other human rights',<sup>39</sup> and that '[a]s an empowerment right, education is the primary vehicle by which economically and socially-marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities'.<sup>40</sup> The ESCR Committee has further observed that not only is the right to education of great importance to the individual, but it is equally significant to the state as an educated person is also highly productive economically. Thus, the ESCR Committee states that '[i]ncreasingly, education is recognised as one of the best financial investments states can make'.<sup>41</sup> Such an analysis would provide good ground for the Court's proposition that '[w]here public resources are in play, the learning institution has to balance the need for academic proficiency with the equally important consideration of ensuring maximum utilisation of scarce resources'.<sup>42</sup>

Further, the observations made by the Court that upheld the 'right of educational institutions to adopt policies and implement assessment mechanisms intended to ensure the academic competence and professional proficiency of persons certified as

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38 ESCR Committee General Comment 3: The nature of states parties' obligations (art 2, para 1 of the Covenant) UN Doc E/1991/23.

39 ESCR Committee The right to education (art 13) UN Doc E/C.12/1999/10 para 1.

40 As above.

41 As above.

42 *Gondwe* case (n 41 above).



having undergone a given course of study' could have been founded on appropriate content of the right by reference to some of the essential features of the right as stated in General Comment 13. For instance, in relation to the facts of this matter, it is important to observe that the content of the right required that 'the form and substance of education, including curricula and teaching methods, have to be acceptable (eg relevant, culturally appropriate and of good quality)' and that the quality of education must meet 'such minimum educational standards as may be approved by the state (see articles 13(3) and (4))'.<sup>43</sup>

Secondly, it is apparent that the socio-economic rights decisions that were litigated during this period involved individual claims rather than claims relating to systemic or widespread violations of socio-economic rights. One reason for this seems to be that counsel have failed to bring the requisite claims before the courts. A classic example of the failure by counsel is evident from the case of *Gable Masangano and Others v Attorney-General and Another (Masangano case)*.<sup>44</sup> In that case, the issues raised were a lack of sufficient nutrition, a lack of sufficient clothing, a lack of adequate housing (as cells were too congested), and a denial of access to medical treatment. Strikingly, although the issues raised related to socio-economic rights, the main gist of the argument rested on a violation of the rights to freedom from torture, cruel and inhuman or degrading treatment or punishment – which are in the domain of civil and political rights. Such claims could have been based directly on the violation of socio-economic rights. Section 30 of the Constitution, for instance, could have been invoked to argue that prisoners lacked equal access to basic resources as required under that section.

The *Masangano* case therefore exemplifies the problem of a lack of capacity on the part of counsel to conceptualise and articulate socio-economic rights claims, and to contribute to the development of jurisprudence in this area. However, as demonstrated below, these issues were raised by state counsel, and the Court made definitive affirmations of the socio-economic rights implicated.

Another reason for the lack of jurisprudence on systemic socio-economic rights issues seems to lie in the conceptual approach that courts have adopted in relation to socio-economic matters that generally involve competing policy considerations. The article turns to this conceptual aspect in more detail in the next section.

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43 n 39 above, para 6(c).

44 *Masangano* case (n 24 above).

#### 4 Malawian courts: Approach to polycentric policy issues

A careful analysis of the various matters in which socio-economic issues were implicated shows that, in the cases that were decided in the years immediately following the adoption of the 1994 Constitution, courts did not engage with the conceptual issues relating to the competence of courts in determining matters that involve complex and polycentric policy considerations. The reasoning was generally simplistic and unsophisticated. However, in related matters which have been decided over the past ten years there seems to have been a significant paradigm shift. Courts have sought to articulate more extensively on the competence of courts to deal with such issues. Regrettably, such analysis has not emerged from cases directly dealing with socio-economic rights. Only in one instance have courts directly grappled with the question of the justiciability of socio-economic rights. This article argues that the approach adopted by courts in dealing with such issues might be a major factor that has contributed to their lukewarm embrace of socio-economic rights norms, principles and jurisprudence.

The first in this latter category of cases was *State v Ministry of Finance, Ex Parte SGS (Malawi) Ltd (SGS case)*.<sup>45</sup> The case was a judicial review application challenging the government of Malawi on the manner in which it had handled the tendering process relating to a pre-shipment inspection services contract. The detailed facts are not necessary for present purposes. What is significant, however, is that Mwaungulu J in this case extensively considered the question of justiciability in matters in which the socio-economic policies of the government are in issue. He observed:

Many epithets delineate [as] non-justiciable ... 'matters involving social and economic policy', 'matters involving competing policy considerations', 'questions of social and ethical controversy'. Generally these are matters where, if involved, courts would be in, in the words of Lord Diplock in *Butees Gas v Hammer*, a 'judicial no-man's land'.

Mwaungulu J proceeded to say that in *Butees Gas v Hammer*,<sup>46</sup> Neill LJ introduced the concept of polycentricity. He quoted with approval the following remarks of Neill LJ:

In this case ... [the] decisions involve a balance of competing claims on the public purse and the allocation of economic resources which the court is ill equipped to deal with. In the language of the late Professor Fuller in his work 'The forms and limits of adjudication' (1978) 92(2) *Harvard LR* 353 at 395, decisions of this kind involve a polycentric task. The concept of a polycentric situation is perhaps most easily explained by thinking of a spider's web: 'A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original

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45 [2003] MWHC 41.

46 [1982] AC 888.

pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap.'

Mwaungulu J concluded that the Court was most unsuited to get involved in weighing which options were more economical than others in the domain of public policy, emphasising that courts should exercise the 'utmost restraint' in cases involving 'questions of social and ethical controversy'. Whilst the matters in issue were arguably not directly on the question of the implementation of socio-economic rights, as they dealt with (i) whether government had followed the proper procedure in awarding a tender, and (ii) that it had opted for a more expensive rather than a cheaper supplier of services, it is submitted that the principles enunciated were of direct relevance and would, if accepted by future courts, lay some normative groundwork, albeit conservative and unprogressive, for the future consideration and determination of socio-economic rights cases.

Mwaungulu J's decision in the *SGS* case was also considered in the case of *State v Minister of Finance and Another, Ex Parte Bazuka Mhango and Others*.<sup>47</sup> In this case, the issue concerned the refusal by the executive arm of government to pay duly-approved allowances of Members of Parliament on the grounds that the approval thereof impacted on the allocation of resources and that Parliament could not approve its own allowances in that fashion without the executive giving prior consent. The Court rejected the argument that the matter involved the evaluation of socio-economic policies or the allocation of resources, agreeing instead with the applicants that the matter was about the implementation of duly-passed legislation. However, importantly, the Court agreed with the decision in the *SGS* case, stating:

This very Court [has] reiterated the fact that courts have little capacity to deal with matters of, *inter alia*, policy. Such matters, we thought, should be left to those best suited to deal with them namely the people's elected representatives and their permanent advisors, ie the civil servants. We would therefore be the first to wash our hands off this case if it raised issues only of policy or required this Court to evaluate socio-economic policy or allocate scarce economic resources.

At the same time, however, there is no doubt that the decision handed down had significant budgetary implications as government was ordered to pay huge sums of money to Members of Parliament by way of allowances.

Similarly, in the case of *State v Chief Secretary to the President and Cabinet, Ex Parte Bakili Muluzi (Muluzi case)*,<sup>48</sup> the applicant was the former President of the Republic of Malawi. He has not been in very good health in recent times. He has been receiving specialist medical

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47 Miscellaneous Civil Cause 163 of 2008 (HC, MR, unreported).

48 Miscellaneous Civil Application 3 of 2011 (HC, MR, unreported).

treatment in the Republic of South Africa. The applicant had a prescription from his doctor in South Africa indicating that he was due for a medical check-up for his condition. As former head of state, he was entitled to free medical treatment (that is, at the expense of the state), whether within or outside the country. Government, however, refused to pay for his treatment, stating that he first had to get certification from a local government medical practitioner that his condition merited referral to a foreign hospital. Aggrieved by this decision, he applied for judicial review. He alleged a breach of government's obligations under the Presidents' (Salaries and Benefits) Act, as well as its general obligations towards the health of its citizens under the Constitution. The Court, whilst finding that government was under an obligation to fund the former President's treatment as requested, in terms of the Presidents' (Salaries and Benefits) Act, reiterated the need for courts to keep away from getting entangled in issues that involve policy considerations. The Court said:

We should also emphasise that we are not here to decide on health policy or how best the powers that be should use scarce resources in relation to the provision of health care services. That is for the people's elected representatives and those that advise them.

What therefore emerges from the foregoing is that in a number of cases, courts have made it clear that in matters where polycentric socio-economic policy considerations are implicated, they do not have the competence to adjudicate. Although the decisions have not directly turned on the determination of socio-economic rights cases, it is axiomatic that socio-economic rights claims, particularly where the issues implicated are of a systemic nature, such as a problematic housing or health policy, courts must necessarily deal with polycentric policy issues. Almost invariably, whenever a court is invited to consider core socio-economic rights under the Constitution, such as access to education, access to health, access to food, and so forth, it will have to engage with policy considerations. As Eide and Rosas astutely observe:<sup>49</sup>

Taking economic, social and cultural rights seriously implies a simultaneous commitment to social integration, solidarity and equality, including the issue of income distribution. Economic, social and cultural rights include a major concern with the protection of vulnerable groups, such as the poor. Fundamental needs should not be at the mercy of changing governmental policies and programmes, but should be defined as entitlements.

Eide and Rosas' statement suggests that where socio-economic issues are enshrined as rights, government programmes should be designed in such a way as to give effect to such rights, and that such rights should not, on the contrary, be defined by constantly-changing government policies.

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<sup>49</sup> A Eide & A Rosas 'Economic, social and cultural rights: A universal challenge' in A Eide *et al* (eds) *Economic, social and cultural rights* (1995) 17-18.

Thus, whilst it is perhaps correct that the courts are ill-equipped to make budgetary allocations, it is a fundamental flaw in jurisprudence for courts to make sweeping assertions that they cannot deal with policy issues.

The 'policy hands-off' approach generally espoused by courts in this stream of jurisprudence is also clearly inconsistent with section 30(4) of the Constitution. It will be recalled that that section states that '[t]he state has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility'. Considering that this duty is entrenched in the Bill of Rights, and it specifically addresses the issue of the justification of policy in accordance with guaranteed rights, it is anomalous for courts to make blanket statements that they will refuse to determine matters where they are called upon to evaluate policy.

Such a 'policy hands-off' approach stultifies the transformative potential of the new constitutional order in Malawi,<sup>50</sup> which could equally be said to represent, in Mureinik's words, 'a bridge away from a culture of authority ... to a culture of justification'.<sup>51</sup> As Liebenberg observes, the transformative character of a constitution is furthered by the entrenchment and guarantee of socio-economic rights in a constitution as this 'creates the possibility for ordinary people to challenge exercises of public or private power that undermine the rights underpinning' the vision of the Constitution.<sup>52</sup>

However, a more progressive approach was adopted in the *Masangano* case. In that case, the applicant was a prisoner who brought a class action on behalf of all prisoners in Malawi. Although the main gist of the argument rested on a violation of the rights to freedom from torture, cruel and inhuman or degrading treatment or punishment, which are in the domain of civil and political rights, this was the first case in which core social rights such as health, housing, food and basic sanitation were directly implicated. In her defence, the Attorney-General invoked Mwaungulu J's position in the *SGS* case. The Court noted in this regard:<sup>53</sup>

The case of *Ministry of Finance ex parte SGS Malawi Limited* Misc Civil Application No 40 of 2003 was ... cited where Mwaungulu J pointed out

50 According to Klare, transformative constitutionalism can be described as a 'long-term project of constitutional enactment, interpretation and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent processes grounded in law.' See K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 150.

51 E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 32, cited in *S v Makwanyane & Another* 1995 3 SA 391 (CC); 1995 6 BCLR 665 (CC) para 156 n 1.

52 S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 34.

53 *Masangano* case (n 24 above).

that matters involving social and economic policy, matters of policy and principle, matters involving competing policy considerations are clearly non-justiciable in judicial review proceedings.

However, the Court rejected the respondents' arguments in this case. It held that the *SGS* case had to be understood on its unique facts. The fact that the reasoning of the Court in the *SGS* case was raised in this matter further demonstrates the dangers that the 'policy hands-off' approach adopted by courts poses to the adjudication of socio-economic rights.

To its credit, however, in response to the specific objection raised against the justiciability of socio-economic rights, the Court rejected the respondent's argument, holding that socio-economic rights in Malawi were justiciable. The Court observed thus:

On the argument that social-economic rights are non-justiciable we would like to suggest that modern legal and judicial thinking has significantly diminished the importance of such an assertion.

The Court made a comparative analysis with the South African position, affirming Christiansen's observation that at the core of socio-economic rights under the South African Constitution are rights to adequate housing, health care, food, water, social security and education; that '[e]ach of these rights is enumerated in the 1996 South African Constitution'; and that '[m]oreover, most of them have been the subject of full proceedings before the South African Constitutional Court'.

The Court concluded in this respect:

Clearly therefore matters of prisoners' [socio-economic] rights are matters that this Court can deal with just like the South African Constitutional Court has dealt with the various matters of socio-economic rights.

The Court then, quite significantly, definitively affirmed the guarantee of various socio-economic rights for prisoners. The Court began by stating:<sup>54</sup>

We would like to reaffirm that prisoners' rights include right to food, clothing, accessories and cell equipment to the minimum standards as set out in the Prisons Act and Prison Regulations. Going below the minimum standards runs the risk of duty bearers not providing anything at all and coming up with seemingly plausible and seemingly convincing excuses.

The Court also identified the right to housing in respect of prisoners, stating that '[w]e also affirm that prisoners have a right to appropriate prison accommodation which is not congested and which has appropriate ventilation'.<sup>55</sup>

Further, the Court affirmed the guarantee of the right of access to healthcare. The Court stated in this respect that prisoners 'have the right to access to medical attention and treatment like any other

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54 As above.

55 As above.

human being', and that 'such prisoner should not be asked what offence he/she committed as a precondition for getting the medical attention or treatment'.<sup>56</sup>

In the final analysis, the Court held the view that<sup>57</sup>

[p]lacing inmates in an overcrowded cell with poor ventilation with little or no room to sit or lie down with dignity but to be arranged like sardines violates basic human dignity and amounts to inhuman and degrading treatment and is therefore unconstitutional.

This final proposition formed the *ratio decidendi* in this case, but from the above exposition of the various affirmations of the unquestionable guarantees of various socio-economic rights for prisoners 'like any other human being', the *Masangano* case clearly marks a very progressive step in the development of socio-economic rights jurisprudence in Malawi and could be a stepping stone from which more sophisticated jurisprudence on systemic socio-economic rights issues can be built.

Notwithstanding that courts are under an obligation in terms of section 11(2)(c) of the Constitution to consider applicable norms of public international law, no court thus far has sought to engage government's socio-economic rights obligations under international law. Malawi, for instance, is a party to ICESCR.<sup>58</sup> The United Nations (UN) body entrusted with the mandate of interpreting ICESCR and monitoring state compliance with their treaty obligations under the Covenant, the ESCR Committee, has issued General Comments that stress the concept of minimum core content obligations. These minimum core obligations define the minimum essential levels of enjoyment of the rights guaranteed under ICESCR below which citizens should not fall, and failure of which constitutes a violation of the Covenant.<sup>59</sup> Courts in Malawi have generally not addressed the issue of minimum core obligations, even in the various decisions on the right to economic activity that they have dealt with directly.

The closest the Court came to invoking international law standards was in the *Masangano* case, where the Court made reference to the UN Standard Minimum Rules for the Treatment of Prisoners, but then the Court merely noted that the Prisons Act of Malawi was in tandem with those rules and based its analysis on the said Act. Be that as it may, it is important to observe that the Court stressed the duty of government to adhere to minimum standards of treatment whenever these are laid down by the law. The Court emphasised:

No one should be allowed to disobey the law merely on the ground that he or she does not have sufficient resources to enable them obey the law

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<sup>56</sup> As above.

<sup>57</sup> As above.

<sup>58</sup> Malawi ratified ICESCR on 22 December 1993. See UN Status of Ratifications, International Covenant on Economic, Social and Cultural Rights <http://www2.ohchr.org/english/law/cescr-ratify.htm> (accessed 9 December 2011).

<sup>59</sup> ESCR Committee General Comment 3 para 10.

and fulfil their obligations under the law. The minimum standards place an obligation on the duty bearer to meet those standards and not to bring excuses for not complying with those standards. We therefore hold that the respondents have a responsibility to comply with the minimum standards set in the Prison Regulations.

To concretise this statement, the Court held:

Accordingly we direct the respondents to comply with this judgment within a period of 18 months by taking concrete steps in reducing prison overcrowding by half, thereafter periodically reducing the remainder to eliminate overcrowding and by improving the ventilation in our prisons and, further, by improving prison conditions generally ... Parliament should therefore make available to the respondents adequate financial resources to enable them meet their obligations under the law to comply with this judgment and the minimum standards set in the Prisons Act and Prison Regulations.

Thus, it is evident that the *Masangano* case provides a ground-breaking precedent in the area of remedies in this cluster of rights. Firstly, it clarifies that where the law sets minimum standards and, by implication, we can read into this statement the minimum core content obligations binding on Malawi, it is no defence that the state does not possess sufficient resources to secure the realisation of such rights. Secondly, not only did the Court specifically require government to take concrete steps and commit sufficient resources to address the socio-economic rights problems in prisons that were made evident in the case, the Court also defined specific time frames within which the order of the Court was to be complied with. Again, whilst the *Masangano* case shows only the beginning of attempts by Malawian courts to give meaningful content to socio-economic rights claims, it remains highly significant as a stepping stone for further jurisprudential development in the area.

## 5 Missed opportunities

Apart from the foregoing cases where socio-economic rights were either addressed in a very fleeting fashion, or other cases where principles that are likely to be a drag on the judicial enforcement of socio-economic rights in Malawi were adopted, there have also been occasions where courts have been presented with clear opportunities to address some of the key socio-economic rights mentioned above, and missed such opportunities.

A classic instance is the case of *Chatepa and Another v Malawi Housing Corporation (Chatepa case)*.<sup>60</sup> In that case, the first plaintiffs were tenants of the defendant, a statutory corporation established under the Malawi Housing Corporation Act.<sup>61</sup> The Malawi Housing Corporation, among other things, builds and sells houses to the

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60 [1997] 1 MLR 237 (HC).

61 Cap 32:02 of the Laws of Malawi.



public at relatively low cost, and also lets out some of its premises at significantly lower cost affordable to low-income earners. In 1995 and 1996, the defendant increased the amount of rent payable by its tenants by a high percentage. According to the plaintiffs, this made it very difficult for most tenants to fulfil their obligations to pay the new rentals. According to section 7(2) of the Malawi Housing Corporation Act, it is provided that the making of profits is not an object of the activities of the Corporation. The plaintiffs argued, therefore, that the defendants were precluded by law from raising rent with a view to making profits and that the raising of rent in the instant case, having evidently been made with a view to achieving profit, was *ultra vires*.

However, in argument counsel did not raise the issue of the right to housing, which was clearly at issue here. In its judgment the Court did not raise the issue either. The Court only narrowly addressed its mind to the confines of the words of the statute, and concluded that it was 'clear from the wording of the Act that in carrying out its operations, the Malawi Housing Corporation's purpose was simply to break even, not to make a profit'.<sup>62</sup> In that regard, the Court held that the 'raised rentals were clearly motivated by commercial interests to make a profit and were therefore *ultra vires* the scope of the powers conferred by the Act'.<sup>63</sup>

This was an instance where the Court could explicitly have raised the issue of violation of the right to housing on the basis of, among others, section 30 of the Constitution. The Court could have adverted to the ESCR Committee's General Comment 4 on the right to adequate housing which, among other things, explicitly deals with the issue of affordability as one of the essential elements of the right. The ESCR Committee states:<sup>64</sup>

Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised ... In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases.

Section 7 of the Malawi Housing Corporation Act had to be read in the context of the Bill of Rights as a whole, which in turn requires the consideration of applicable norms of public international law such as those stated in the ESCR Committee's General Comment 4. Thus, *Chatepa* is clearly a decision which ought to have been anchored in the socio-economic rights discourse.

Another interesting case, relating to the rights to property and housing, is *Jessica Somanje v Euwate Somanje and Others (Somanje case)*.<sup>65</sup> The facts were that the plaintiff's husband, Mr Harvey Robert

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62 *Chatepa* case (n 60 above) 238.

63 As above.

64 ESCR Committee General Comment 4: The right to adequate housing (art 11(1) of the Covenant), UN Doc E/1992/23.

65 Civil Cause 2055 of 1999 (PR) (unreported).

Somanje, had died at a private hospital in Blantyre, Malawi. The defendants soon after his death locked up the matrimonial home together with the property of the family. The plaintiff and her seven children were not allowed to enter the house. They had to squat at the plaintiff's brother's house. In its decision, the Court stressed a number of constitutional rights, including the rights of widows to a fair distribution of property upon the dissolution of the marriage in terms of section 24(1) of the Constitution. The Court also cited, regrettably without any analysis, section 23 of the Constitution that deals with child rights. The Court proceeded to observe that property grabbing of deceased estate property was a crime under section 84A of the Wills and Inheritance Act. The Court then stated:<sup>66</sup>

The scenario in the present case is that the widow and her seven children have been abruptly made homeless and destitute and have been forced to seek refuge in the applicant's brother's house causing great inconvenience and hardship to everybody concerned ... In the circumstances, I grant an order to the applicant and direct that the defendants unlock the house and allow the widow and her seven children to occupy the house and have quiet enjoyment of the matrimonial home pending the determination of the main action.

Again, this is a matter where the Court was presented with an opportunity to develop constitutional norms relating to key socio-economic rights and it missed the opportunity. From the facts, this is a matter where the immediate family of the deceased person was rendered homeless by the deceased's relatives through arbitrary and extra-judicial eviction. It is clear that the right to housing was violated. The deceased person's relatives failed to respect the plaintiff and her children's right to housing by arbitrarily evicting them from the family house. The Court here had an opportunity to define the contours of this right and, also significantly, to articulate the obligations of non-state actors, and thus the horizontal application of the Bill of Rights in socio-economic rights cases. The Court instead chose the path of constitutional avoidance and resolved the matter merely by the application of legislative provisions.

## 6 Lessons from elsewhere: Remedies

Malawian courts might draw a number of lessons from other jurisdictions, most especially South Africa, whose constitutional design mirrors closely that of Malawi as far as the Bill of Rights is concerned. As South African courts have done much in defining the obligations of the state in this area generally, and also in respect of various specific rights, an exercise that Malawian courts have generally shunned thus far, the latter might generally benefit from the former in developing jurisprudence that both meets international standards and is responsive to the specific circumstances of Malawi.

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66 As above.

One critical area where courts in Malawi might draw lessons from South Africa in respect of these rights is on remedies. In particular, two innovative remedies are significant. First is the remedy of 'meaningful engagement' that was first artfully adopted and elaborated in the *Olivia Road* case.<sup>67</sup> Under such an order, instead of the court making its own decision on the substantive issues raised, it instead requires the parties to go back and meaningfully engage with each other with a view to reaching a mutually-agreeable solution. An order of meaningful engagement does not leave the parties unguided. The court is at liberty to provide pointers in respect of some of the critical issues that the parties have to address. Further, as the name of the order suggests, the engagement between the parties has to be 'meaningful'. Parties should not approach the engagement process with a pre-conceived idea of ensuring that the engagement process would fail. Indeed, to the court's credit, the parties in the *Olivia Road* case reached a mutually-agreeable solution after meaningful engagement. The standard used to gauge the meaningfulness of such engagement is that of reasonableness.

The second remedy where Malawian courts might equally draw inspiration from is that of supervisory (structural) interdicts.<sup>68</sup> Here, upon making an order, a court proceeds to require the state to report back to the court on the measures adopted in order to give effect to the court's order. This order can indeed be made together with an order for meaningful engagement in appropriate cases.<sup>69</sup> As noted above, whilst it is commendable that the Court in the *Masangano* case issued an order with specific timelines on the implementation thereof by the state, the order fell short of requiring the government to report back to the Court on the measures adopted to give effect to the order. It is hoped that this is something that future courts will do in order to make the judicial enforcement of these rights more effective.

## 7 Conclusion

The Constitution of Malawi envisages a developmental state committed 'to guarantee the welfare and development of all the people' of the country.<sup>70</sup> Socio-economic rights which empower people, particularly the most vulnerable, to demand of the state that it acts reasonably and progressively to ensure that all enjoy the basic necessities of life,<sup>71</sup> thus play a critical role in the creation of such a welfare and developmental state. Through their adjudication of socio-

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67 *Occupiers of 51 Olivia Road, Berea Township & 197 Main Street Johannesburg v City of Johannesburg & Others* 2008 3 SA 208 (CC).

68 In Malawi, an interdict is called an 'injunction'.

69 *Residents of the Joe Slovo Community v Thubelisha & Others* 2010 3 SA 454 (CC).

70 Preamble (n 12 above).

71 *Mazibuko* case (n 3 above).

economic rights, courts play a pivotal role in social transformation aimed at achieving this goal.<sup>72</sup>

Liebenberg identifies four functions or roles that courts can play in this process. Firstly, 'they provide a forum where the impact of legislation and policies on the lives of the poor receives serious and reasoned consideration in the light of the values and commitments of the Constitution'.<sup>73</sup> Therefore, in the Malawian context, as demonstrated in this article, the argument that courts should adopt a 'policy hands-off approach' on the basis the traditional and now rather anachronistic arguments that they lack the requisite competency or legitimacy, is problematic as it is contrary to the spirit and letter of the Malawian Constitution.

Secondly, such adjudication, according to Liebenberg,<sup>74</sup>

can facilitate meaningful participation by civil society and communities in the formulation and implementation of social programmes requiring such participation as a component of the relevant rights, and by requiring transparency in the formulation of social policies and programmes.

As this article has demonstrated, one of the lessons that Malawian courts can draw from South African socio-economic rights jurisprudence lies in the area of remedies, one of which is that of 'meaningful engagement'. Such a remedy enhances participatory democracy in the process of development. From the socio-economic rights jurisprudence in Malawi, it seems there is not much to show for the role that courts have thus far played in promoting social transformation through participatory and transparent decision making in the implementation of these rights.

Thirdly, the judicial enforcement of these rights helps to 'develop the normative basis of those parts of our legal system that regulate traditionally private relations in ways that protect and facilitate poor people's access to socio-economic resources'.<sup>75</sup> It has been demonstrated in this article that, generally, Malawian courts are yet to substantially develop the normative content of socio-economic rights, and indeed to develop jurisprudence that clarify, in a transformative fashion, how traditionally private relations are to be regulated with a view to advancing the protection of socio-economic rights. Thus, for instance, in *Jessica Somanje v Euwate Somanje and Others*, an opportunity was missed for the court to clarify the horizontal application of the Bill of Rights in respect of the right to housing.

Fourthly, such enforcement can prod the polity as a whole 'to be more responsive to systemic socio-economic inequalities and deprivations'.<sup>76</sup> This article has shown that, whilst a number of

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72 Liebenberg (n 52 above) 37.

73 As above.

74 Liebenberg (n 52 above) 38.

75 As above.

76 As above.

decisions have been handed down in this area of human rights, most of these cases have revolved around few economic rights and that, apart from the *Masangano* case, there has been no meaningful attempt to address systemic violations of socio-economic rights. The *Masangano* case is significant as it, for the first time, addressed comprehensively the issue of the treatment of prisoners with a focus on issues of a social rights nature. Such treatment of prisoners has been prevalent in Malawian prisons for decades, with the result that most people took it as part of the normal and expected consequences of being incarcerated. What decisions like the *Masangano* case would achieve in doing, as Liebenberg correctly observes, is to enjoin authorities and society as a whole 'to be more responsive to systemic socio-economic inequalities and deprivations'.

Clearly, much remains to be done in the judicial enforcement of socio-economic rights in Malawi. This article has, firstly, painted a picture of what has thus far been done in adjudicating these rights since the adoption of the Constitution in 1994. The major decisions on these or connected to these rights have been explored. Most of these decisions were very pedantic, narrow and simplistic in their approach to the determination of the socio-economic issues at hand. There were missed opportunities, and the courts need to be more vigilant, resourceful and robust in their articulation of the normative content of these rights and the nature of the obligations that they engender on the state as well as non-state actors where applicable.

Lastly, the article has highlighted some of the conceptual deficiencies that exist, mostly articulated in matters that did not directly implicate key socio-economic rights but which, nevertheless, are directly conceptually connected to the justiciability of socio-economic rights. These cases, it has been shown, have tended to adopt what in this article is referred to as a 'policy hands-off' approach, which might stultify further development of jurisprudence in this area. In this regard, the article has pointed to some of the lessons that can be drawn from elsewhere. It is hoped that the article will contribute to the developing intellectual conversation on the judicial enforcement of socio-economic rights in Malawi.

# Advancing refugee protection in Botswana through improved refugee status determination

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## Summary

*Botswana's Refugee (Recognition and Control) Act has been in force since 1967. It was promulgated before Botswana became a state party to the UN Refugee Convention and its Protocol and before its accession to the OAU Refugee Convention. Refugee status determination (RSD) procedures should reach human rights standards in procedural fairness as enunciated in the Universal Declaration on Human Rights. The United Nations High Commissioner for Refugees (UNHCR) has issued several documents concerned with procedural fairness in RSD. This article takes a critical look at RSD procedures in Botswana, measuring them against human rights standards and UNHCR recommendations for fair and effective RSD procedures. The article recommends that RSD procedures be improved in order to ensure procedural fairness and reduce the risk of refoulement in deserving cases.*

## 1 Introduction

Botswana has been admitting refugees for almost half a century. In their study on migration and refugee policy in Botswana, Oucho and

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Campbell describe Botswana as a 'country of migration'.<sup>1</sup> Rutinwa notes that the influx of refugees into Botswana can be linked to wars of liberation from racist minority rule in South Africa, South West Africa and Southern Rhodesia, and the struggle for independence in neighbouring countries, particularly Angola.<sup>2</sup> This view is echoed by Tshosa, who also observes that the refugee problem appears to have lessened in intensity with the independence of all the countries in the Southern African region.<sup>3</sup> Currently, refugee numbers in Botswana are just over 3 000 – mainly from East Africa and neighbouring Southern African countries.

There are a number of scholarly articles and papers on the refugee situation in Botswana. Maluwa comments on the general legal and political situation of refugees in Botswana.<sup>4</sup> Zetterquist writes on refugee experiences and support systems in Botswana.<sup>5</sup> Rwelamira and Buberwa remark on the social demographics of refugees in Botswana.<sup>6</sup> Tshosa comments on the scheme of the Refugee (Recognition and Control) Act 1967 making recommendations for law reform.<sup>7</sup> However, there has been no consideration of the important legal question of refugee status determination (RSD) procedures in Botswana. This article aims to fill that gap by providing an overview of the RSD process and analysing its fairness and effectiveness against human rights standards and United Nations High Commissioner for Refugees (UNHCR) recommendations.<sup>8</sup>

The article situates the reader by giving an overview of Botswana's refugee law framework and the sources of information on Botswana's RSD procedures. The article outlines the sources of procedural standards in RSD in human rights law and UNHCR recommendations. This is followed by a restatement of the significance and importance

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- 1 JO Oucho & EK Campbell 'Changing attitudes to immigration and refugee policy in Botswana' in J Crush (ed) *Migration policy series No 28* (2003) 1.
  - 2 B Rutinwa 'Asylum and refugee policies in Southern Africa: A historical perspective' <http://www.sarpn.org.za/documents/d0001212/rutinwa/rutinwa.pdf> (accessed 7 July 2011).
  - 3 O Tshosa 'National refugee laws in the light of international standards: Some reflections on the Refugee (Recognition and Control) Act 1967 of Botswana' (2007) 5 *University of Botswana Law Journal* 49.
  - 4 T Maluwa 'The concept of asylum and the protection of refugees in Botswana: Some legal and political aspects' paper presented at the 2nd International Refugee Advisory Panel Conference, Oxford, 1991.
  - 5 J Zetterquist 'Refugees in Botswana in the light of international law' <http://uir.unisa.ac.za/bitstream/handle/10500/1256/02thesis.pdf?sequence=3> (accessed 6 July 2011).
  - 6 M Rwelamira & LG Buberwa 'Refugees in Botswana, Lesotho and Swaziland: Some preliminary notes on their magnitude, characteristics and social support systems' paper presented at the Africa Refugees Seminar, organised by the African Refugee Centre, University of Dar es Salaam, Arusha, Tanzania, 30 July-3 August 1990.
  - 7 Tshosa (n 3 above).
  - 8 This article is the result of an unpublished workshop paper presented by E Macharia-Mokobi and J Pfumorodze entitled 'Procedures for granting refugee status in Botswana in the light of international refugee law' Refugee Law Workshop, University of Botswana, 11-12 June 2009, Gaborone, Botswana.

of procedural fairness in the RSD process. An analysis of the implementation of RSD in Botswana follows. The article concludes by making policy and law reform recommendations.

## 2 Botswana's refugee law framework

### 2.1 Sources of information about Botswana's refugee status determination procedures

Most of the data for this article was collected from a desk study of refugee law and international treaties relevant to Botswana. The authors' particular interest was to examine status determination procedures in Botswana with a view to making policy and law reform recommendations. The authors held discussions with UNHCR officers regarding their practical experience of the implementation of RSD procedures in Botswana. The comments of officers interviewed have been incorporated into the article. One limitation on the collection of data on practical implementation of the RSD legislation in Botswana is that the process is not open to the public. Unlike in other countries, there are no publicly available records of status determination interviews or hearings that may be reviewed for scholarly purposes. The UNHCR has observer status in RSD hearings and officers interviewed gave the authors insights into the practical workings of the system. While comments from the UNHCR helped to provide a window onto RSD in Botswana, the article as a whole still expresses only the views of the authors.

### 2.2 Accession to refugee law treaties

Botswana is a state party to the 1951 UN Convention on the Status of Refugees (1951 Convention) and its 1967 Protocol,<sup>9</sup> as well as the OAU Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Convention).<sup>10</sup>

Botswana has entered several reservations to the 1951 Convention.<sup>11</sup> The first reservation is to article 7 on reciprocity.<sup>12</sup> The effect of the reservation on reciprocity means that Botswana is not obliged to offer refugees the same treatment as that accorded generally to non-citizens who are in Botswana. This is so, despite the

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9 Botswana became party to these instruments on 6 January 1969.

10 Botswana acceded to this treaty on 16 May 1995.

11 <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=3d9abe177&query=reservations> (accessed 8 July 2011).

12 The exemption to reciprocity is defined as follows in the *Handbook on refugee protection: A guide to international refugee law* 11 as follows: 'Where according to a country's law, the granting of a right to an alien is subject to the granting of similar treatment by the alien's country of nationality, this will not apply to refugees. The notion of reciprocity does not apply to refugees since they do not enjoy the protection of their home country.' [http://www.ipu.org/pdf/publications/refugee\\_en.pdf](http://www.ipu.org/pdf/publications/refugee_en.pdf) (accessed 25 November 2010).



fact that refugees cannot avail themselves of the protection of their home state.

Botswana has also made a reservation to article 12(1) of the Refugee Convention in respect of personal status, which provides that the personal status of a refugee shall be determined by his country of domicile and if he has no domicile, by his country of residence.

Botswana further entered reservations to article 17 on wage-earning employment that requires that refugees be afforded the most favourable treatment accorded to nationals of a foreign country as regards the right to work. Article 17 also provides for exemption for refugees from restrictive measures employed for the protection of the national labour market. Botswana's motivation for the reservation on wage-earning employment is the high unemployment rate and the need to protect what jobs were available for citizens.<sup>13</sup> The effect of this reservation is that Botswana does not provide any special exemptions to refugees seeking employment. Botswana treats refugees who are able to find work in the same way as other non-citizens seeking employment in the country by requiring them to apply for and obtain work permits and residence permits.<sup>14</sup>

Article 26 of the Refugee Convention provides that refugees shall be afforded the right to choose their place of residence and move freely within the territory of the country. Botswana has entered a reservation to this article. This reservation was entered for reasons of national security because, as Makhema notes, some refugees coming into Botswana in the 1960s were members of liberation movements and reasons of security necessitated this reservation.<sup>15</sup> Refugees have been able to move freely in the country in the past. However, in recent years Botswana has adopted the encampment policy. Refugees are now settled at the Dukwi refugee camp where they are expected to reside upon being granted refugee status.<sup>16</sup> Whilst encampment policies are not desirable in terms of international refugee law, a study has shown that 46,5 per cent of Botswana citizens favour the encampment of refugees.<sup>17</sup>

Botswana has made a reservation to article 31, which prohibits the imposition of penalties on refugees unlawfully in the country of refuge, and to article 32, which prohibits expulsion of refugees except on grounds of national security or public order. These reservations

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13 M Makhema 'Social protection for refugees and asylum seekers in the Southern Africa Development Community (SADC)' SP Discussion Paper 0906, Social Protection and Labour, The World Bank 10 16 <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0906.pdf> (accessed 25 November 2010).

14 Makhema (n 13 above) 29.

15 Makhema (n 13 above) 16.

16 Makhema (n 13 above) 28.

17 Oucho & Campbell (n 1 above) 27-28.

were also motivated by reasons of national security, given the unstable political situation in Southern Africa in the 1960s.

Finally, Botswana has made reservations to article 34 of the Refugee Convention on the naturalisation of refugees. Makhema notes that this reservation was entered due to concerns about a potential change in the balance of power between ethnic groups in Botswana should significant numbers of people from neighbouring countries be naturalised.<sup>18</sup> Botswana's population is small, being estimated at approximately 1,9 million people in 2010. The concerns expressed by Makhema would have been very real in the 1960s and 1970s when Botswana's population was significantly smaller.

As mentioned previously, Botswana's accession to the 1951 Convention and the OAU Convention came after the promulgation of Botswana's municipal refugee legislation in 1967, entitled the Refugee (Recognition and Control) Act (Act).<sup>19</sup> There is therefore a disconnect between Botswana's international obligations in terms of the 1951 UN Convention and the OAU Convention and Botswana's municipal law. The scheme of the Act is discussed below.

### 2.3 The Refugee (Recognition and Control) Act 1967

The Refugee (Recognition and Control) Act of 1967 is control-oriented and not protection-oriented.<sup>20</sup> Botswana's Refugee Act suffers from the problems plaguing similar control-oriented statutes which were the norm in the region in the 1960s and 1970s. Rutinwa characterises these problems as follows:<sup>21</sup>

The first notable aspect of the above laws [control-oriented statutes] is that that they were not comprehensive refugee legislation. Rather, they addressed selected aspects of the refugee problem. Second, the selected aspects did not so much relate to protection of refugees. Rather, as the long titles connote, they were mainly aimed at *controlling* refugees. The laws vest wide and discretionary powers to determine who is a refugee in the relevant Minister.

Status determination procedures in the Act can fairly be described as basic. An individual seeking asylum under the Act in Botswana is required to declare his intention to apply for asylum at the earliest possible opportunity.<sup>22</sup> This may be done at a border post upon initial entry, by appearing at a police station, or at the UNHCR offices in the capital city Gaborone. At the time of making the initial claim for asylum, the applicant is immediately referred to the police, immigration officers or UNHCR for an initial interview. At this

18 Makhema (n 13 above) 16.

19 Cap 25:01.

20 For more on control orientation versus protection orientation, see Rutinwa (n 2 above) 53-57.

21 Rutinwa (n 2 above) 54.

22 This information is derived from discussions with UNHCR, Botswana. It is based on their experience and knowledge of the status determination process before an application is placed before the RAC.

interview, his details are taken and he is required at this stage to inform the interviewer of his reasons for fleeing his country. An interview may also be conducted by an intelligence officer for security purposes should this be deemed necessary.

After his application has been received, an asylum seeker will then be transferred to the Centre for Illegal Immigrants in Francistown.<sup>23</sup> He or she will reside there pending the determination of his or her status as a refugee. In the meantime, the asylum seeker's application is forwarded to the Refugee Advisory Committee (RAC), the body established under section 3 of the Act charged with status determination.

The asylum seeker is then summoned by the RAC for a status determination inquiry where he or she is required to inform the RAC of the circumstances surrounding potential flight and establish that he or she has a well-founded fear of persecution upon return to the country of nationality.<sup>24</sup> This inquiry is held in private.<sup>25</sup> The RAC has powers to summon to give evidence any individual who may shed light on the case before it.<sup>26</sup> The UNHCR participates as an *ad hoc* member of the RAC providing relevant country information and advice on how similar cases were treated in other countries. Upon completion of the inquiry, the RAC then prepares a report for the Minister.<sup>27</sup>

The Act vests the Minister with the power to recognise a person as a refugee or deny the individual such recognition.<sup>28</sup> In the event that the individual receives recognition as a refugee, he or she is then transferred to the Dukwi settlement<sup>29</sup> where they will be required to reside for as long as they remain refugees. In the event that an individual is denied recognition, she then becomes subject to the immigration law of Botswana. She is classified as an illegal immigrant and will be removed from Botswana if she no longer has a legal basis to remain under Botswana's immigration laws.<sup>30</sup> There is no requirement in the Refugee Act not to *refouler* an asylum seeker whose application for asylum has been rejected. However, in terms of the Act, an asylum seeker who is detained pending the outcome of her application may leave Botswana to enter some other country if she satisfies an immigration officer that it is lawful for her to enter such a country and that she possesses the means and in fact intends to enter

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23 This is a government-run centre for detention of undocumented immigrants who are usually deported under immigration laws.

24 Secs 4 & 5 of the Act.

25 Sec 5(2) of the Act.

26 Sec 5(1)(d) of the Act.

27 Sec 4(3) of the Act.

28 Sec 8(1)(a) of the Act.

29 A refugee camp located in the village of Dukwi, 154 kilometers north of Francistown, Botswana's second-largest city.

30 Sec 8(1)(b) as read with sec 8(2) of the Act.

that country. The asylum seeker choosing this route will not be granted a right of re-entry into Botswana.<sup>31</sup>

The Act has several obvious limitations. The Refugee Act contains no requirement that the report prepared by the RAC and the reasons for the decision taken by the Minister be provided to the asylum seeker. The Refugee Act contains no right of appeal against the decision of the Minister. The Minister does have the power in appropriate cases to direct the committee to re-open the inquiry or make a further report.<sup>32</sup> In practice, however, refugees who receive a negative decision write letters to the Minister to request a review of the negative first-instance decision. All remain detained at the Centre for Illegal Immigrants in Francistown pending final determination of their request for review of the Minister's decision. The Refugee Act makes no provision for group determination, providing no mechanism for status determination in cases of mass influx of refugees of a particular category.

The status determination procedure outlined above is basic and antiquated. While much is done in practice to augment the bare bones provided by the Act, much remains to be done to improve the RSD procedures.<sup>33</sup> Consideration of developments on the international stage in the area of status determination would be instructive when seeking to amend the Act to bring it in line with international human rights standards.

### 3 Significance of refugee status determination and importance of fair procedures

RSD is the procedure whereby the UNHCR and states decide whether an individual is entitled to protection under the 1951 Convention or under national refugee laws.<sup>34</sup>

Status determination is an essential and definitive stage in refugee law. Hathaway<sup>35</sup> points out that refugee rights are defined by virtue of status alone. He remarks that a refugee must be respected as such by host states unless and until a negative determination of the refugee's claim is rendered. This is because refugee status arises out of

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31 Sec 7 Refugee Act.

32 Sec 8(1)(c). This cannot amount to a true appeal as the same decision maker that took the first decision must then reconsider its own decision.

33 Eg, the UNHCR has an *ad hoc* presence on the RAC and provides much-needed country reposts to the RAC.

34 M Albert 'Governance and *prima facie* refugee status determination: Clarifying the boundaries of temporary protection, group determination and mass influx' (2010) 29 *Refugee Survey Quarterly* 61.

35 JC Hathaway *The rights of refugees under international law* (2005) 278.

her predicament rather from a formal determination of status. The UNHCR in its *Refugee handbook* reiterates this view, stating that<sup>36</sup>

[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him one. He does not become a refugee because of recognition, but is recognised because he is a refugee.

The 'criteria' alluded to in the handbook are found in the 1951 Convention's definition of a refugee. In terms of the 1951 Convention, the term 'refugee' is defined in article 1(2) as any person who<sup>37</sup>

owing to a well-founded fear of being persecuted by reason of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality or is unable, or owing to such fear is unwilling to avail himself of the protection of that country.

There is of course a wider definition found in the OAU Convention. In order to address the problem of refugees in the African context, and to cater for the deficiencies of the 1951 Convention definition, the OAU Convention defines a refugee to include persons fleeing their country of origin due to external aggression, occupation, foreign domination, or events seriously disturbing public order in either a part or the whole of the country of origin or nationality.<sup>38</sup>

Status determination is crucial as it is in some instances directly linked to accessing humanitarian assistance, residence or work permits, identity documentation or resettlement.<sup>39</sup> It is interesting to note, however, that the 1951 Convention does not contain RSD procedures. States determine their own RSD procedures, ideally guided by the imperative to respect human rights and UNHCR recommendations on RSD norms and procedures. States have concerns regarding procedures that are complicated, expensive and non-responsive to the specific refugee problem they face. States also have concerns about the misuse of the asylum system and unequal distribution of responsibilities.<sup>40</sup> These concerns inform the scheme of RSD procedures devised by states.

There are two types of RSD, individual and *prima facie*. Individual status determination involves a state or the UNHCR making a decision on whether to recognise an individual asylum seeker as a refugee in

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36 UNHCR *Handbook on procedure and criteria for determining refugee status under the 1951 and the 1967 Protocol Relating to the Status of Refugees* HCR/IP/4/Eng/Rev1 (1992) 28.

37 Art 1(A)(2).

38 Art 1(2).

39 A Edwards 'Refugee status determination in Africa' (2006) 14 *African Journal of International and Comparative Law* 204 206.

40 UNHCR Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures) 31 May 2001 EC/GC/01/12 <http://www.unhcr.org/refworld/docid/3b36f2fca.html> (accessed 9 October 2012) 2.

terms of the 1951 Convention after receiving their application and being satisfied that the individual meets the Convention's criteria discussed above. Albert notes that individual status determination is often costly and a common site of friction between states and the UNHCR and that, as a result, the UNHCR often becomes the primary source of RSD administration and expense.<sup>41</sup>

*Prima facie* RSD, which is also known as group or mass influx determination, occurs where a host state, at its own discretion, decides to afford refugee status in situations where its capacity to conduct individual status determination is surpassed. In such instances, the host state affords *prima facie* refugee status to all individuals who enter from a particular place over a given period. This decision is based on objective information known to the host state about conditions in that particular place over the given period. The host state, therefore, assumes that every claimant from that particular place can prove all the elements of the 1951 refugee definition.<sup>42</sup>

As previously stated, international refugee law does not prescribe any specific procedure to be followed by countries in the determination of refugee status. The means and processes of status determination are left to the discretion of each state. One may at the outset assume that any procedure established by a state that achieves the desired aim of distinguishing between genuine cases for recognition and other non-deserving cases would be sufficient. Indeed, state practice with regard to status determination differs depending on the nature of the refugee problem and the general efficiency of the particular state's courts and administrative systems. Further, the UNHCR has observed that the methods used to decide whether to recognise someone as a refugee vary around the world, reflecting a variety of legal traditions, local circumstances and national resources.<sup>43</sup>

In spite of this apparent *carte blanche* states hold to devise their own status determination procedures, each state is in fact subject to international standards. In ensuring the effective implementation of international refugee law, each state must have 'some form of procedure for the identification of refugees, and some measure of protection against laws of general application governing admission, residence and removal of refugees'.<sup>44</sup>

The standards to be upheld by states in RSD are derived from general principles of administrative and human rights law on the

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41 Albert (n 34 above) 63.

42 As above.

43 K Jastram & M Achiron *Refugee protection: A guide to international refugee law* <http://www.unhcr.org/3d4aba564.html> (accessed 7 July 2011).

44 G Goodwin-Gill & J McAdam *The refugee in international law* (2007) 528.

guarantee to a fair hearing as well as the UNHCR advice to governments on fair and efficient RSD procedures.<sup>45</sup>

## 4 Sources of procedural standards in refugee status determination

### 4.1 Human rights standards

International human rights instruments have provisions that apply to and protect refugees. The protection afforded by these instruments is premised on the principles of universality, equality and non-discrimination. The UN system has a plethora of legal instruments protecting human rights. Some of these instruments are non-binding and some are only binding for those states that ratify or accede to them. These instruments can be categorised into two groups. The first category consists of instruments that are regarded as constituting the international bill of human rights. These are (i) the Universal Declaration of Human Rights (1948) (Universal Declaration); (ii) the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR); (iii) the International Covenant on Civil and Political Rights (1966) (ICCPR); (iv) the Optional Protocol to the International Covenant on Civil and Political Rights; and (v) the Second Optional Protocol to the International Covenant on Civil and Political Rights.

The second category consists of instruments that are regarded as core international human rights instruments and their monitoring bodies.<sup>46</sup> Some of these treaties have optional protocols that address specific issues.<sup>47</sup>

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45 M Kagan 'Assessment of refugee status determination procedure at UNHCR's Cairo office 2001-2002' Forced Migration and Refugee Studies Working Paper 1 5-6 <http://www.aucegypt.edu/GAPP/cmrs/reports/Documents/RSDReport.pdf> (accessed 9 October 2012).

46 These include (i) the International Convention on the Elimination of All Forms of Racial Discrimination 1965; (ii) the International Covenant on Civil and Political Rights 1966; (iii) the International Covenant on Economic, Social and Cultural Rights 1966; (iv) the Convention on the Elimination of All Forms of Discrimination Against Women 1979; (v) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984; (vi) the Convention on the Rights of the Child 1989; and (vii) the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990.

47 These include (i) the Optional Protocol to the International Covenant on Civil and Political Rights 1966; (ii) the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty 1989; (iii) the Optional Protocol to the Convention on the Elimination of Discrimination Against Women 1999; (iv) the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000; (v) the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000; (vi) the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment 2002; and (vii) the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

Apart from UN instruments, there are also African Union (AU) instruments that deal with human rights issues at the regional level. These include (i) the African [Banjul] Charter on Human and Peoples' Rights (African Charter); (ii) the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights; (iii) the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; (iv) and the African Charter on the Rights and Welfare of the Child (African Children's Charter).

The focus of this article is on international human rights instruments relating to the right to a fair hearing which asylum seekers are entitled to during the status determination process. Under international human rights law, asylum seekers have due process, that is, access to fair and effective procedures for the examination of their claims. This means that the basic procedural safeguards enshrined in human rights instruments must always be respected. These procedures must include an appeal mechanism. The nexus between international human rights instruments and refugee law was succinctly captured by the UNHCR in the following words:<sup>48</sup>

While the 1951 Convention, which sets minimum standards for the treatment of persons who qualify for refugee status, predates the major international human rights mechanisms by over a decade, it is generally accepted that the provisions found in those human rights instruments complement the Convention and so offer greater protection to all persons of concern to UNHCR.

It should be noted that the 1951 Refugee Convention was preceded by the Universal Declaration. Article 10 of the Universal Declaration provides for the right to a fair hearing,<sup>49</sup> whilst article 14 provides for the right to seek asylum.

The International Covenant on Civil and Political Rights provides individuals, including asylum seekers and refugees, with extensive rights relating to a fair trial in the determination of a 'criminal charge' and of a person's 'rights and obligations in a suit at law' (article 14). The right to a fair hearing in a 'suit of law' may cover refugee status determination procedures. Similarly, article 7(1) of the African Charter provides for the right to a fair trial. The African Commission on Human and Peoples' Rights (African Commission) has determined that expelling refugees, either individually or *en masse*, without granting them the opportunity to have their cases heard, violates article 7(1) of

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48 UNHCR *Human rights and refugee protection self-study* Module 5 Vol I 15 December 2006, [http://www.hrea.org/erc/Library/display\\_doc.php?url=http%3A%2F%2F&www.unhcr.org%2F45a7acb72.html&external=N](http://www.hrea.org/erc/Library/display_doc.php?url=http%3A%2F%2F&www.unhcr.org%2F45a7acb72.html&external=N) (accessed 28 October 2012) 23.

49 For other international human rights instruments which enshrine the right to a fair hearing, see art 14 of ICCPR; arts 5 & 6 of CERD; arts 6 & 7 of Protocol 7 of the European Convention; arts 8 & 25 of the American Convention; arts 7 & 12(3) of the African Charter; Inter-American Court, Advisory Opinion OC-17/02 on juridical condition and human rights of the child, 28 August 2002.



the African Charter.<sup>50</sup> It may be argued that this provision is applicable also in the proceedings for the determination of refugee status. Thus, this discussion has demonstrated that human rights instruments are also applicable in refugee law generally, and in status determination procedures specifically.

## 4.2 UNHCR recommendations

The UNHCR has been instrumental in providing a benchmark for RSD by publishing general guidelines on minimum standards for RSD procedures through statements made by its Executive Committee.<sup>51</sup> The UNHCR issued its first guidelines on RSD in 1977. In 1980, a set of guidelines for Africa, called the OAU-UNHCR Guidelines For National Refugee Legislation and Commentary, was issued by the Executive Committee. The Fair and Expeditious Asylum Procedures followed in 1994, and were the benchmark until 2001, when the UNHCR issued a comprehensive guide entitled Fair and Efficient Asylum Procedures.

### 4.2.1 The 1977 UNHCR Executive Committee recommendations<sup>52</sup>

In 1977, the Executive Committee of the UNHCR noted that only a limited number of states had established procedures for the formal determination of refugee status under the 1951 Convention and its 1967 Protocol. The Committee encouraged states to adopt rules of status determination based on the seven basic procedural requirements that are outlined below.<sup>53</sup>

First, the Executive Committee recommends that the applicant must address himself to a competent official at the border. It recommends that such an official should have clear instructions on dealing with persons claiming protection relevant to international instruments. This official must act in accordance with the principle of *non-refoulement* and immediately refer the case to higher authorities. Second, the Executive Committee recommends that applicants should receive the necessary guidance as to the procedure to be followed. Third, it suggests that there should be a clearly-identified central

50 See *Organisation Mondiale Contre la Torture & Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996); and *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996), which are discussed in UNHCR (n 45 above).

51 The Executive Committee of the High Commissioner's programme was created on 1 January 1959 by Resolution 672 (XXV) of 1958, under para 4 of the 1950 Statute of the Office of the UNHCR under the auspices of the Economic and Social Council. It consists of 20 to 25 member states of the UN and serves as an advisory committee on refugees.

52 Conclusions Adopted by the Executive Committee in the International Protection of Refugees 1975-2009 (Conclusion 1-109). See Conclusion 8 9, <http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf> (accessed 9 October 2012).

53 28th session of the Executive Committee of the High Commissioner's Programme 1977 as cited in Goodwin-Gill & McAdam (n 44 above) 530.

authority that bears the responsibility of examining refugee requests and taking a decision in the first instance. Fourth, applicants should be given the necessary facilities, including the services of competent interpreters, for submitting their case to the authorities concerned and be informed and given the opportunity to contact a UNHCR representative. Fifth, applicants recognised as refugees should be informed accordingly and given documentation certifying refugee status. Sixth, applicants not recognised should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or a different authority, whether administrative or judicial and, lastly, applicants should be allowed to remain in the country pending decisions on the initial request unless it is deemed abusive to the protection process, and to remain in the country pending an appeal.

#### 4.2.2 1980 OAU-UNHCR Guidelines<sup>54</sup>

The OAU-UNHCR working group on national refugee legislation to provide for entry, recognition and status of refugees in order to define their rights and duties adopted the 1980 Guidelines for National Refugee Legislation.<sup>55</sup> The purpose of these Guidelines is to assist African governments to implement the recommendations of the 1979 Pan-African Arusha Conference on African Refugees, by formulating possible rules relating to the admission of asylum seekers and procedures for determining refugee status under the UN Refugee Convention, its 1967 Protocol and the 1969 OAU Convention on Refugees.<sup>56</sup>

The Guidelines recommend the use of the 1951 UN Refugee Convention definition of a refugee as well as the OAU Convention definition of a refugee.<sup>57</sup> The Guidelines also promote the ideal of legal representation for refugees, arguing that legal representation benefits the refugee as well as the standing refugee body of any country.<sup>58</sup> Legal representation gives the refugee an opportunity to present her case fully and the standing refugee body a chance to examine the applicant regarding the facts invoked in support of her claim.<sup>59</sup> The Guidelines also recommend that the standing refugee body takes into account the views of the UNHCR representative in the country where this would be helpful in arriving at a determination.<sup>60</sup> The Guidelines promote the right to an appeal coupled with the

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54 UNHCR 'Guidelines for national refugee legislation, with commentary' 9 December 1980, HCR/120/41/80/GE.81-0013 <http://www.unhcr.org/refworld/docid/3ae6b32610.html> (accessed 9 October 2012).

55 n 54 above, 1.

56 n 54 above, 7.

57 n 54 above, secs 1-2.

58 n 54 above, sec 3(2).

59 n 54 above, 10.

60 n 54 above, sec 3(2).

requirement for a separate standing refugee appeal body.<sup>61</sup> The Guidelines provide that the standing refugee body informs the asylum seeker of the rejection of her application and the grounds for such a rejection.<sup>62</sup> The Guidelines provide that each state should have specific rules prohibiting *refoulement* in their national legislation and recommend that individuals entering the country seeking asylum should not be classified as prohibited immigrants and detained, imprisoned or penalised.<sup>63</sup> The recommendations are that all African countries give asylum seekers documentation on their status and avail to them the right to remain pending determination of their applications for asylum and decisions on appeal.<sup>64</sup>

#### 4.2.3 2001 UNHCR recommendations<sup>65</sup>

The 2001 UNHCR Recommendations on Fair and Efficient Asylum Procedures are aimed at seeking to establish a common understanding of asylum procedures and the need to identify core procedural standards that are necessary to preserve the integrity of the asylum regime as fair and efficient.<sup>66</sup>

The Recommendations note:<sup>67</sup>

Asylum procedures are guided by or built around responsibilities derived from international and regional refugee instruments, notably the 1951 Convention relating to the Status of Refugees, its 1967 Protocol, international human rights law and humanitarian law, as well as relevant Executive Committee Conclusions. National judicial and administrative law standards also determine the form and content of these procedures.

Recognising that the 1951 Convention does not incorporate procedural guidelines for status determination, the UNHCR Recommendations state that fair and efficient procedures are essential to the full and inclusive application of the Convention.<sup>68</sup> The 2001 UNHCR Recommendations list a raft of recommendations on fair and efficient procedures, which include recommendations for the assessment of the admissibility of claims, recommendations regarding reception of asylum seekers at borders, procedures for dealing with manifestly unfounded claims, undocumented and uncooperative asylum seekers and asylum seekers from safe countries of origin and the appeals process. The document also makes recommendations for enhancing the protection of special women and unaccompanied children.

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61 n 54 above, sec 3(3).

62 n 54 above, sec 3(4).

63 n 54 above, secs 6(2) & 7(1).

64 n 54 above, sec 8.

65 UNHCR (n 40 above).

66 UNHCR (n 40 above) 2.

67 As above.

68 As above.

## 5 Case for full implementation of the 1951 Convention and 1969 OAU Convention in Botswana

As mentioned above, the Refugee Act in Botswana is antiquated. The Act should be reviewed in order to bring its provisions in line with Botswana's international obligations in terms of the OAU Convention. Botswana is a dualist state, whereby international law and municipal law are treated as separate spheres of law.<sup>69</sup> In order for international obligations undertaken by states by way of treaty to form part of national laws, dualism propounds that the international law rules would have to be transformed into national law rules through the use of enabling legislation.<sup>70</sup> Enabling legislation simply gives effect to the international rules on a municipal level, creating enforceable rights and duties. In order for international treaties that Botswana has ratified to form part of Botswana's national laws, domestication is required.<sup>71</sup> Tshosa characterises the ratification of a treaty in a dualist country as a 'purely executive act'.<sup>72</sup> The domestication of treaties gives the legislature the opportunity to endorse the treaty rules that will, from the point of domestication onwards, affect the rights and liberties of individuals in the jurisdiction.<sup>73</sup>

The status of undomesticated treaties in Botswana is that they have no force of law. In *Kenneth Good v The Attorney-General*,<sup>74</sup> Tebbutt JP stated:

Botswana ... is a signatory to a number of international treaties ... it is trite and well recognised that signing such a treaty does not give it the power of law in Botswana and its provisions do not form part of the domestic law of this country until they are passed into law by parliament ... those treaties do not confer enforceable rights on individuals within the state ...

It is recommended that Botswana review the Refugee Act and legislate on the following points: the definition of a refugee and *non-refoulement* with a view to abiding by its international obligations.

### 5.1 Definition of a refugee

The definition of a refugee forms the basis upon which a country grants refugee status to a person seeking asylum. If an individual meets the requirements of the definition, then they are entitled to recognition as refugees. Botswana, like most countries, has adopted the definition of a refugee found in article 1 of the 1951 Geneva

69 OB Tshosa 'The status and role of international law in the national law of Botswana' in CM Fombad (ed) *Essays on the law of Botswana* 230.

70 Tshosa (n 69 above) 234-235.

71 237.

72 234.

73 235.

74 Botswana Court of Appeal 2005 (2) BLR 337 (CA) 345-346.

Convention as read with its 1967 Protocol. In Botswana a person may be given recognition as a political refugee if they are a person who<sup>75</sup>

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group of political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

This definition does not take account of the 1969 OAU Convention, and in particular the broader definition given to a refugee in the African context. The OAU Convention adopts the 1951 Refugee Convention definition above. It goes further to provide under article 1(2) that the definition of a refugee

shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The UNHCR Guidelines recommend that a broader definition of refugees be adopted by states. This is in order to extend protection to all. It is submitted that a broader definition of a refugee is more suited to the realities of the African continent. As a state party to the OAU Convention, Botswana should give effect to it and amend its laws to include this definition. Many Zimbabwean nationals may have qualified for refugee status under the OAU Convention definition during the Zimbabwean political and economic crisis on the grounds that the events in Zimbabwe seriously disturbed public order in the country. Instead, many were forced to flee and ended up in Botswana as undocumented illegal immigrants enjoying almost no legal protection.

## 5.2 *Non-refoulement*

The principle of *non-refoulement* provides that an asylum seeker or refugee should be allowed to enter and remain in the territory and should not be expelled back to a country where she is likely to face persecution or death. This principle is expressly provided for in the 1951 UN Convention and the 1969 OAU Convention, as stated above. However, this principle is not adequately covered by the Act.

Section 6 of the Act restricts the removal from Botswana of an immigrant who may be a refugee pending the determination of her status. The right of refugees to enter and remain in Botswana is not expressly stated or guaranteed. The protection from removal only comes at a later stage when the case is being determined or where refugee status has already been granted.

Given that *non-refoulement* is a principle of customary international law, Botswana is duty-bound to respect it. The OAU-UNHCR Recommendations promote the idea that states should have a specific

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75 See Schedule to Refugee Act.

clause encompassing the principle of *non-refoulement*. There is a need for legislative reform to enshrine the principle of *non-refoulement* into Botswana's legislation.

It is noted that the Refugee Act has no express requirement that immigration officers at a border post inform an asylum seeker of the procedures to be followed by her in order that the relevant status determination authority in Botswana hear the case. Since the right to such information is not guaranteed, it is entirely possible that the principle of *non-refoulement* is at risk of being breached repeatedly by officers who, through ignorance or a lack of diligence, fail to refer deserving cases to the designated authority for determination.

## 6 Achieving effective refugee status determination standards in Botswana: The right to a fair hearing

Status determination procedures in Botswana lag behind the UNHCR Recommendations for a robust RSD process. This is not to say that Botswana does not recognise the right to a fair hearing and the guarantees of due process that accompany this right. Botswana's Court of Appeal has pronounced on the importance of safeguarding this right on many occasions. In *Phala v Director, Public Service Management and Another*,<sup>76</sup> the Court of Appeal noted the importance of a fair hearing as follows:

It is instructive to note, as courts have so often held, that the rules of natural justice have their origins in ancient times. As was said in *M & J Morgan Investments (Pty) Ltd v Pinetown Municipality* 1997 4 SA 427 (SCA), these rules, of which *audi alteram partem* is one, 'facilitate accurate and informed decision making, secondly they ensure that decisions are made in the public interest; and thirdly, they cater for certain important process values ...' In *Botswana Housing Corporation v Rabana* [1997] BLR 106 CA at pp 121-122, this Court said the following *per* A Tebbutt JA (as he then was): 'What is required is that in reaching its decision the employer must apply its mind honestly to the issue and that its procedures must be fair. Fairness in turn requires that the employee should be given an opportunity of meeting the case against him.'

Without case preparation facilities, rules of procedure, written decisions and the right to appeal and the right to legal representation, the asylum seeker finds the decks stacked against her. She is unable to present her case effectively. It is submitted that these facilities be afforded to asylum seekers. This would be in the interests of the asylum seeker who would have an opportunity to present her circumstances in the best manner as well as that of the RAC, which would be able to make its decision with all relevant information at hand.

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76 2007 (1) BLR 499 (CA) 504-505.

### 6.1 Case preparation facilities

The 1977 UNHCR Recommendations propose that asylum seekers be given the necessary facilities to prepare their case. This includes the provision of services of competent interpreters for submitting their case to the authorities concerned.<sup>77</sup>

The Refugee Act is silent on the provision of case preparation facilities to an individual claiming asylum. Indeed, the right to a fair hearing encompasses within it the right to information on the procedure for lodging and application. This information ought to be provided in a language the refugee understands.

The absence in the Act of a requirement for assistance in case preparation and for interpretation facilities where necessary is lamentable. An individual seeking refugee status may be illiterate or indigent and so unable to secure competent assistance in preparing an application. It is proposed that the law be amended to provide, as a protection to all asylum seekers, the right to assistance in case preparation. This amendment should include access to interpretation services.

### 6.2 Rules of procedure

The UNHCR Executive Committee's Recommendations propose that applicants for recognition as refugees should receive the necessary guidance as to the procedure to be followed.<sup>78</sup>

In contrast, section 4 of the Refugee Act provides that proceedings of the status determination be conducted 'in such a manner as the RAC may determine'. Nowhere in the Act is there a requirement that the rules of procedure be made available to the applicant. The UNHCR in Botswana reports that the current practice in Botswana is that all applicants for asylum are accorded an initial interview at the UNHCR or by a police or immigration official during which a statement is taken and forwarded for attention to the Refugee Advisory Council. It is at this stage that individuals are advised of the procedure to make their application and presumably be given a copy of the UNHCR/Ditshwanelo *Handbook*.

It is submitted that the absence of a requirement to avail and explain the procedure to be followed and the rights and obligations flowing therefrom to the individual claiming protection is a serious deficiency. The effect of this gap in the law is that a person seeking protection has no control over his case and is not certain of the sort of case he should mount, and the sort of evidence he should produce in order to make a sound case for the granting of refugee status. He

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77 Para iv.

78 Para ii.

cannot make informed decisions regarding the manner to best advance his cause.

In the procedure as it stands, there is certainly a risk that the individual's fundamental human right to a fair hearing, where his rights and obligations are at stake as guaranteed by the Constitution, may be compromised.<sup>79</sup> A hearing premised on a lack of information in procedure is unfair as it stacks the cards heavily against the applicant and creates an unequal playing field, increasing the likelihood of failure in the application for asylum.

It is therefore recommended that rules of procedure should not be available to the Refugee Advisory Council alone. The rules of procedure should be legislated and available to all applicants at the outset to enable them to adequately prepare their applications.

### 6.3 Reasons for the decision

Whilst the claimant has the right to make representations to the Refugee Advisory Council,<sup>80</sup> there is no requirement that the Council avail its report to the applicant. In practice, the UNHCR confirms that the report is not given to the applicant but is given to the Minister alone.<sup>81</sup> Reasons for the Minister's decision to recognise the applicant as a refugee or to reject his application are also not given to the applicant.

All UNHCR Recommendations on status determination provide that the asylum seeker be availed with written reasons for a negative decision. It is submitted that this reflects international law. The requirement to provide reasons for a decision is a fundamental part of due process. It ensures that the inquiry process is meaningful and assures the applicant that his representations have been given due consideration and a decision was taken on the factual and legal merits of his application. An added benefit of written decisions would be that they allow the country to develop jurisprudence in this area of the law. The absence of this duty on the part of the Refugee Advisory Council should be remedied to bring it in line with the UNHCR recommendations and human rights standards of a fair hearing.

### 6.4 Right to an appeal

The UNHCR Executive Committee recommendations require that applicants not recognised as refugees 'be given a reasonable time to appeal for a formal reconsideration of the decision either to the same or a different authority whether administrative or judicial, according to the prevailing system'.

The Act contains no right of appeal against a negative decision. The closest thing to an appeal is a reconsideration, as captured by section

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79 Art 10 Universal Declaration.

80 Sec 5(2).

81 Sec 4(3).



8(c) of the Act, which provides that upon receiving the report, the Minister may order the Refugee Advisory Council to reopen the inquiry or to make a further report on the matter.

This provision cannot be termed a true appeal for the following reasons: First, the Minister is not obliged to refer every negative decision he makes for reconsideration by the Council. It is the Minister's prerogative to order or not to order a reopening of the case and there are no guidelines as to what circumstances should prompt a reopening of the case. Second, the applicant has no role to play in requesting a reconsideration of her case. Third, a true appeal is considered by a different body from that making the initial determination.

It is recommended that the Act be amended to allow of a right to appeal to a separate body. This right should be exercised at the instance of the applicant. This will give the process fairness, transparency and objectivity.

### **6.5 Right to legal representation**

The Botswana Refugee Act is silent on the right to legal representation. Yet, the right to an attorney is a fundamental element of a fair trial and is recommended by the UNHCR. The presence of an attorney helps not only the asylum seeker to present his case in a dispassionate and considered manner, but also assists the decision-making body to better understand the asylum seeker's case.

A sound case may be made for the provision of some legal assistance to applicants, for example in the event of a negative decision. This will further strengthen the fairness of status determination procedures in Botswana.

## **7 Proposals for reform of the Refugee Advisory Council**

### **7.1 Composition of the Refugee Advisory Council**

Due process denotes that an asylum seeker receives notice of his hearing, an opportunity to be heard and the right to defend her rights before a court or orderly proceeding; in short, that she receives a fair hearing. This right is also enshrined in Botswana's Constitution.<sup>82</sup> A fair hearing must above all be overseen by an adjudicator who has the competent knowledge and experience necessary to make sound decisions.

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<sup>82</sup> See art 10(9): 'Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established or recognised by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.'

The composition of the Refugee Advisory Council created under section 4 of the Act merits comment. The Council consists of the District Commissioner, Francistown, the Botswana Police Divisional Commander (North), the Settlement Commander Dukwi Refugee Settlement, The Officer Commanding, Special Branch (Northern Division), and the Regional Immigration officer (North).

When commenting on the composition of the RAC, Tshosa notes that the Act has no requirement that members have knowledge or experience in international refugee law.<sup>83</sup> He cites this as a serious drawback. Investigations with the UNHCR have revealed that training is offered on an ongoing basis to the members of the RAC in principles of international refugee law by UNHCR officials.

It is submitted that the Act ought to be amended to require that officers appointed to the RAC have a minimum standard of legal training and some experience or knowledge in international refugee law. This will ensure that Botswana's convention obligations are respected and adhered to.

The Refugee Advisory Council draws its membership from senior officers in the Police Service, District Administration and Immigration Departments. By virtue of their high office in the various departments, these individuals already have numerous other duties to fulfil and the Council is therefore not their core responsibility. The UNHCR reports that for these reasons, regular meetings are difficult to arrange. This leads to delays in status determination, which in turn lengthen the period of detention of refugees. A case may be made for the appointment of commissioners who can work solely, independently and speedily on status determination matters in order to expedite the process.

## 7.2 Decision-making power of the Refugee Advisory Council

The 1977 UNHCR Executive Committee Recommendations and the 1980 OAU-UNHCR Recommendations require that states establish a clearly-identified central authority which bears the responsibility of examining refugee requests and taking a decision in the first instance.<sup>84</sup>

It is submitted that the Refugee Advisory Council is deficient in this respect. The law provides (under section 4(3)):<sup>85</sup>

After holding an inquiry in terms of this section, the RAC shall report thereon to the Minister and further that when the Minister receives the report of an inquiry held under section 4 he may, if he is of the opinion that the person who has been subject to the enquiry is a political refugee, declare that he recognises such a person as a political refugee. If he does not hold the opinion that the person is a political refugee or he considers

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83 Tshosa (n 7 above) 61-62.

84 Para iii, 1977 recommendations and sec 3(3) 1980 OAU-UNHCR recommendations.

85 See secs 8(1)(a) & (b).

that there is no or insufficient evidence to treat him as a political refugee, he may declare that he does not recognise the person as a political refugee.

In terms of the Act, the Refugee Advisory Council prepares a report for the Minister. The Minister then makes a determination whether or not to recognise the individual as a refugee. There are several concerns that emerge from this procedure. First, it is submitted that this provision effectively emasculates the Refugee Advisory Council, transferring its decision-making power to the Minister. Where the Minister upholds the findings of the Refugee Advisory Council, the process cannot be faulted. However, where the Minister disagrees with the determination of the RAC and withholds recognition from the refugee, the process is immediately problematic. This is because a negative decision would have been made without hearing any evidence or representation from the affected party by the Minister tasked with making a decision. This may be criticised as being arbitrary. It is recommended that the body seized with adjudicating on the merits of the application take a decision on the facts and on the law.

Experience has shown that there are delays inherent in this two-tier system. The reports from the Refugee Advisory Council have to be considered and acted upon by the Minister who has other duties to attend to. The UNHCR reports that this has led to some delays in reaching a final decision. Perhaps the time has come to consider the decentralisation of the status determination process in the interests of an expeditious status determination process.

In instances where the Minister's decision runs contrary to the RAC's recommendations, the inquiry process is unnecessary and lacks in predictability. In order for this process to inspire the confidence of refugees and the international community alike, it should be streamlined to give the Council decision-making powers with a right to an appeal vesting in the Minister or another body.

### **7.3 Increased capacity of the Refugee Advisory Council**

As the law stands today, there is only one five-man committee which sits at Francistown that is tasked with the determination of refugee status.<sup>86</sup> In 2005, the UNHCR reports that Botswana had just over 3 000 refugees, mainly from Namibia, Angola, Somalia, DRC and Burundi. The UNHCR reports that in 2008, there was an influx of applications from Zimbabwe in the region of about 850, which was a massive increase from figures seen previously. Large numbers of applications have also been received from Somalia and the Great Lakes region. The number of refugees received has most certainly increased and it seems unlikely that a single commission will be able to meaningfully address these numbers. A larger Refugee Advisory

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<sup>86</sup> See Refugees (Recognition and Control Order) Statutory Instrument 92 1993.

Council, sitting in more than one committee, may be advisable in order to make status determination more efficient.

#### 7.4 Role of the UNHCR

The UNHCR encourages the participation of its officials in status determination. The rationale for this is the need to allow the UNHCR to monitor closely matters of status, the entry and removal of refugees, and participation in the identification of those who should benefit from refugee status<sup>87</sup> and the provision of up-to-date information regarding the general situation in an applicant's country of origin.<sup>88</sup>

Asylum seekers should not be denied the opportunity to communicate with the UNHCR.<sup>89</sup> The UNHCR should also be afforded the right to present its view in the exercise of its supervisory responsibility to any competent authority regarding individual applications for asylum at any stage of the procedure under article 35 of the 1951 Convention.<sup>90</sup>

Although the Act is silent on this, the practice on the ground is that applicants for refugee status received by the UNHCR are provided with an initial interview with a protection officer. The UNHCR also has *ad hoc* representation in the Refugee Advisory Council. The role of the UNHCR in the Refugee Advisory Council is to sit as an *ex officio* member and advise on refugee law and provide up-to-date information in so far as is possible on an applicant's country of origin. The UNHCR reports that this partnership with the Refugee Advisory Council works remarkably well. It is submitted that the Act should be revised to formalise participation by the UNHCR in the status determination procedure.

### 8 Matters concerning the reception and assistance of asylum seekers

#### 8.1 Group determination

The Act is silent on group determination. There are two ways of determining the status of refugees, namely, the individual determination procedure and the group determination procedure. The former is suitable where refugees trickle into the host state at a low rate and have different bases for seeking protection. However, this method is not suitable where there is a mass influx of refugees from one state to another. For example, where a group of asylum seekers seek protection from a host state at the same time, it would be time

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87 Goodwin-Gill & McAdam (n 44 above) 532.

88 Art 8(2)(b) 1951 Convention.

89 Art 10(1)(c) 1951 Convention.

90 Art 21(1)(c) 1951 Convention.

and resource consuming to consider their cases individually instead of dealing with the group as a whole.

Part Two of the Act, which deals with the status determination procedure, is limited to an individual status determination process. There is a need to amend the Act to include group determination in the Act in order to expedite the determination of group asylum claims.

## 8.2 First country of asylum policy

This policy provides that genuine asylum seekers should seek refugee status in the first safe country that they reach upon fleeing their country.<sup>91</sup> The rationale of this policy is to prevent the secondary irregular movement of refugees and asylum seekers.<sup>92</sup> The first country of asylum policy is currently being applied in Botswana although it is not specifically provided for in the Act.

The use of the first country of asylum policy militates against abusive claims. However, applying this principle presents some difficulties. There are instances where protection in the first country of asylum is not available to the individual concerned. There may be instances where protection may be available but is not effective.<sup>93</sup> The first country of asylum policy often ignores the fact that refugees have hopes and aspirations for a better life that may not be realisable in the first country of safety.

There is a need for the Act to contain specific rules regarding the admissibility of applications from individuals who have passed through third countries or who already have protection from another country. This includes procedures for undocumented and unco-operative asylum seekers as well as the imposition of time limits for making an application for asylum.

## 8.3 Competent and trained border officials

The UNHCR Recommendations of 1977 provide that the refugee must address himself to a competent official at the border who must have clear instructions on dealing with cases that might be within the purview of the relevant international instruments. The recommendations suggest that the official should be required to act in accordance with the principle of *non-refoulement* and immediately refer the case to higher authorities.<sup>94</sup>

The aforementioned standards require that border officials receiving applicants have some training in international refugee law. This training would enable them to effectively identify cases for referral to the refugee determination authority. Training would also ensure that

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91 UNHCR (n 40 above) 3.

92 As above.

93 As above.

94 Para (i) UNHCR Recommendations 1977.

*refoulement* is not inadvertently occurring at the border post due to a lack of knowledge of the relevant international law instruments.

Botswana's immigration officers may lack competence in international refugee law. The Botswana Auditor-General lamented to journalists that immigration officers were inexperienced with regard to their academic background and had only one to two weeks' training. He noted, for instance, that only 6 per cent of Botswana's junior immigration officers received relevant training to assist them with document assessment.<sup>95</sup>

The UNHCR in Botswana reports that it has mounted one-day training workshops on refugee law for mid-level government officials from the Immigration Department, the Police Service and Security Intelligence Services. It has further prepared a guide for refugees and asylum seekers in association with Ditshwanelo<sup>96</sup> that is available to all asylum seekers to inform them of current asylum procedures in Botswana. There is no 'quick-fix' solution to the problem of lack of training of immigration officers. It is recommended that a mandatory course in the basic principles of refugee law should be available to officers who operate border posts at regular intervals. This would go a long way to ensure that applicants for refugee status are identified quickly and assisted properly.

#### **8.4 Detention of asylum seekers**

As noted above, Botswana entered a reservation to the 1951 Convention on both the freedom of movement of refugees and their right to work. In practice, asylum seekers are detained at the Centre for Illegal Immigrants pending the determination of their status. Asylum seekers and illegal immigrants share the same facility. The lack of a separate facility for asylum seekers is not desirable. Some asylum seekers, traumatised by the experience of flight, need specialised facilities such as counselling and psychological support. Such facilities are not available in the detention centre. It is argued that asylum seekers should be accommodated separately from illegal immigrants, and that special regard be given to their unique position.

In the event that refugee status is granted, refugees are removed from the Centre for Illegal Immigrants to the Dukwi refugee camp. This camp is in a rural and remote setting and the economic activity of refugees is therefore severely curtailed. This increases the amount the state spends on these refugees who could have engaged in

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95 Report by G Toka entitled 'Immigration officers' poor training, low morale undermine national security' *Sunday Standard* 20 April 2009: 'The Auditor-General, in his Performance Audit Report 9, 2008 on Management of Illegal Immigrants by the Department of Immigration, has expressed concern at this state of affairs. DIC is one of the government departments which, at most, work with minimum experienced officers in terms of academic background, and who, upon entry, were offered 1-2 weeks on the job training, which would anyhow be considered inadequate.'

96 A human rights NGO watchdog in Botswana.

meaningful economic activity. Thus, it is recommended that Botswana should reconsider its reservations on the freedom of movement and the right to work clauses of the 1951 Convention to allow refugees to enjoy these rights.

## 9 Refugee status determination in Botswana: Looking forward

The aim of this article is to assess the effectiveness of RSD in Botswana, measured against human rights standards of a fair hearing and the UNHCR Recommendations on Status Determination. This assessment is important to achieve a fair and effective procedure in Botswana. This is an opportunity to assess how well Botswana has given effect to its international law obligations under the 1951 Convention, its 1967 Protocol, and the 1969 OAU Convention.

The assessment revealed that Botswana's Refugee Act is a relic of the past. It is control-oriented and lacks many protections considered necessary by the UNHCR in the status determination process. From the above discussion it is apparent that the procedure for the determination of refugee status in Botswana falls short of the UNHCR Recommendations. Thus, there is a need for reform.

Specific recommendations that may be considered in order to implement convention obligations are the expansion of the definition of a refugee to include the broader definition found in the OAU Convention, a provision prohibiting *refoulement*. In order to improve the status determination process, there is a need to avail case preparation facilities, to provide legal representation, require the provision of a written decision by the RAC whether the asylum seeker's application is rejected, and provide a right to appeal. With respect to the RAC, it is recommended that the government reconsiders its structure and creates an independent central authority capable of hearing refugee applications and taking final decisions at the initial stage. Other recommendations include the provision of group determinations, regular training of border officials in refugee law and the provision of separate holding arrangements for asylum seekers pending the determination of their applications. The government is also encouraged to consider granting freedom of movement to refugees in Botswana and to do away with the encampment policy.

The implementation of the above-mentioned recommendations will go a long way to ensure that Botswana's status determination procedure supports the basic rights of asylum seekers and refugees.

# Human rights developments in African sub-regional economic communities during 2012

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## Summary

*In 2012, the abolition of individual access to the Southern Africa Development Community Tribunal all but put a final nail to the budding human rights regime that was growing in the region. However, the two other main sub-regional human rights regimes in Africa continued to grow from strength to strength: in East Africa under the East African Community framework and in West Africa under the Economic Community of West African States framework. With the increasing involvement of these sub-regional regimes in the field of human rights, the African Charter is being applied in an unprecedented way in a manner that penetrates the shield of national sovereignty and in areas where continental human rights structures may have taken time to reach. Taking the view that this trend calls for stakeholders to pay more attention to the work of these sub-regional human rights regimes in order to ensure quality control and maintain legitimacy of the overall African human rights system, this contribution undertakes a descriptive analysis of the most significant judicial and non-judicial human rights developments that occurred in these sub-regions during 2012.*

## 1 Introduction

The idea that human rights can be, and actually are, promoted and protected within the framework of regional economic integration in Africa is no longer disputed. Even the most ardent opponents of the idea would have accepted by now that there is no going back in this regard. In fact, human rights realisation in sub-regional frameworks

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on the continent has become so entrenched that, in addition to its recognition in regional human rights strategy-development activities, it is beginning to attract serious scholarly interest within and outside the continent.<sup>1</sup> Civil society has also begun to cherish the nascent but important contributions that sub-regional regimes make to the protection of human rights in Africa. This perhaps explains the reaction to the suspension and eventual abolition of the human rights work of the Southern Africa Development Community (SADC) Tribunal. Very significantly, during 2012, lawyers and civil society in Southern Africa brought two important actions before the continental human rights supervisory bodies to challenge the decisions taken by SADC leaders regarding the SADC Tribunal.<sup>2</sup> Space constraints prevent any detailed analysis of those developments in this work. However, despite the setback experienced in the Southern Africa region, human rights activities have not slowed down in either the East African Community (EAC) framework or in the Economic Community of West African States (ECOWAS). Instead, in both of these regional economic communities (RECs), mechanisms involved in the promotion and protection of human rights are becoming stronger and more pervasive.

As the human rights activities of sub-regional bodies become more entrenched, there is a growing need for stakeholders to pay even more attention to those activities, at the very least to ensure some measure of quality control. This is because, even as continental human rights mechanisms battle to meet the challenge of translating the rhetoric of the African Charter on Human and Peoples' Rights (African Charter) into reality for the greatest number of people on the continent,<sup>3</sup> sub-regional mechanisms have moved into previously-uncharted areas applying the Charter as their normative framework. While this trend is positive to the extent that it complements the work of continental mechanisms for the benefit of African peoples, the need for vigilance remains as there is an attendant risk of reduced legitimacy of the African Charter arising, among other things, from conflicting interpretations of Charter provisions. Such watch-dog roles can only be played effectively when there is an awareness of the human rights activities in the RECs.

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1 Across Africa, there is an increase of doctoral investigation into different aspects of the human rights work of RECs. There is also an increase in scholarly work in this area. See eg K Alter *et al* 'A new international human rights court for West Africa: The ECOWAS Community Court of Justice' (forthcoming, 2014).

2 See 'African Commission prepared to consider application for reinstatement of SADC Tribunal' <http://www.mikecampbellfoundation.com/page/african-commission-to-consider-sadc-tribunal-case> (accessed 28 April 2013). Also see 'African human rights court asked to rule on legality of SADC tribunal's suspension' <http://www.southernafricalitigationcentre.org/2012/11/26/press-release-african-human-rights-court-asked-to-rule-on-legality-of-sadc-tribunals-suspension/> (accessed 6 May 2013).

3 See M Killander & A Abebe 'Human rights developments in the African Union during 2010 and 2011' (2012) 12 *African Human Rights Law Journal* 200.

Against the background outlined above this contribution undertakes a mostly descriptive analysis of the major human rights events that took place within the most human rights-active sub-regional bodies in Africa in 2012. Although limited, non-judicial human rights activities continue in the SADC framework. Due to space constraints, the article focuses on judicial and non-judicial human rights activities in the EAC and ECOWAS. The article highlights the huge contributions that sub-regional human rights regimes are making to the development of an improved human rights culture in Africa.

## **2 Human rights developments in the East African Community framework**

### **2.1 Non-judicial human rights development**

As has been the case over the past few years, a small but significant number of non-judicial human rights developments occurred in the framework of the EAC during 2012. These were mostly in the areas of standard setting, thematic meetings and activities aimed at strengthening democratic governance in the East African region. Considering that limited legislative activities occur in this issue area at this level, standard setting is used here in a wide sense to include resolutions and plans of action.

#### **2.1.1 Setting human rights standards**

At the very beginning of 2012, the EAC recorded standard-setting activity with the adoption of the Second Plan of Action on the Promotion and Protection of Human Rights in East Africa 2012-2015.<sup>4</sup> As set out in the Plan itself, its main objective is to 'enhance and complement partner states' laws, policies, strategies and programmes in inculcating the culture of respect for human rights in line with the Community's fundamental principles'.<sup>5</sup> The adoption of a Plan of Action dedicated to human rights is a strong statement that the EAC takes serious the fundamental principle of promoting and protecting human rights as set out in articles 6 and 7 of its Treaty. Effectively, the Plan provides a platform of legality and legitimacy for human rights realisation within the EAC framework.

Another significant activity was the adoption of the EAC Strategic Plan on Gender, Youth, Children, Persons with Disabilities, Social Protection and Community Development (2012-2016) in March

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4 Final Plan on Action available at the EAC Secretariat (on file with author).

5 Para 3 EAC Plan of Action.

2012.<sup>6</sup> Background documents on this Strategic Plan set treaty-based fundamental principles as well as article 120 of the EAC Treaty as the supporting provisions for its adoption.<sup>7</sup> While lumping different vulnerable groups together in this document is likely to raise the challenges of dispersed attention, the adoption of the Plan takes protection beyond the level of mere rhetoric, as is generally the case at the regional level.

The East African Legislative Assembly (EALA) – the legislative arm of the EAC – was also actively involved in setting human rights standards in 2012. In this regard, the EALA adopted and passed the EAC HIV and AIDS Prevention and Management Bill at its 5th legislative session.<sup>8</sup> The Bill is seen as a preliminary step towards a model HIV and AIDS law that would be applicable in the EAC partner states. Although it requires the assent of EAC heads of state in order to become binding law, the passing of the Bill demonstrates a sense of awareness of the human rights issues that people living with HIV and AIDS face in Africa. Commentaries on the Bill indicate that, although it prioritises the prevention of HIV, the Bill takes a ‘rights-based approach in content and spirit’ in relation to treatment, care and support.

Another very important bill adopted and passed by the EALA is the EAC Human Rights Bill 2012. The EAC Human Rights Bill provides for the establishment of a Human Rights Commission for the region. The Bill, which also requires the assent of the heads of state, is supposed to ‘give effect to the provisions of the Treaty for EAC on human and peoples’ rights’.<sup>9</sup> It becomes an Act upon assent and supplements the EAC Treaty. This is another indication of the seriousness that the EAC attaches to the fundamental principles which urge partner states and the community to promote and protect human rights. Accordingly, the Bill is meant to consolidate ‘various principles on human and peoples’ rights found in the Charter on Human Rights and various conventions and agreements, including the African Charter on Human and Peoples’ Rights, as well as the UN Charter on Human and Peoples’ Rights’.

In the realm of international criminal law, the EALA also engaged in activities that have consequences for human rights protection in the

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6 R Mtui ‘EAC Sectoral Council meeting on gender, women, children, persons with disabilities and developing community’ <http://reginaldandersonmtui.blogspot.com/2012/03/eac-sectoral-council-meeting-on-gender.html> (accessed 30 April 2013).

7 Art120 of the EAC Treaty obliges partner states to closely co-operate in the field of social welfare with respect to the development and adoption of a common approach towards the disadvantaged and marginalised groups, including children, the youth, the elderly and persons with disabilities.

8 <http://www.eannaso.org/index.php/component/k2/item/15-eac-bill-passedbyeala> (accessed 30 April 2013).

9 ‘EALA passes bill on human rights’ [http://www.eac.int/index.php?option=com\\_content&view=article&id=988:eala-passes-bill-on-human-rights&catid=146:press-releases&Itemid=194](http://www.eac.int/index.php?option=com_content&view=article&id=988:eala-passes-bill-on-human-rights&catid=146:press-releases&Itemid=194) (accessed 30 April 2013).

region. First, the Assembly adopted a resolution in which it urged the EAC Council of Ministers to 'implore the International Criminal Court to transfer the cases of the four accused Kenyans facing trial at The Hague to the East African Court of Justice (EACJ)'.<sup>10</sup> It then urged the Council of Ministers to take appropriate action to amend article 27 of the EAC Treaty relating to the East African Court of Justice (EACJ), with a view to expanding the jurisdiction of that Court with retrospective effect to cover international crimes. As would be discussed later in this contribution, the process for the expansion of the EACJ's jurisdiction in this regard has already commenced. It also needs to be noted that EAC action in this area runs parallel to ongoing moves to create a criminal chamber at the African Court. It remains to be seen how the two relate.

### 2.1.2 Thematic meetings

Another type of non-judicial human rights activity that took place in the EAC framework during 2012 was the involvement of the EAC in meetings and programmes on different thematic issues in the field of human rights. The EAC's involvement has generally been either as host, participant or facilitator in cases where it provides a platform for other actors to meet. This remained the case in 2012. In January 2012, the Community provided a platform for the EAC Forum of Human Rights Commissions to meet to examine the progress that has been made in the field of human rights.<sup>11</sup> The Forum created an opportunity for the EAC to reiterate its conviction that human rights realisation is 'key for social, political and economic development of the East African region'. Although the African Commission on Human and Peoples' Rights (African Commission) collaborates with national human rights commissions, sub-regional meetings such as the one hosted by the EAC creates space for meaningful engagement with a focus on region-specific trends and issues. Thus, proximity is positively applied to encourage peer learning.

Building on the EAC's growing focus on vulnerable groups, in 2012 an inaugural East African Community Child Rights Conference with the theme 'Addressing the issues that negatively impact on the realisation of child rights in the East African community' was held in Burundi.<sup>12</sup> A significant feature of the conference was the participation of children, creating an opportunity for their interaction with stakeholders. Considering the challenges that continue to

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10 'EALA session ends in Nairobi' <http://www.eala.org/media-centre/press-releases/347-eala-sessions-end-in-nairobi-.html> (accessed 30 April 2013).

11 'EAC partner states urged to do more to uphold people's rights' [http://www.eac.int/index.php?option=com\\_content&view=article&id=892:eac-partner-states-urged-to-do-more&catid=146:press-releases&Itemid=194](http://www.eac.int/index.php?option=com_content&view=article&id=892:eac-partner-states-urged-to-do-more&catid=146:press-releases&Itemid=194) (accessed 30 April 2013).

12 'Inaugural EAC Child Rights Conference concludes in Bujumbura' [http://www.eac.int/index.php?option=com\\_content&view=article&id=1093:inaugural-eac-child-rights-conference-concludes-in-bujumbura&catid=146:press-releases&Itemid=194](http://www.eac.int/index.php?option=com_content&view=article&id=1093:inaugural-eac-child-rights-conference-concludes-in-bujumbura&catid=146:press-releases&Itemid=194) (accessed 30 April 2013).

beleaguer efforts at actualising the promise of the African Charter on the Rights and Welfare of the Child (African Children's Charter), sub-regional initiatives are commendable complements, especially when they create opportunities for children to be represented and heard. The Conference brought children's rights issues to the fore and ended with the adoption of the Bujumbura Declaration and Recommendations on Child Rights and Wellbeing in the EAC.

During 2012, sexual health rights also received attention in the EAC framework as the EAC sent a high-profile delegation to an African conference on the subject. Hosted by Namibia with the theme 'Sexual health and rights in Africa: Where are we?', the conference is an initiative originally conceived on the platform of the African Union (AU).<sup>13</sup> The conference aimed at addressing measures to eliminate all forms of discrimination and to promote the sexual health and reproductive rights of African citizens. Thus, issues such as maternal and child health, teenage pregnancies, gender-based violence, HIV and AIDS prevention, policy, legislation and rights, sexual and reproductive health for marginalised groups and social mobilisation were top on the agenda. While this was not an exclusive EAC initiative, its significance lies in the demonstration that RECs can partner with continental structures for the benefit of human rights. In this way, not only are scarce resources saved by the avoidance of duplication of efforts, but conflicting approaches to such sensitive issues are also prevented.

A final activity worthy of note under this heading was the November 2012 meeting of experts on the EAC Principles for Election Observation and Evaluation, hosted by the EAC in Nairobi, Kenya.<sup>14</sup> The meeting was convened to review the EAC's draft principles on the subject before submission to the EAC Council of Ministers. The formulation of these principles will contribute to the development of higher standards in election observation and promote the right to democratic governance in the region.

### 2.1.3 Strengthening democratic governance

The most significant activity under this heading is also a standard-setting activity. It involved the consideration of an EAC Elections Bill 2012, which seeks to establish the EAC Elections Board to be responsible for setting and harmonising electoral standards in the

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13 'EAC at 5th Africa Conference on Sexual Health and Rights in Windhoek' [http://www.eac.int/index.php?option=com\\_content&view=article&id=1113:eac-at-5th-africa-conference-on-sexual-health-and-rights-in-windhoek&catid=146:press-releases&Itemid=194](http://www.eac.int/index.php?option=com_content&view=article&id=1113:eac-at-5th-africa-conference-on-sexual-health-and-rights-in-windhoek&catid=146:press-releases&Itemid=194) (accessed 30 April 2013).

14 'EAC committed to promoting credible elections in partner states' [http://www.eac.int/index.php?option=com\\_content&view=article&id=1158:eac-committed-to-promoting-credible-elections-in-partner-states&catid=146:press-releases&Itemid=194](http://www.eac.int/index.php?option=com_content&view=article&id=1158:eac-committed-to-promoting-credible-elections-in-partner-states&catid=146:press-releases&Itemid=194) (accessed 30 April 2013).

Community.<sup>15</sup> The Board is expected to set standards that National Electoral Commissions in the partner states will adhere to. As a demonstration of the importance attached to democratic governance, sanctions are envisaged for non-adherence to the set standards. Considering the difficulty that the AU has had with effectively operationalising the African Charter on Democracy, Elections and Governance, sub-regional initiatives continue to drive Africa's search for a culture of democratic governance. The developments in this and the previous sections demonstrate that human rights are increasingly becoming central issues of interest in the framework of the EAC in a manner that civil society stakeholders can devote more attention to the EAC human rights regime.

## 2.2 Judicial protection of rights

Unlike in previous years, developments in the judicial sector during 2012 went beyond courtroom events. The first important development in this area with consequence for human rights was the launching of sub-registries of the EACJ in partner states. Beginning with a first sub-registry in Kigali, Rwanda,<sup>16</sup> the EACJ proceeded to launch sub-registries in Tanzania and Kenya.<sup>17</sup> Considering the level of poverty on the continent, these initiatives promote access to justice as they bring the EACJ closer to its potential users.

The year 2012 also saw developments aimed at improving the efficiency and effectiveness of the EACJ. In a significant departure from original practice, the EAC gave its approval for the Judge-President of the Appellate Division and the Principal Judge of the First Instance Division to transform into full-time staff of the Community with effect from July 2012.<sup>18</sup> In addition to improving administration, the permanent presence of the heads of the two divisions of the EACJ would allow matters requiring urgent judicial attention to be summarily dealt with without fuss.

A development which could evoke mixed feelings is the extension of the jurisdiction of the EACJ to cover international crimes. During 2012, this extension of the EACJ's jurisdiction reached an advanced stage with the approval by the Council of Ministers, of the draft

15 <http://www.eala.org/media-centre/press-releases/347-eala-sessions-end-in-nairobi-.html> (accessed 30 April 2013).

16 'Chief Justice of Rwanda officially opens EACJ Kigali sub-registry' [http://www.eac.int/index.php?option=com\\_content&view=article&id=1072:chief-justice-of-rwanda-officially-opens-eacj-kigali-sub-registry&catid=146:press-releases&Itemid=194](http://www.eac.int/index.php?option=com_content&view=article&id=1072:chief-justice-of-rwanda-officially-opens-eacj-kigali-sub-registry&catid=146:press-releases&Itemid=194) (accessed 30 April 2013).

17 [http://www.eac.int/index.php?option=com\\_content&view=article&id=1097:eacj-opens-sub-registry-in-dar-es-salaam&catid=146:press-releases&Itemid=194](http://www.eac.int/index.php?option=com_content&view=article&id=1097:eacj-opens-sub-registry-in-dar-es-salaam&catid=146:press-releases&Itemid=194). Also see <http://www.judiciary.go.ke/portal/east-african-court-of-justice-sub-registry-launched-in-nairobi.html> (accessed 30 April 2013).

18 'EACJ Judge-President, principal judge now full-time in Arusha' [http://www.eac.int/index.php?option=com\\_content&view=article&id=1044:eacj-judge-president-principal-judge-now-full-time-in-arusha&catid=146:press-releases&Itemid=194](http://www.eac.int/index.php?option=com_content&view=article&id=1044:eacj-judge-president-principal-judge-now-full-time-in-arusha&catid=146:press-releases&Itemid=194) (accessed 30 April 2013).

protocol on the extension.<sup>19</sup> The speed with which the extension was achieved raises some doubt regarding the intentions of the EAC to clothe the Court with an express human rights jurisdiction. While the subject of expansion to cover human rights has been oscillating for years, the current expansion has reached this stage even though it was only in their April 2012 meeting that EAC heads of state gave approval to the EALA Resolution, calling for an extension of jurisdiction to cover international crimes. In view of the perception that the ICC unfairly targets African leaders, it is difficult to gauge whether the expansion of the EACJ's jurisdiction in this direction will positively affect human rights through the promotion of transitional justice in the region. Apart from the developments above, the EACJ also considered cases with an impact on human rights.<sup>20</sup> The most important of those cases are considered below.

### 2.3 Consideration of cases<sup>21</sup>

#### 2.3.1 *AG Republic of Kenya v Independent Medical Legal Unit*

In its decision in the case of *Independent Medical Legal Unit v Kenya* (Kenya Appeal),<sup>22</sup> the First Instance Division of the EACJ (lower court) overruled the objections raised by Kenya and ruled that it had jurisdiction to entertain the reference and that the reference was not barred by lapse of time. The present appeal is against that decision of the lower court. Before dealing with the substantive appeal, the Appellate Division held that preliminary objections ought to be used only where facts are not in dispute and a successful application of the contentious point of law leads to a determination of the entire action.<sup>23</sup> By this elaboration, the Court provides crucial guidance for practice as most human rights and rights-related cases before sub-regional regimes revolve around such objections raised by state parties.

On the first limb of the appeal challenging the jurisdiction of the EACJ over human rights cases, the Court first noted that the lower court relied principally on its own decision in *Katabazi and Others v Secretary-General of the East African Community and Another (Katabazi case)*.<sup>24</sup> The Court then pointed out that the lower court had a duty to establish its jurisdiction beyond a mere reference to the *Katabazi* case. It concluded that the significance of the *Katabazi* case is not in the Court's refusal to abdicate its responsibility, but the 'ability to find

19 'EACJ jurisdiction extended' [http://www.busiweek.com/index.php?option=com\\_content&task=view&id=3135&Itemid=1](http://www.busiweek.com/index.php?option=com_content&task=view&id=3135&Itemid=1) (accessed 30 April 2013).

20 In view of art 27(2) of the EAC Treaty, the EACJ currently lacks a clear human rights jurisdiction.

21 The case law of the EACJ is available on the website of the Court.

22 Appeal 1 of 2011; unreported suit, reference 3 of 2010, ruling delivered on 29 June 2011.

23 Kenya appeal judgment, 5-6.

24 (2007) AHRLR 119 (EAC 2007).

and supply, through interpretation of the Treaty, the source and basis for ... jurisdiction in the circumstances of the case then before the Court'.<sup>25</sup> Hence, the Appellate Division asserted that the lower court in the *Katabazi* case traced the cause of action, and by extension its jurisdiction, to the EAC Treaty rather than to an alleged violation of human rights. The Court expressed support for the judgment in the *Katabazi* case, but emphasised that that case was not 'a magic wand' that automatically conferred human rights jurisdiction on the EACJ.

Regarding the lapse of time, the Appellate Division reaffirmed that a two-month limitation applied by virtue of the EAC Treaty. The Court then stated that the Treaty did not empower it or the lower court to extend time limited in the Treaty and that courts had to act within the limits of power granted by the Treaty.<sup>26</sup> After engaging in a detailed analysis of facts and law, the Court came to the conclusion that the action was time-barred. Significantly, the Court refused to be swayed by the argument of a continuing violation. In essence, this decision reiterates the need for victims and civil society to be vigilant in monitoring cases for submission to the EACJ. Based on the ground that the case was submitted after the time frame allowed by the Treaty, the appeal was allowed.

### 2.3.2 *Rwanda v Plaxeda Rugumba*

In June 2012, the Appellate Division of the EACJ delivered its judgment in this appeal brought by Rwanda against the decision of the First Instance Division in *Plaxeda Rugumba v Rwanda (Rwanda Appeal)*.<sup>27</sup> The lower court had held that the reference filed by the applicant in the original case, on behalf of her brother who was in the custody of the Rwandan authorities, was competent. The lower court also ruled that the reference was not barred by the exhaustion of local remedies rule and, further, that by its continuing detention of the victim, Rwanda was in breach of its obligation under the EAC Treaty.<sup>28</sup> Dissatisfied with that decision, Rwanda argued afresh in the present case that the EACJ lacked jurisdiction to entertain the reference. Rwanda argued further that the application had been filed out of time, that local remedies had not been exhausted first, that the lower court's decision had no legal basis and that, since Rwanda rendered justice in the victim's irregular detention, there was no legal or factual basis to declare that the state was in breach of the EAC Treaty.<sup>29</sup>

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25 Kenya appeal judgment, 10.

26 See Kenya appeal decisions, 16. To buttress this point, the Court made reference to the case law of the European Court of Justice

27 Appeal 1 of 2012; Unreported, Reference 8 of 2010, judgment of 1 December 2011.

28 Para 14 Rwanda appeal judgment.

29 Para 15 Rwanda appeal judgment.



The Appellate Division began its analysis by narrowing Rwanda's case to the argument that the original reference was inadmissible since it related to an alleged violation of human rights, an area that currently falls outside the EACJ's competence. While it agreed that article 27(2) supported Rwanda's position, the Court drew attention to articles 6(d) and 7(2) of the EAC Treaty, underlining the reference to the promotion and protection of human rights in accordance with the African Charter. The Court then pointed out that despite the lack of an EAC catalogue of rights, references to human rights abounded within the legal framework of the EAC.<sup>30</sup> The Court reinforced earlier decisions of the lower court where that court had assumed competence over matters that touched on human rights. It also agreed with the view that despite the absence of a protocol endowing the EACJ with human rights jurisdiction, it was possible to speak of 'a layer of inchoate human rights in the Treaty' awaiting operationalisation.<sup>31</sup>

The Appellate Division also introduced the concept of the 'doctrine of a special cause of action under the EAC Treaty'<sup>32</sup> which it considered to have arisen in the *Katabazi*<sup>33</sup> case. The Court drew the distinction between cases before national courts and cases before the EACJ, pointing out that in the latter cases the cause of action is usually a violation of the principles of the rule of law and of good governance by a partner state, which violation amounts to an infringement of the EAC Treaty.<sup>34</sup> This distinction is important for at least two reasons: First, it takes the discourse outside the framework of human rights over which the EACJ cannot immediately claim jurisdiction. Accordingly, the EACJ can deny any allegation of illegality or *ultra vires* action. Secondly, by this distinction, arguments of *res judicata* in cases where national courts had made a decision (as was the case in *Katabazi*) would be unsustainable.

Concluding that the Reference was properly admitted, the Court evaluated arguments on the merit and took the view that preventive detention without lawful authority and in breach of the laws of Rwanda amount to a breach of the EAC Treaty. Effectively, the Court concluded that Treaty obligations of partner states are invoked by non-compliance with their own national laws. The Court ruled that the mere fact of arrest of a person suspected of committing a crime does not violate the EAC Treaty or international human rights law, unless detention exceeds the allowable time limit and occurs in unacceptable conditions.<sup>35</sup> Despite its insistence that it was not

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30 Paras 22–24 Rwanda appeal judgment.

31 Citing Justice J Ogoola 'Where treaty meets constitutional law' keynote address presented at the University of Dar es Salaam, May 2012.

32 Para 24 Rwanda appeal judgment.

33 n 25 above.

34 Para 24 Rwanda appeal judgment.

35 Para 31 Rwanda appeal judgment.

dealing with human rights, the Court still made some reference to international human rights law in this analysis.

This case also presented an opportunity for the Appellate Division to reaffirm that the rule of exhaustion of local remedies is inapplicable before the EACJ. Accordingly, even though it noted that the Court could be 'flexible and purposeful' to the extent of reading in the requirement, the Appellate Division expressed the need for the Court to 'be careful not to distort the express intent of the EAC Treaty'.<sup>36</sup> Hence, if there were any doubts on the matter, the *dictum* of the Court puts such doubts to rest and declares unequivocally that 'unlike other legal regimes ... the EAC Treaty provides no requirement for exhaustion of local remedies'.<sup>37</sup> In its final analysis, the Appellate Division upheld the decision of the first instance division, albeit on different legal grounds.

### 3 Human rights developments in the ECOWAS framework

#### 3.1 Non-judicial human rights developments

In 2012, ECOWAS also engaged in comparatively fewer non-judicial human rights and rights-related activities. Similar to the discourse on the EAC, the most important of these developments are discussed broadly below under the headings of standard setting, thematic meetings and activities aimed at strengthening democratic governance. However, considering the growing importance of direct ECOWAS assistance to citizens of its member states, a discourse on direct humanitarian assistance has been included in this section.

##### 3.1.1 Setting human rights standards

The first significant standard-setting activity with implications for human rights in the ECOWAS regime in 2012 was the promulgation of the Supplementary Act A/SP.13/02/12 on sanctions against member states that fail to honour their obligations to ECOWAS.<sup>38</sup> This Supplementary Act gives concrete effect to article 77 of the revised ECOWAS Treaty which allows for the imposition of sanctions against ECOWAS member states for their failure to comply with Community obligations. Some of the highlights of the Supplementary Act include the stipulation of respect for human rights as a core obligation under ECOWAS Community law<sup>39</sup> and the provision that a failure to comply with decisions of the ECCJ constitutes a violation of Community obligations.<sup>40</sup> Considering the difficulties that arose in relation to the

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36 Para 35 Rwanda appeal judgment.

37 Para 39 Rwanda appeal judgment.

38 On file with author.

39 Art 2(2) Supplementary Act A/SP.13/02/12.

40 Art 2(3) Supplementary Act A/SP.13/02/12.

implementation of certain decisions against The Gambia,<sup>41</sup> the promulgation of this Supplementary Act is a welcome development.

Another significant activity was the adoption of the ECOWAS Humanitarian Policy and Action Plan in March 2012.<sup>42</sup> Although the focus of the Policy is conflict prevention and management, the link between human rights and humanitarian law makes this an important policy document for human rights in West Africa, especially considering the increasing involvement of ECOWAS in conflict resolution in the region.<sup>43</sup> The Policy envisages joint action by ECOWAS member states and the ECOWAS Commission to 'jointly ensure the integration of cross-cutting issues such as HIV/AIDS, sexual violence and gender, people with disabilities and other related issues in humanitarian strategies and action plans'.

### 3.1.2 Thematic meetings

Although the series of meetings and consultations that led up to the ECOWAS intervention in the Mali crisis obviously has huge implications for human rights in the region, it is the more general thematic meetings that this contribution focuses on. In this regard, the February 2012 meeting between the ECOWAS Commission and the International Labour Organisation (ILO) is significant.<sup>44</sup> The meeting addressed the rights of the child and resulted in a resolution of the two organisations to work closely in engaging the challenges of child labour in West Africa. Linked to the issue of trafficking in persons, the sustained ECOWAS attention on the rights of the child far exceeds current continental initiatives in this regard.

During the year, ECOWAS also provided a forum for Chairpersons and Vice-Chairpersons of election commissions of ECOWAS member states to meet for the purpose of reviewing the conduct of elections in the region.<sup>45</sup> The meeting addressed issues of democratic governance since it involved seeking additional measures for improving election management and entrenching the democratic culture in West Africa.

### 3.1.3 Strengthening democratic governance

Perhaps as a result of the conviction of ECOWAS leaders that the development of a democratic culture is vital for conflict prevention in the region, much time and resources were dedicated to activities strengthening democratic governance in the region. As early as January 2012, the ECOWAS Commission began its monitoring of the elections in Senegal by releasing a statement to 'express serious

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41 Eg, *Ebrimah v The Gambia* ECOWAS Law Report (2004-2009) 181.

42 Document on file with author.

43 ECOWAS is currently involved in the conflict in Northern Mali.

44 'ECOWAS, ILO to intensify fight against labour'(2012) 6 *Echoes of ECOWAS*.

45 'Electoral chiefs agree action plan to improve electoral process in ECOWAS region' (2012) 28 *Echoes of ECOWAS*.

concern for the rising tensions among political parties and citizens'.<sup>46</sup> The Commission also seized the opportunity to appeal to 'the authorities to ensure that all citizens enjoy equal treatment and fundamental rights in accordance with the laws of the Republic'. Considering the general tradition on the continent of regional international organisations subtly supporting sitting governments, this is a major shift on the part of ECOWAS.

In terms of the actual observation and monitoring of elections, ECOWAS continued its practice in this regard by the deployment of election monitors and observers to the elections that took place in Ghana, Guinea Bissau, Sierra Leone and Senegal. As has been its practice over the years, the ECOWAS Commission sent teams led by former leaders but comprising of stakeholders from different sectors of society, including legal and civil society electoral experts.<sup>47</sup> One small area that might be of concern is the involvement of former military coup plotters as heads of ECOWAS missions to monitor elections in member states.<sup>48</sup> Although he was generally considered to be a benevolent military leader, the fact remains that General Salou Djibo, former head of the military junta in Niger who led the ECOWAS mission to Guinea Bissau, violated the ECOWAS Democracy Protocol by his coup. In that regard, inviting him to act on the strength of an instrument which he violated is a bad precedent even if it may be good diplomacy. Such actions have the potential of encouraging other coups as they send the messages that successful coup plotters will be rewarded by ECOWAS.

Regarding the actual conduct of the missions, ECOWAS continued its commendable practice of sending fact-finding teams ahead of missions to study and assess the general environment prior to the elections. This way, ECOWAS takes election monitoring as a process beyond the narrow concept of the voting. However, the sweeping endorsement of elections, despite reports of irregularities in the voting, is one area that ECOWAS may need to address.<sup>49</sup>

### 3.1.4 Direct humanitarian intervention

An increasingly important means by which ECOWAS contributes to the protection of human rights in West Africa is the provision of direct assistance in kind and cash to victims of natural and man-made

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46 'ECOWAS releases press release on the forthcoming presidential elections in the Republic of Senegal' (2012) 1/122 *Echoes of ECOWAS*.

47 See eg 'ECOWAS sends 150 election observers to Senegal' <http://news.ecowas.int/presseshow.php?nb=028&lang=en&annee=2012> (accessed 30 April 2013).

48 See 'Niger's former interim President to head ECOWAS election observation mission to Guinea Bissau' <http://news.ecowas.int/presseshow.php?nb=049&lang=en&annee=2012> (accessed 30 April 2013).

49 'ECOWAS observation mission says Guinea Bissau presidential election was transparent' <http://news.ecowas.int/presseshow.php?nb=066&lang=en&annee=2012> (accessed 30 April 2013).

disasters. During the year, ECOWAS approved the release of US \$3 million to provide humanitarian assistance to victims of food crises and rebel attacks in the Sahel-Sahara region of West Africa.<sup>50</sup> ECOWAS also approved the disbursement of funds to assist member states to render support to the returnees arising from the Libyan crisis.<sup>51</sup> Similarly, ECOWAS approved the release of about 300 metric tons of rice to the Liberian government for distribution to more than 66 800 Ivorian refugees in Liberia, who were displaced by the post-2012 electoral crisis. These activities demonstrate that ECOWAS takes human rights realisation beyond the level of theory and policy formulation. In fact, the Commission sees the provision of humanitarian assistance to citizens in distress as 'a core task of our institution and, by extension, the implementation of one of the assignments passed on to us by the Community'.<sup>52</sup>

### 3.2 Judicial protection of rights<sup>53</sup>

The human rights jurisdiction of the ECOWAS Community Court of Justice (ECCJ) has become so entrenched that it needs no introduction. A clear manifestation of this is the fact that the bulk of the cases brought before the Court each year relate to complaints of human rights violations. A selection of some of the most important cases heard by the ECCJ in 2012 is discussed below in the order in which judgment was delivered.

#### 3.2.1 *Falana and Another v Benin and 2 Others*<sup>54</sup>

The plaintiffs were former officials of the West African Bar Association who alleged that, in the course of travelling by road from Nigeria to Togo on an official assignment sometime in 2004, they encountered obstructions by roadblocks mounted by security officials of the three defendant ECOWAS member states. Although the plaintiffs were allowed to proceed after they had identified themselves, they brought this action in the interest of other ECOWAS citizens who allegedly suffer harassment and extortion on these routes. Thus, the plaintiffs sought a declaration that Benin, Nigeria and Togo have no powers to close their borders and erect checkpoints that restrict the right to free movement as guaranteed under the ECOWAS Protocol on Free

50 'ECOWAS to provide humanitarian assistance to victims of food crisis, rebel attacks' <http://news.ecowas.int/presseshow.php?nb=022&lang=en&annee=2012> (accessed 30 April 2013).

51 'ECOWAS to provide humanitarian assistance to victims of food crisis, rebel attacks' <http://news.ecowas.int/presseshow.php?nb=022&lang=en&annee=2012> (accessed 30 April 2013).

52 'ECOWAS supports Ivorian refugees in Liberia with humanitarian assistance' <http://news.ecowas.int/presseshow.php?nb=359&lang=en&annee=2012> (accessed 30 April 2013).

53 Most of the decisions of the ECCJ are now available on the Court's website.

54 Unreported Suit ECW/CCJ/APP/10/07 Judgment ECW/CCJ/Jud/02/12 of 24 January 2012.

Movement<sup>55</sup> and under the African Charter. The plaintiffs also sought a declaration that the defendant states were obliged to remove all obstacles to free movement, an order compelling the removal of the obstacles and an order of perpetual injunction restraining the defendant states from closing the borders.<sup>56</sup> The states challenged the temporal jurisdiction of the Court on the grounds that the events occurred in 2004 when private individuals had no access to the ECCJ and that the 2005 Supplementary Protocol could not take retroactive effect.<sup>57</sup>

In its analysis, the ECCJ identified seven issues that it considered essential for a resolution of the dispute.<sup>58</sup> Four of the issues identified by the Court are particularly noteworthy. They include the questions whether article 9(3) of the 2005 Supplementary Protocol, which stipulates a three-year limit for action before the ECCJ against community institutions or member states was applicable in the present case; whether the 1991 Protocol of the ECCJ was amended, repealed or substituted by the 2005 Supplementary Protocol; whether the 2005 Supplementary Protocol could be applied retroactively and thereby keep the cause of action alive; and whether cases alleging human rights violations could be affected by statutes of limitation. The ECCJ concluded that article 9(3) of the 2005 Supplementary Protocol contained a limitation that applied to the present case since the case was filed some three years and six months after the alleged violation. In some ways, article 9(3) introduces a certainty that is lacking in the admissibility requirements in article 56(6) of the African Charter that merely require a complaint to be brought within a reasonable time. However, the African system allows for the exercise of discretion that could take account of exceptional cases. In coming to its conclusion on this point, the ECCJ aligned with domestic jurisprudence from Nigeria that urges judicial restraint in the interpretation of unambiguous words. Although not specific to the current issue, this approach raises the general question whether the rules of interpretation that apply to national statutes should also be applied strictly to the interpretation of treaties, especially international human rights treaties which other international human rights supervisory bodies have interpreted as living documents.

Further, the ECCJ concluded that the amended articles 9 and 10 in article 3 of the 2005 Supplementary Protocol were substitutes for article 9 of the 1991 Protocol so that they take effect from the date the original article 9 (in the 1991 Protocol) was adopted.<sup>59</sup> Thus, the

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55 Protocol A/P1/S/79 relating to Free Movement of Persons, Residence and Establishment.

56 See paras 3-4 of the *Falana* decision. The action was originally brought against all 15 ECOWAS member states but was amended to target Benin, Nigeria and Togo after the defence successfully challenged the inclusion of the other states.

57 See paras 9-10 of the *Falana* decision.

58 Para 16 *Falana* decision.

59 See para 25 of the *Falana* decision.

Court held that a plaintiff could bring an action under the current articles 9 and 10, even though the events occurred before the adoption of the 2005 Supplementary Protocol which conferred a human rights mandate on the ECCJ. The gains of this interpretation were taken away by the Court's view that article 9(4) applied together with article 9(3) which sets the three-year limit for bringing action.<sup>60</sup> In this regard, the ECCJ pointed out that, while it can extend time set in its rules of procedure, it has no such power in relation to time limits set in the treaties. This is consistent with the view expressed by the EACJ that it cannot extend time limited by treaty provisions.

Although it held that a statute of limitation could apply to cases alleging violations of human rights, the Court held that such limitations would not apply in cases of gross violations of human rights.<sup>61</sup> For this position, the ECCJ relied on UN General Assembly Resolution 60/147 of 16 December 2005. The Court's stance is positive as, for instance, it holds promise for victims of massive violations by previous administrations who seek restorative justice from the Court. However, taking the view that the alleged restriction of the right to free movement is not a gross violation and that the right to free movement is not an absolute right, the ECCJ found no violation in this case. The Court passed on the opportunity to make any pronouncements on the allegation that other less privileged ECOWAS citizens suffer daily restrictions. Such a pronouncement would have strengthened the case for *actio popularis* in the regime. This case also provided a chance for the ECCJ to set its standard for proof of claims. The approach adopted by the Court relies heavily on municipal law based on its conclusion that international law does not have adequate rules governing evidence. Overall, the Court found that the right to free movement had not been violated.

### 3.2.2 *Gaye v Senegal*<sup>62</sup>

The plaintiff, a Senegalese citizen, brought this action in October 2011 alleging that Senegal had violated his Charter-guaranteed rights by arresting and detaining him on allegations of money laundering and financing terrorism. The plaintiff sought a declaration that his detention for four months was a violation of his rights and that he is entitled to an order compelling the state to release him immediately and to pay him damages.<sup>63</sup> The plaintiff argued that he had been the victim of a police trap arising from the association of his name with extremist organisations involved in insurgency activities in Somalia. He alleged that the police trapped him by posing as staff of a telephone company to intercept his telephone conversation. The plaintiff claimed that he was illegally held in preventive detention for nine days

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60 As above.

61 Para 30 *Falana* decision.

62 Rôle gen ECW/CCJ/APP/28/11, arrêt ECW/CJJ/JUG/01/12, 26 January 2012.

63 Paras 1-2 *Gaye* decision.

without any *prima facie* proof of his involvement in any criminal activity and this amounted to a violation of his rights. He contended that his right to a presumption of innocence was violated and that the detention was beyond the allowable period for preventive detention. He argued further that the act of entrapping him was humiliating and abusive. Thus, plaintiff contended that his rights under articles 2, 9 and 14 of the International Covenant on Civil and Political Rights (ICCPR), as well as articles 6 and 7 of the African Charter, had been violated. Surprisingly, the plaintiff also invoked article 5 of the European Convention and demanded damages in the sum of CFA Francs 380 million.<sup>64</sup>

The state confirmed that by its participation in Interpol activities, it had received intelligence that the plaintiff and others were involved in terrorist activities. Further, that their investigations showed circumstantial evidence in support of the allegations, including that the plaintiff and others were in constant telephone contact with a suspected terrorist. Hence, these persons, including the plaintiff, were placed in preventive detention in accordance with Senegalese criminal procedure. The state stressed that the plaintiff was indicted by the investigating judge in the presence of his lawyers.<sup>65</sup> Since the plaintiff's application for bail before the national court failed, the state argued further that the ECCJ was not competent to adjudicate on matters previously heard by national courts and the matter was inadmissible since it is already pending before a domestic court. On the merits, the state argued that the arrest and detention were done in accordance with domestic law.

In its analysis, the ECCJ agreed that it could not review decisions of national courts. However, it asserted that the fact that a matter was before a national court had no impact on its jurisdiction as, by article 10(d)(ii), only cases brought before another international court can affect the ECCJ's jurisdiction.<sup>66</sup> This aspect of the Court's decision is in the right direction although the Court had previously given the impression that it was reluctant to handle a matter which had previously been heard by a national court.<sup>67</sup> However, it is also a matter of concern that the ECCJ would be willing to admit a case which is running before a national court. This is one of the negative consequences of the absence of a requirement to exhaust domestic remedies.

Taking the applicant's two grounds requesting an order to invalidate the national procedure together, the Court took the view that there had been no violence or physical abuse of the plaintiff. Thus, the Court found no violation, notwithstanding the plaintiff's contention that his rights to dignity and presumption of innocence

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64 Paras 14-22 *Gaye* decision.

65 Paras 9-13 *Gaye* decision.

66 Para 28 *Gaye* decision.

67 See eg *Keita v Mali*, Suit ECW/CCJ/APP/05/06.



had been violated. The ECCJ reasoned that the right to the presumption of innocence does not prevent national authorities from arresting and investigating people suspected of committing a crime.<sup>68</sup> Regarding the legality of the plaintiff's detention, the Court examined article 6 of the African Charter which it compared to ICCPR and (curiously) the European Convention on Human Rights (European Convention) over which it has no basis to exercise jurisdiction. The ECCJ then analysed the circumstances of the arrest and detention and concluded that it was done in accordance with Senegalese law. The Court also found no violation in relation to the refusal to grant the plaintiff bail at the national level. Despite finding in favour of the state, the Court denied Senegal's application for damages against the plaintiff. Overall, the Court once again showed its deference to the legal procedures of member states which it ought to supervise along with the other arms of government.

### 3.2.3 *Aziabevi Yovo and 31 Others v Togo Telecom and Another*

This case<sup>69</sup> was filed by 32 Togolese citizens against Togo Telecom Company and the state of Togo. The plaintiffs alleged that the defendants had violated article 3 of the African Charter for failure to implement the judgment of the Labour Court of Togo.<sup>70</sup> The plaintiffs alleged that, despite the fact that the judgment of the Labour Court had been confirmed on appeal, Togo Telecom had claimed immunity and the state had failed to implement the decision. The defendants on their part invoked articles 10(d)(ii) and 24 of the 2005 Supplementary Protocol of the ECCJ, and argued that the matter was inadmissible on the grounds that it had been heard by another international court – the OHADA Court.<sup>71</sup> The defendants argued further that the plaintiffs lacked both cause of action and standing to bring the action because, among other things, some of the listed plaintiffs had died.

Although the Court in its analysis indicated that the plaintiffs (or at least the surviving plaintiffs) had both a cause of action and standing to bring the action, it resolved that the principle of *res judicata* was applicable on the basis of article 10(d)(ii), since the matter had previously been brought before the OHADA Court. However, the ECCJ affirmed that states had a firm duty to execute and implement court decisions against public institutions. In support of its position, the Court made one of its rare references to the jurisprudence of the European Court of Human Rights instead of its more common reference to the jurisprudence of the courts of ECOWAS member states.

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68 Paras 33-36 *Gaye* decision.

69 Rôle gen ECW/CCJ/APP/08/11, judgment of 31 January 2012.

70 Para 1 *Yovo* decision.

71 The OHADA Court is the judicial organ of the West African-based Organisation for the Harmonisation of Business Laws in Africa.

### 3.2.4 *Saidykhan v The Gambia*

In line with article 25 of the 1991 Protocol of the ECCJ and article 92 of the Rules of Procedure of the ECCJ which allow parties to apply for a review of cases decided by the ECCJ, The Gambia brought this application for a review of the Court's decision in the case of *Saidykhan v The Gambia*.<sup>72</sup> The Gambia contended that in awarding Saidykhan damages to the tune of US \$200 000, the Court failed to properly appraise the evidence before it. After establishing that article 25 of the 1991 Protocol of the ECCJ envisages a review only where previously unavailable but decisive evidence had emerged and that article 92 of its rules envisages that an application for review is brought within three months of the emergence of the new evidence, the Court concluded that the present case was not eligible for review. Essentially, this decision sends a message to states which display indifference to ECCJ proceedings that they cannot wake up after judgment is delivered to make the Court reverse its judgment without good cause.

### 3.2.5 *Ameganvi and Others v Togo*<sup>73</sup>

The original case was decided by the ECCJ in October 2011.<sup>74</sup> Following their contention that Togo had a duty to reinstate them to their seats in the Togolese Parliament, the plaintiffs returned to the Court to seek a review or interpretation of the original judgment.<sup>75</sup> Taking advantage of article 64 of the Court's Rules, the plaintiffs argued that one of their main demands in the original case was for them to be restored to their respective places as Deputies in the Togolese Parliament and that the ECCJ had failed to decide on that demand. Accordingly, the present action was brought to remedy that alleged omission by the Court. For its part, Togo claimed that it had fulfilled its entire obligation towards the plaintiffs as set out in the original judgment handed down by the Court.<sup>76</sup> The state also relied on the Rules of its National Assembly and its national Constitution to argue that the plaintiffs were not entitled to the reliefs that they sought, partly on grounds of *res judicata*.<sup>77</sup>

After deciding that the application for review was admissible, the Court drew attention to the fact that the complaint in the original action related to a violation of articles 7 and 10 of the African Charter. Thus, the Court held that a demand for reinstatement was at best a

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72 Suit ECW/APP/11/07, judgment of 7 February 2012. The original judgment in *Saidykhan v The Gambia* was delivered in December 2010.

73 Rôle gen ECW/CCJ/APP/12/10, review judgment of 13 March 2012.

74 Rôle gen ECW/CCJ/APP/12/10, arrêt ECW/CCJ/JUD/09/11, judgment of 7 October 2011 where the ECCJ ordered the state to pay damages to the applicants.

75 Para 1 *Ameganvi* review decision.

76 Paras 2-4 *Ameganvi* review decision.

77 Paras 5-8 *Ameganvi* review decision.

consequence of a violation and not a separate claim.<sup>78</sup> Accordingly, the Court noted that it had properly dealt with the original complaint in its entirety. The Court reasoned further that the demand for reinstatement was a reaction to the decision of the Constitutional Court of Togo and since the ECCJ is neither a court of cessation nor an appellate court, it could not entertain that claim. The ECCJ stated clearly that it had no competence to order reinstatement of the plaintiffs. This case demonstrates the need for lawyers appearing before the ECCJ to understand the nature of its human rights mandate and the type of reliefs that can realistically be sought from the Court in view of its character as an international court.

### 3.2.6 *Hassan v Governor of Gombe State and Another*<sup>79</sup>

In February 2010, the plaintiff brought this action against the Governor of Gombe State (one of the component states in Nigeria) and the Federal Republic of Nigeria. The plaintiff alleged that the killing of 71 citizens of his community by government-sponsored or supported armed gangs in Gombe State amounted to a violation of articles 1, 4, 5 and 7 of the African Charter.<sup>80</sup> Accordingly, the plaintiff sought a declaration that the extra-judicial killing of those 71 citizens amounted to a violation of article 4 of the Charter, a declaration that the refusal of the Nigerian government to disarm the armed gang is illegal and poses a threat to life in the community, and an order directing the Governor of Gombe State to pay 150 million Nigerian Naira to the family of each of those killed. The plaintiff also sought an order directing the Nigerian government to disarm the armed gang of the Governor of Gombe State. Claiming that he had been arrested and released but continued to receive death threats, the plaintiff also sought provisional orders from the Court.

In their separate responses to the action, both defendants challenged the jurisdiction of the ECCJ. In addition to raising issues of *locus standi* and non-exhaustion of local remedies, the Governor of Gombe State argued further that the plaintiff could not use the processes of the ECCJ to undermine the powers of Nigerian courts.<sup>81</sup> Part of the plaintiff's reaction to the preliminary objection was the argument that, although the Governor of Gombe State is not a member state of ECOWAS, he was a necessary party for a resolution of the dispute.<sup>82</sup>

Setting out the rationale for the grant of provisional orders, the ECCJ in its analysis concluded that the death of the plaintiff before the hearing of the matter had rendered the request moot.<sup>83</sup> Faced with

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78 Paras 13-14 *Ameganvi* review decision.

79 Suit ECW/CCJ/APP/03/10, judgment of 15 March 2012.

80 Paras 1-2 *Hassan* decision.

81 Para 21 *Hassan* decision.

82 See para 24 of the *Hassan* decision.

83 Para 34 *Hassan* decision.

the question whether the death of the plaintiff had automatically made reaching a decision irrelevant, the ECCJ held that it still had a duty to resolve issues raised in the matter. Regarding the preliminary objection raised, the Court held that a component of a member state could not be a defendant before it. In relation to the argument that Gombe State was a necessary party, the Court held that by its own rules, a third party could only join the matter as an intervener.<sup>84</sup> Another crucial pronouncement made by the ECCJ in this case relates to the *locus standi* of applicants. Interpreting article 10 of the 2005 Supplementary Protocol, the Court emphasised that there was a victim requirement in those provisions and only victims could institute actions before it. While this conclusion is consistent with the Court's position in cases such as *Mrakpor v Five Others*,<sup>85</sup> it contradicts the decision in *SERAP v President of Nigeria and Others*.<sup>86</sup> However, the Court may have given a clue for this supposed inconsistency when it held that the rights invoked were individual rights rather than collective rights under the African Charter so that Hassan had no *locus standi* to initiate the present case. It could then mean that SERAP was accepted as plaintiff because it invoked collective rights rather than the individual rights of the alleged victims.

### 3.2.7 *Dias v Senegal*<sup>87</sup>

On 31 January 2012, this case was brought on behalf of Barthelemy Dias against Senegal and it was concluded within the same year with judgment delivered in March 2012. The case arises from the 2011 riots in Senegal when Senegalese people demonstrated against what they considered to be unconstitutional political decisions of the ruling party, including the attempt to create the office of Vice-President. The plaintiff, a Senegalese national, was one of the leaders of the demonstration who had allegedly been arrested and detained in 2011 for his part in the demonstration.

The plaintiff alleged that as a result of the success of the demonstration and his own prominent role in it, he had been the target of threats and attacks by an armed group sponsored by the ruling party. In the course of one confrontation with the said armed group, the plaintiff alleged that he had to release shots from his own firearm in self-defence. Although no one was injured, and in spite of the fact that he was the one attacked, criminal proceedings were commenced against him but not against his attackers. On the basis of these criminal proceedings, the investigating judge ordered his detention. On these facts, which were not contested by the state, the plaintiff sought a declaration that Senegal had violated his rights as

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84 Para 42 *Hassan* decision.

85 Consolidated suit ECW/CCJ/APP/17/10; ECW/CCJ/APP/01/11, judgment of 18 March 2011.

86 Suit ECW/CCJ/APP/08/09; ruling ECW/CCJ/APP/07/10, ruling delivered on 10 December 2010.

87 Rôle gen ECW/CCJ/APP/01/12, judgment of 23 March 2012.

guaranteed in all international human rights instruments to which the state is party.

The plaintiff specifically alleged a violation of articles 2, 3, 9 and 14 of ICCPR, article 5(4) of the European Convention on Human Rights (European Convention), articles 7 and 98 of the Senegalese Constitution, articles 5, 7, 8, 9,10, 11 and 25 of the Universal Declaration of Human Rights (Universal Declaration), articles 2, 3, 6, 7 and 16 of the African Charter and article 316 of the Senegalese Penal Code. The plaintiff also relied on the jurisprudence of the European Court of Human Right (European Court). He sought an order compelling the state to release him, to pay him reparations in the sum of FCFA 1 billion and another FCFA 100 million for legal fees.<sup>88</sup> Relying on the ECCJ's decision in *Gaye v Senegal*,<sup>89</sup> Senegal argued that the detention of the plaintiff was done in strict accordance with its national laws and as such was neither arbitrary nor inequitable and was not in violation of any international human rights instrument.<sup>90</sup>

In its analysis, the ECCJ correctly identified that the complaint alleged political interference with the criminal process against the plaintiff, a violation of his right to equality before the law and a denial of his right to be presumed innocent until found guilty, especially as the investigating judge did not take his status as a prominent politician into account. The Court then noted that the criminal process was founded on the applicable law of Senegal and therefore was not arbitrary. While at face value this position appears to represent a proper interpretation of the African Charter which is infamous for its claw-back provisions, the reluctance to review the national process falls short of standards set by regional institutions such as the African Commission. According to the African Commission, the term 'according to law' should not be applied in a manner that limits the exercise of the protected freedom.<sup>91</sup> At the least, the ECCJ ought to be willing to review national judicial process, even though not the judgment, for regularity. In fact it had done so to some extent in its original judgment in *Ameganvi v Togo*.<sup>92</sup>

Regarding the alleged political interference in the criminal process, the ECCJ held that the opinions expressed by the politicians were private, and even if they were made by people in authority, were not of a nature that would compromise or affect the independence of the investigating judge.<sup>93</sup> Considering the unequal relationship that exists between the arms of government in Africa, tilting heavily in favour of the executive arm, this position of the Court is somewhat unrealistic. However, on the basis of its analysis, the ECCJ found no violation of

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88 See paras 1-8 of the *Dias* decision.

89 n 77 above.

90 Paras 12-13 *Dias* decision.

91 See *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000); *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998).

92 Rôle gen ECW/CCJ/APP/12/10, arrêt ECW/CCJ/JUD/09/11.

93 See para 21 of the *Dias* decision.

any human rights instrument. The Court went further to state that the principle of separation of powers had not been violated.

On the alleged violation of the right to equality before the law, the Court concluded that the plaintiff had not proved his allegation and accordingly found no violation.<sup>94</sup> The ECCJ again deferred to the national jurisdiction with regard to the allegation that the plaintiff's right to presumption of innocence had not been respected. In the Court's view, the claim to self-recognition on the grounds of the plaintiff's political standing was a matter of fact that was outside the purview of a Community human rights mandate. However, the ECCJ correctly summarised its duty in the circumstances of the case as one requiring an evaluation whether the principles of fair hearing and respect for the right to defence have been respected in the national proceedings. Concluding that those rights had been respected, the ECCJ found no violation against Senegal.

### 3.2.8 *Adewale v Council of Ministers of ECOWAS and 3 Others*<sup>95</sup>

The plaintiff in this case had applied for a post at the ECCJ which had been declared vacant on the resignation of the incumbent. Following the reinstatement of the incumbent to the position, the plaintiff filed this action alleging a violation of her rights to equality, to be heard, equal access to the public service, equality and equal opportunity and freedom from discrimination as guaranteed in the African Charter. Accordingly, amongst other reliefs, she sought a declaration that these rights have been violated and that she is entitled to an order for damages amounting to 20 million Naira.

In view of the circumstances of this case, it was argued that it ought not have been admitted as a human rights complaint. Although the ECCJ did not simply dismiss the complaint as falling outside the category of human rights, the Court examined the question whether the plaintiff, who is not a staff member of ECOWAS, had the standing to prompt the Court to review the act of a Community institution.<sup>96</sup> After establishing that international organisations have to be governed in line with the principle of legality and that the ECCJ is empowered to review acts of ECOWAS institutions and officials for legality, the Court concluded that the right to trigger such review is only available to an individual if his or her rights had been directly affected.<sup>97</sup> In the present case, the ECCJ held that the plaintiff was not directly affected by the decision to reinstate the former incumbent to her office since the plaintiff had the same right as every other ECOWAS citizen. Accordingly, the ECCJ reiterated that the mere fact of being an ECOWAS citizen did not clothe an individual with the capacity to judicially challenge acts of

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94 See para 24 of the *Dias* decision.

95 Suit ECW/CCJ/APP/11/10, judgment of 16 May 2012.

96 Para 31 *Adewale* decision.

97 See paras 38-42 of the *Adewale* decision.

the Community that had no direct impact on such a person. Thus, the Court found no violation.

Considering the difficulty that staff and officials of international organisations have with respect to challenging the acts and omissions of political and administrative actors in these institutions, this approach is a set-back for effective governance. This is even more so since ECOWAS had expressed an intention to move to being 'an ECOWAS of peoples' and this can only occur when citizens are actively involved in monitoring institutional governance in the Community framework.

### 3.2.9 *Ayika v Liberia*<sup>98</sup>

The plaintiff in this case was a Nigerian national. He brought this action against Liberia alleging that the seizure by that state of the sum of \$508 200 from him was unlawful and in violation of his right to property under the African Charter. The facts indicate that the plaintiff had taped the amount in hard currency on his person and had failed to declare it on arrival at the airport in Liberia. Following his subsequent arrest and the order to confiscate made by a circuit court in Liberia upon application by the authorities, the sum of money was seized pending investigation. The money was never released despite an advice to that effect.<sup>99</sup> In his action before the ECCJ, the plaintiff alleged a violation of articles 7(1)(b), 12 and 14 of the African Charter. On these facts, the plaintiff sought a declaration that the confiscation of his \$508 200 was 'unconstitutional, null and void', an order directing the state to release the sum and the plaintiff's passport and costs of 20 000 Liberian dollars.

A first point of interest in the *Ayika* case is procedural. In response to the state's contention that the failure of the plaintiff to give evidence in person should be translated to mean that he had abandoned his claim, the ECCJ pointed out that there were several ways, other than direct evidence by a plaintiff, by which facts could be proved.<sup>100</sup> As a result of its unusual position as a court of first instance, the ECCJ has to employ rules of evidence applicable before national courts. Another aspect worthy of note in the judgment relates to the ECCJ's analysis of the national court process. After acknowledging that the state had a right to investigate suspected crimes within its territory, the ECCJ embarked on an evaluation of the procedure adopted during the confiscation hearing.

Engaging in a determination whether the rules of fair hearing and natural justice had been respected, the Court concluded that the national proceedings fell short of acceptable standards for failing to

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98 Suit ECW/CCJ/APP/07/11, judgment of 8 June 2012.

99 See paras 1-4 of the *Ayika* decision. The advice to release the money to the plaintiff was later reversed on the grounds that it was based on incorrect and fraudulent information.

100 See para 10 of the *Ayika* decision.

give the plaintiff prior notice of the pending confiscation proceedings. It would be noted that the ECCJ did not base its analysis on the right to a fair hearing under international human rights law, even though it could have arrived at the same result if it did so. It is also noteworthy that despite its acclaimed reluctance to act as an appellate jurisdiction over national courts, the ECCJ was bold enough to engage in this analysis. However, the Court was quick to point out that it was not the decision of the national court that was problematic since the national court 'did not finally determine the rights of the plaintiff'. In doing this, the ECCJ remained within the safety of its reluctance to confront national courts of ECOWAS member states.

After a lengthy discussion of the circumstances of the investigative report that led to retention of the plaintiff's money,<sup>101</sup> the ECCJ came to the conclusion that four years was too long a time for the state to conduct investigations. This kind of reasoning is a welcome development for the right to a fair hearing as it might be heralding a shift from the Court's earlier position which did not consider long delays as necessarily negative.<sup>102</sup> It is important to note that as a result of the nature of this case, the ECCJ had to engage in an analysis of issues that had little to do with human rights. This is one of the consequences of the Court acting as a court of first and last instance. Curiously, while it took the view that the right to a fair hearing had been violated, in the operative part of the judgment, the ECCJ only found a violation of the right to property even though it awarded costs against the state for the undue delay in investigating the case against the plaintiff.<sup>103</sup>

### 3.2.10 *Alade v Nigeria*<sup>104</sup>

In this case, the plaintiff, a citizen of Nigeria, brought the action against Nigeria, alleging that he had been unlawfully detained by the authorities at a maximum security prison facility in Lagos, Nigeria, from 2003 to 2011. The plaintiff alleged that he had been arrested in March 2003 by a plainclothes policeman and detained in a police station till May 2003 when he was charged before a magistrate's court for an alleged crime of armed robbery. Since the magistrate's courts in Nigeria lack jurisdiction over the crime of armed robbery, the plaintiff alleged that he was remanded in prison custody by the magistrate on a holding charge.<sup>105</sup>

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101 Paras 28-44 *Ayika* decision.

102 *Amouzou & Others v Côte d'Ivoire* rôle gen ECW/CCJ/APP/01/09, arrêt ECW/CCJ/JUG/04/09, para 97.

103 Paras 48-50 *Ayika* decision.

104 Suit ECW/CCJ/APP/05/11, judgment of 11 June 2012.

105 A common practice in the Nigerian legal system is that the police charge suspects before magistrate's courts even when they know that that level of courts lacks jurisdiction over the offence allegedly committed by the suspect. In the knowledge that he or she lacks jurisdiction, the magistrate would usually remand the suspect in prison custody pending their arraignment before a court of competent jurisdiction.



Although he was not brought before any other court, the plaintiff alleged that he had been held in prison custody until June 2011 when the action before the ECCJ was filed. Based on these facts, the plaintiff sought a declaration from the ECCJ that his indeterminate detention without trial under the so-called holding charge amounted to a violation of his right to a fair trial within a reasonable time, his right to be presumed innocent and his right to liberty, all guaranteed under the African Charter. The plaintiff also invited the ECCJ to declare that his unlawful, excessive and continued detention by the Nigerian authorities was in violation of his rights as guaranteed in the African Charter. Accordingly, the plaintiff requested an order compelling his immediate release and directing the state to pay him 29 million Naira for unlawful detention, pecuniary damages for loss of earnings and the cost of the action. The defendant state challenged the jurisdiction of the Court and argued further that the plaintiff had failed to discharge the burden of proof on him for failing to adduce credible evidence before the Court.

In the analysis leading to its decision, the ECCJ reaffirmed its adoption of all African Charter-guaranteed rights on the basis of article 4(g) of the 1993 revised ECOWAS Treaty.<sup>106</sup> The Court then pointed out that its human rights mandate extended beyond the African Charter and encompassed UN human rights instruments to which ECOWAS member states are parties.<sup>107</sup> While this position extends the scope of instruments that victims of human rights violations in West Africa can claim, it heightens the risk of conflicting jurisdiction along with the attendant risks of conflicting jurisprudence and the danger to the coherence of established jurisprudence.

Another aspect worthy of note is the ECCJ's response to the state's question whether the Court is competent to exercise appellate powers over an order of a domestic court. The Court restated its position that it did not consider itself to be in hierarchical appellate relationship with the national courts of ECOWAS member states.<sup>108</sup> However, the ECCJ took a significant step towards upholding the almost supranational character<sup>109</sup> of its international jurisdiction when it drew the distinction between an appellate review and what the ECCJ considered itself to be doing. According to the ECCJ, 'there is a thin divide of not reviewing [*sic*] the decision but hearing the matters that

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106 See para 24 of the *Alade* decision. Art 4(g) of the 1993 revised ECOWAS Treaty provides that recognition, promotion and protection of human rights contained in the African Charter is one of the fundamental principles upon which the ECOWAS integration is to take place. This is a position consistently held by the ECCJ in a whole line of cases.

107 See para 25 of the *Alade* decision.

108 See paras 33-34 of the *Alade* decision. This is a position that the ECCJ has maintained, famously since it gave its decision in *Keita v Mali* (n 67 above).

109 I have used 'almost' deliberately to qualify 'supranational jurisdiction' in the face of my awareness that there is insufficient material to sustain an argument that the ECCJ enjoys supranationality in the same manner or even similar to what the European Court of Justice claims and enjoys.

flow from the decisions which allegedly pose the questions of violations of human rights'.<sup>110</sup> The Court arguably used this decision to indicate that while it may not entertain any appeals against decisions of national courts, it would not hesitate to engage in a review of either procedures of those courts or the fall-out and consequences of such national decisions. This is a significant statement by the ECCJ since it defines the parameters of the Court's jurisdiction *vis-à-vis* national courts, including especially the highest courts of member states, which are the bearers of treaty obligations to ensure the implementation of the decisions of the ECCJ. In the present case, the ECCJ was not interested in reviewing the national decision that authorised the detention of the plaintiff but was rather interested in the events that have occurred since that decision was made by the national court.

In terms of the procedure that the ECCJ adopts in carrying out its human rights mandate, the decision in the *Alade* case contains pointers as to which way the Court will tilt when it acts as a court of first instance or when it has to engage in activities that are generally undertaken by national courts. First, the Court demonstrated that it preferred to 'eschew technicalities' and rather 'do substantial justice' in cases before it.<sup>111</sup> This could be significant in situations where clear human rights violations have occurred, but either as a result of incompetent legal advice or inexperience on the part of counsel, a party fails to satisfy important procedural issues that are raised by counsel for state parties. It remains to be seen how far the Court will go in toeing its current line of reasoning and action. In relation to proof of claims before it, the ECCJ made the point that in its character as an international court, it sees no distinction between a burden of proof and a burden of evidence, both of which have to be borne by the plaintiff first, but both of which could also shift to the state party involved in a case.<sup>112</sup>

On the substantive issue of unlawful detention, the ECCJ took the view that 'what amounts to ... arbitrary detention depends on the circumstances of each case'. The Court pointed out that even where detention may originally have been lawful, continued detention may violate the right to liberty since the original legality may cease as even the original justification for the detention would have become redundant.<sup>113</sup> Accordingly, the ECCJ found that Nigeria had violated the African Charter in relation to the plaintiff. The Court was, however, very conservative in its award of damages, pointing out in its analysis that the award of damages had to be fair to both parties. Accordingly, the ECCJ maintained some consistency in the

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110 Para 35 *Aladed* decision.

111 Para 38 *Alade* decision.

112 See paras 48-51 of the *Alade* decision.

113 See paras 54-56 f the *Alade* decision.

conservative approach to the award of damages that it has shown in its recent jurisprudence.

### 3.2.11 *Tsheku v Nigeria*<sup>114</sup>

Following his arrest in September 2010 and continued detention for months despite an order of release made by a magistrate, the plaintiff in this case brought this action before the ECCJ in 2011. The plaintiff, a Nigerian national, asked the ECCJ to declare that his arrest and detention in spite of the order of release by the magistrate was arbitrary, illegal, illicit and violated his right to personal liberty and freedom of movement as guaranteed in the African Charter. The plaintiff also sought a declaration that the denial of medical care during his detention and the bad conditions of detention he was subjected to threatened his right to health and violated his right to dignity under the Charter. Thus, the plaintiff wanted the ECCJ to order his immediate release and ask the state to pay him damages in the sum of 10 million Naira.<sup>115</sup>

Following an allegation that the plaintiff had successfully pursued a similar action based on the same facts before the High Court of Abuja in Nigeria, the state argued that the present case was inadmissible on grounds of violating the principle of *res judicata*. Before the Nigerian court, the plaintiff along with a co-plaintiff had sued the Nigerian police for a declaration that his arrest and continued detention were in violation of his rights under the Nigerian Constitution and the African Charter. The plaintiffs in that case also sought an order of release and damages in the sum of 10 million Naira. The judgment tendered by the state indicated that the High Court made the declarations, ordered that the plaintiff should be brought before a court and awarded him compensation in the sum of 5 million Naira.<sup>116</sup> The High Court also ordered the Nigerian police to enforce the order of release made by the magistrate's court.

The ECCJ commenced its analysis by taking the view that *res judicata* would only apply if 'it is established that the application brought before it is essentially the same as another one already satisfactorily decided upon by a competent domestic court'.<sup>117</sup> The Court then determined whether<sup>118</sup>

an application seeking to safeguard fundamental human rights constitutionally recognised and guaranteed, before ... a domestic court may be ... analogous with another application seeking to safeguard human rights internationally recognised and guaranteed before the Court of Justice ...

114 Suit ECW/CCJ/AAP/12/12, judgment of 12 June 2012.

115 Paras 1-2 *Tsheku* decision.

116 Para 11 *Tsheku* decision.

117 Para 13 *Tsheku* decision.

118 Para 15 *Tsheku* decision.

Citing the ECOWAS Democracy Protocol, the ECCJ stressed that its mandate covered rights protected at the African regional and international levels. It then took the view that, impliedly, the Democracy Protocol 'sanctioned the guarantee of human rights as a principle of constitutional convergence'.<sup>119</sup> In view of its understanding of its duty to protect international human rights 'in line with the laws, practices and national policies of the member states', the ECCJ concluded that constitutionally-guaranteed rights and international human rights were analogous so that the claim of the plaintiff before the Nigerian Court was essentially the same as the case before the ECCJ. Reasoning that the plaintiff was not dissatisfied with the outcome before the national court since he had not appealed and that he had not indicated that the state had refused to implement the decision and further that he had brought no new complaint before the court, the ECCJ held that it could not retry a case in which judgment had been delivered by a national court and 'against which no contestation has been raised'.<sup>120</sup> Thus, there is a subtle suggestion that the ECCJ may accept a case already decided by a national court if the plaintiff is not satisfied with the outcome at the national level or the state concerned fails to implement a favourable decision. Commendable as this may be, it raises the question whether all unfavourable national judgments amount to a violation of human rights.

In general terms, there are at least two obvious challenges with the ECCJ's approach in this case. First, it can be argued that *res judicata* should not be operative as between international courts and national courts since the normative instruments applicable before international courts and national courts are not the same. As technical as it may sound, similarity of content does not mean normative sources are synonymous. This explains why national courts of states with dualist legal traditions do not apply international instruments even where their contents coincide with constitutional bills of rights. Further, taking a different approach would mean that the exhaustion of local remedies principle would become redundant as every matter resolved by national courts would never be brought before an international tribunal.

Thus, notwithstanding the non-applicability of the exhaustion of local remedies principle in the ECOWAS regime, it may have been better for the Court to adopt 'mootness' as the applicable terminology since it can then be argued that the envisaged violation had already been remedied at the national level. The second challenge is with the use of the term 'satisfactorily'. It is not clear if this means satisfactorily to the plaintiff – in which case it would be synonymous with favourable decision – or satisfactorily to the Court, leaving open the question of what criteria would determine

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119 Para 16 *Tsheku* decision.

120 Para 19 *Tsheku* decision.

'satisfactorily' to an international court. Following its analysis in which it established that the relevant sections of the Nigerian Constitution and the African Charter (Ratification and Enforcement) Act of Nigeria invoked before the national court protected the same rights invoked before the ECCJ, the Court reasoned that the case before the national court was essentially the same as that before it. Accordingly, the ECCJ rejected the case and declared it inadmissible.

### 3.2.12 *Pinheiro v Ghana*<sup>121</sup>

This case was brought by a Nigerian national who is a senior lawyer in Nigeria. He alleged that he had been refused admission into the Ghana Law School after he had been shortlisted for an interview. The plaintiff contended that Ghana had violated his rights as guaranteed in articles 7, 12, 20, 22 and 23 of the African Charter as well as articles 1, 2 and 12 of the ECOWAS Protocol on Free Movement of Persons, Right of Residence and Establishment. On these bases, the plaintiff asked the ECCJ to declare that the failure of the Ghana Law School to give him access to participate in the bar examinations in Ghana was a violation of article 2(2) of the ECOWAS Treaty, articles 1 and 2 of the ECOWAS Supplementary Protocol A/SP/2/5/90 and articles 20 and 22 of the African Charter. The plaintiff also sought an order mandating the Ghana Law School to immediately allow him to participate in its bar programme.<sup>122</sup>

The summary of the defendant state's case was that the plaintiff did not meet the requirements for participation in the programme. The state also stated that at the time the plaintiff applied, the programme was limited to Ghanaians. It was also pointed out on behalf of the state that articles 20 and 22 of the African Charter invoked by the plaintiff are collective rights which an individual cannot claim.

In its analysis, the ECCJ agreed with the defendant state that the plaintiff as an individual cannot singularly claim a collective right in exclusion of a community.<sup>123</sup> Using the opportunity to make a statement on the division of the rights in the African Charter into individual and collective rights respectively, the ECCJ made a very rare reference to the jurisprudence of the African Commission by relying on the *Katangese People v Zaire* communication.<sup>124</sup> Considering the fact that jurisprudential dialogue is one way to avoid the dangers of conflicting jurisdiction between the mechanisms of the African human rights system and the ECOWAS human rights regime, this trend is commendable.

In relation to the claim based on the ECOWAS Protocol on Free Movement, the ECCJ affirmed that it is a 'solid and consistent legal foundation' for a right to establishment of ECOWAS citizens in a

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121 Suit ECW/CCJ/APP/07/10, judgment of 6 July 2012.

122 Paras 1-2 *Pinheiro* decision.

123 See paras 34-36 of the *Pinheiro* decision.

124 Para 37 *Pinheiro* decision.

country other than their own. The Court then added that the failure of a member state to internally implement either a Community Protocol or the rights of a Community citizen is a violation of that state's treaty obligation. A significance of this finding is that ECOWAS states can face sanctions for such a failure on the basis of article 77 of the revised ECOWAS Treaty and the recently-adopted Supplementary Act on Sanctions.<sup>125</sup> However, the Court was again quick to find that individuals do not have the right to sue states for a violation of obligations under Community texts. According to the ECCJ, only another member state or the ECOWAS Commission is capacitated to bring an action to compel a state to fulfil its obligations.<sup>126</sup> Hence, the Court suggested that the two options open to a citizen would be either to prompt his or her own state to bring an action or to come directly before the national courts of the defaulting state with those national courts acting as community courts.<sup>127</sup> On the basis that the plaintiff lacked standing, the Court dismissed the action. An interesting question that arises from this decision is whether the Court would have arrived at the same conclusion if it looked at the issue as a matter of the human rights of the citizen rather than the obligation of a member state, especially since the Court itself had pointed out the existence of a right.

### 3.2.13 *Umar v Nigeria*<sup>128</sup>

This case arose from the claim that the plaintiff had been arrested along with three of her children (including a baby) and subjected to physical and mental torture. Accordingly, the plaintiff argued that her rights as guaranteed in articles 2, 4, 6 and 12 of the African Charter had been violated. Thus, she sought a declaration that their arrest and torture were in violation of the African Charter, especially since her baby was still breastfeeding. She also sought an order compelling the defendant state to release her immediately and to pay her 10 million Naira in damages.

After the ECCJ ruled against it on the preliminary objection it brought, the state informed the Court during the hearing on the merits that counsel for the plaintiff had mentioned the existence of a judgment of a domestic court in favour of the plaintiff on the same facts as those before the ECCJ.<sup>129</sup> Similar to the *Tasheku* case, a copy of a judgment of the Federal High Court of Nigeria, Abuja, in a case in which the plaintiff had instituted an action against the Nigerian police force was tendered before the ECCJ. The production of the judgment, which was in favour of the present plaintiff, raised the question whether the ECCJ could proceed with its hearing of the present case

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125 n 40 above.

126 Para 48 *Pinheiro* decision.

127 Paras 49-50.

128 Suit ECW/CCJ/APP/12/11, judgment of 14 December 2012.

129 Para 4 *Umar* decision.

since the state argued that the case was not admissible before the ECCJ.

In its analysis, the ECCJ considered the production of the judgment as new evidence which warranted a re-opening of the admissibility aspect of the case. The Court then went on to address the issue of *res judicata* in relation to the present case. Citing its earlier decision in the *Tsheku* case,<sup>130</sup> the Court repeated that *res judicata* would only apply if 'it is established that the case brought before it ... is essentially the same as another case which has already been satisfactorily adjudicated upon by a competent national court'. The issues discussed in relation to the *Tsheku* case therefore apply to this case. It is hoped that the Court would have the opportunity to revisit this issue. It is unfortunate that lawyers who are aware of existing national judgments in favour of their clients still go on to seek similar relief before the ECCJ. Such practice ought to be condemned as an abuse of the court process.

### 3.2.14 *SERAP v Nigeria*

Perhaps one of the most publicised cases decided by the ECCJ in 2012 was the case of *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria*.<sup>131</sup> Originally filed against the Federal Republic of Nigeria and some oil companies operating in Nigeria, the complaint was amended to exclude the oil companies following a ruling of the Court that non-state actors could not be defendants before it.<sup>132</sup> The plaintiff's case was that the rights to health, an adequate standard of living and economic and social development of the people of the Niger Delta had been violated by the state which had failed to enforce laws and regulations to protect the environment.<sup>133</sup>

Among other things, the plaintiff sought a declaration that everyone in the Niger Delta was entitled to the affected rights and that the failure of the defendant to establish adequate monitoring of the human rights impacts of oil-related pollution, as well as the systematic denial of access to information to the people concerning oil exploration and production effects, were in violation of the African Charter, ICCPR and ICESCR. The plaintiff requested the ECCJ to make orders directing the state to ensure the full enjoyment of the affected rights to the people of the Niger Delta, compelling the state to hold oil companies operating in the area responsible for complicity in human rights violations and compelling the state to solicit the views of the people throughout the process of planning and policymaking on the Niger Delta. Also sought were orders to direct the defendant state to establish adequate regulations for the operations of the companies, to carry out a transparent and effective investigation into

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130 n 114 above.

131 Suit ECW/CCJ/APP/08/09, judgment of 14 December 2012.

132 See ST Ebobrah 'Human rights developments in African sub-regional economic communities during 2011' (2012) 12 *African Human Rights Law Journal* 223.

133 Para 4 *SERAP* decision.

the activities of the oil companies and to pay compensation to the people of the region.<sup>134</sup>

An interesting argument put forward by the state was that the ECCJ had no jurisdiction to adjudicate on alleged violations of ICCPR and ICESCR as the Nigerian Constitution only recognises the jurisdiction of Nigerian domestic courts over ICCPR, while ICESCR is not intended to be justiciable.<sup>135</sup> The state contended that the ECCJ's jurisdiction covered only the treaties, conventions and protocols of the ECOWAS Community. The state argued further that SERAP lacked *locus standi* to bring the action and that some of the facts raised were statute-barred by reason of the application of article 9(3) of the 2005 Supplementary Protocol of the ECCJ.<sup>136</sup> On these bases, the state asked that the case be dismissed.

Linking article 9(4) of the 2005 Supplementary Protocol of the ECCJ, which endows the Court with its human rights mandate to the ECOWAS Protocol on Democracy and Good Governance (ECOWAS Democracy Protocol), the ECCJ pointed out that ECOWAS member states intended that human rights in 'the international instruments, with no exception whatsoever' be protected within the Court's mandate.<sup>137</sup> The ECCJ went on to assert that in spite of the lack of an ECOWAS-specific human rights catalogue, international human rights instruments could be invoked before it, especially because all ECOWAS member states 'have renewed their allegiance to the said texts within the framework of ECOWAS'. The Court is able to make this assertion since those instruments are mentioned in the text of the ECOWAS Democracy Protocol. While it may appear a somewhat remote link, the Court is arguably on reasonable grounds since, by a liberal reading, even the Vienna Convention on the Law of Treaties (VCLT) recognises the possibility of states implementing an earlier treaty within the framework of a subsequent treaty.<sup>138</sup>

It is also a significant advancement for judicial protection of economic, social and cultural rights that the ECCJ refused to be cowed by the argument that ICESCR is not intended to be justiciable. According to the ECCJ, no such general label of non-justiciability should be attached to the rights in that instrument as it is better to deal with each right on a concrete case-by-case basis in order to extract specific obligations that are imposed on duty bearers, taking into account the limitation that availability of resources imposes on enforceability.<sup>139</sup> In essence, the Court followed the common argument that, at the very least, state responsibility to protect (as distinct from the duty to fulfil) socio-economic rights is immediate

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134 See para 19 of the *SERAP* decision.

135 Paras 20 & 24 *SERAP* decision.

136 Para 21 *SERAP* decision.

137 Paras 25-27 *SERAP* decision.

138 See art 30 of the VCLT.

139 Paras 31-32 *SERAP* decision.



and justiciable even in the face of resource constraints. Employing the framework of protection analysis, the ECCJ reasoned that in the instant case, it is the failure of the defendant state to live up to its protection obligation rather than the fulfilment obligation that was in issue.<sup>140</sup> Interestingly, despite its earlier view that there is a convergence of constitutional rights and international human rights which the ECCJ protects, the Court stated that its mandate was not to protect rights guaranteed in the constitutions of member states but international human rights.

Coming in response to the insinuation that economic, social and cultural rights are not justiciable under the Nigerian Constitution, the ECCJ is sending a message that even rights that national courts are constitutionally barred from enforcing can be brought before it insofar as the state concerned has ratified an international instrument that guarantees that right. This has the potential of flooding the Court's docket with cases from states such as Nigeria. The ECCJ also reaffirmed that SERAP had *locus standi* to bring the action. This is consistent with the Court's position in the earlier case of *SERAP v Nigeria and Others*.<sup>141</sup> However, it creates a difficulty for understanding some other decisions where the Court has held that there is a victim requirement for access to its human rights jurisdiction. Even the argument above that this decision may have been influenced by the collective nature of rights invoked can be defeated by another argument that certain rights invoked by SERAP in favour of the victims are individual rights. In relation to the argument that the events complained of occurred more than three years before the filing of the case, the ECCJ took a continuing violation approach as it pointed out that the limitation provision can only start to run 'from the time when the unlawful conduct or omission ceases'.<sup>142</sup>

Having disposed of the objections raised by the defendant state, the Court considered the alleged violations of articles 1, 2, 3, 4, 5, 9, 14, 15, 16, 21, 22, 23 and 24 of the African Charter, articles 1, 2, 6, 9, 10, 11 and 12 of ICESCR, articles 1, 2, 6, 7 and 26 of ICCPR as well as article 15 of the Universal Declaration. The Court subtly derided the idea of citing several instruments containing analogous rights as it considered such an approach to be superfluous. It then went on to state that the plaintiff could not rely exclusively on an Amnesty International report which was in 'the public domain' as conclusive evidence in proof of its case. This view is similar to the admissibility requirement under the African Charter that communications should not be based exclusively on events reported in the media.<sup>143</sup> After looking at the totality of evidence at its disposal, and pointing out that despite the state's contentions, it is public knowledge that oil spills

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140 Para 33 *SERAP* decision.

141 n 135 above.

142 See para 62 of the *SERAP* decision.

143 Art 56(4) African Charter.

pollute water and consequently adversely affect the health and means of livelihood of people, the Court reasoned that it is not the cause of the harm that was in question but the attitude of the state to these spills.<sup>144</sup> The ECCJ consequently narrowed the dispute to a determination whether the defendant state's attitude was in conformity with its obligation under article 24 of the African Charter read together with article 1 of the Charter.

In the ECCJ's analysis, state obligation in article 24 of the African Charter is both 'an obligation of attitude and an obligation of result'.<sup>145</sup> Hence, the Court reasoned that article 24 'requires every state to take every measure to maintain the quality of the environment ... such that [it] may satisfy the human beings who live there, and enhance their sustainable development'.<sup>146</sup> The Court pointed out further that the determination whether the state has fulfilled its obligation can only be made by examining the environment.

Arguably, this is the most elaborate consideration and pronouncement on the right to a satisfactory environment made by an international court. After taking note of the legislative measures taken by the defendant state and the allocation of 13 per cent resources for the development of the Niger Delta, the Court held that environmental degradation has continued despite those measures.<sup>147</sup> The Court boldly pointed out that states needed to take concrete 'other measures' beyond the formulation of policies, the adoption of legislation and the establishment of agencies in order to comply with their obligations under article 24 of the Charter.

Overall, the Court found Nigeria in violation of articles 1 and 24 of the African Charter. Although the plaintiff asked for US \$1 billion to be paid as compensation to the people of the Niger Delta, this request was dismissed because, according to the Court, no single victim had been identified and there would be difficulty in distributing any monetary award.<sup>148</sup> However, noting that a finding of violation is worthless to victims who are not awarded any reparations or remedial orders, the ECCJ ordered the state to take effective measures within the shortest possible time to ensure restoration of the environment, to prevent 'occurrence of damage to the environment' and to hold perpetrators of environmental damage accountable.<sup>149</sup> The Court further directed the state to bear all costs and pronounced that the state should comply with and enforce the judgment in accordance with the ECOWAS Treaty and the Court's 2005 Supplementary

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144 Paras 94-98 *SERAP* decision.

145 Perhaps the ECCJ is substituting obligation of conduct with obligation of attitude. Otherwise, the Court would be introducing a new concept into international human rights terminology.

146 Paras 100-101 *SERAP* decision.

147 Para 104 *SERAP* decision.

148 Paras 116-117 *SERAP* decision.

149 Para 121 *SERAP* decision.

Protocol. While the reasoning of the Court with respect to the issue of payment of compensation is understandable, for the purpose of monitoring implementation, it is not clear how equipped the Court is to monitor the implementation of the orders it has made in this case. That difficulty notwithstanding, this decision remains a landmark in the pursuit of the effective enjoyment of economic, social and cultural rights by minorities.

#### **4 Conclusion**

In the early days after the adoption of the African Charter, the need for incorporation or domestication of the Charter into national law was paramount since it became obvious that the African Commission, which had the exclusive mandate to promote and protect as well as supervise the protection of Charter-guaranteed rights, would not be able to cover the entire continent. The African Commission certainly did not have the resources – human and material – to undertake such a herculean task. Even the emergence of the African Committee of Experts on the Rights of the Child and the operationalisation of the African Court on Human and Peoples' Rights did not bring the African human rights system anywhere near realising the expectations of civil society that Charter-guaranteed rights should be taken to the nooks and crannies of Africa to protect the most vulnerable, in ways beyond the reactive judicial and quasi-judicial processes that existed at the time.

Things have surely begun to change since African RECs discovered that promoting and protecting human rights were sure ways of realising the goals of regional economic integration. In the hands of the RECs, the African Charter is going into places and areas that it may not have reached in decades to come. Even more significant is the fact that this expansion of reach propelled by sub-regional human rights regimes is happening in a manner that combines proactive non-judicial and reactive judicial approaches. Hopefully, this article has demonstrated that annually, more and more human rights and rights-related activities occur at the sub-regional level. This is an important fact that stakeholders, especially civil society, need to pay attention to. It calls for greater attention in order to ensure quality control, but it also provides huge opportunities for intervention and collaboration. These regimes create spaces for human rights promotion and protection far beyond what the limitations of continental structures allow. The cause of creating a culture of human rights in Africa will definitely benefit more than it will lose from REC participation in the field of human rights.

## ***LM and Others v Government of the Republic of Namibia: The first sub-Saharan African case dealing with coerced sterilisations of HIV-positive women – Quo vadis?***

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### **Summary**

*It has been argued that three factors characterise the HIV epidemic in sub-Saharan Africa – its female face; the implications it poses for sexual and reproductive health services (particularly those provided to women); and the pervasive discrimination following those who are infected. These factors also form the context within which there have been an increasing number of reports of HIV-positive women being coerced or forced into being permanently sterilised in order to prevent future pregnancies. The recent decision in LM and Others v Government of the Republic of Namibia deals with the alleged discriminatory and coerced sterilisation of three women living with HIV. This article describes and critiques the LM judgment. It concludes with brief comments on the way forward for similar litigation in other Southern African countries.*

### **1 Introduction**

Globally, sub-Saharan Africa is the region most profoundly affected by HIV/AIDS, as it is home to more than two-thirds of all people living

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with HIV.<sup>1</sup> Women are disproportionately affected by the virus, with almost 60 per cent of all HIV infections being in women of reproductive age.<sup>2</sup> Furthermore, the epidemic continues to be characterised by high levels of stigma and discrimination against people living with HIV.<sup>3</sup> It has been argued that three factors characterise the epidemic in sub-Saharan Africa – its female face; the implications it poses for sexual and reproductive health services (particularly those provided to women); and the pervasive discrimination following those who are infected.<sup>4</sup> These factors also form the context within which there have been an increasing number of reports of HIV-positive women being coerced<sup>5</sup> or forced<sup>6</sup> into

1 WHO, UNAIDS & UNICEF *Global HIV/AIDS response: Epidemic update and health sector progress towards universal access report* (2011) 24 [http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/20111130\\_u\\_a\\_report\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2011/20111130_u_a_report_en.pdf) (accessed 8 March 2013).

2 As above.

3 E Cameron 'Legal and human rights responses to the HIV/AIDS epidemic' (2006) 1 *Stellenbosch Law Review* 37 38; United Nations Development Programme *Global Commission on HIV and the law: Risks, rights and health* (2012) 65 <http://www.hivlawcommission.org/index.php/report> (accessed 7 February 2013).

4 Z Essack & A Strode "'I feel like half a woman all the time": The impacts of coerced and forced sterilisations on HIV-positive women in South Africa' (2012) 92 *Agenda* 24-25. The authors refer to four ways in which HIV impacts on adult women. Firstly, most women become infected during the years in which they may choose to reproduce; secondly, without medical interventions, vertical transmission of HIV is possible; thirdly, HIV can negatively affect the fertility of HIV-positive women, making reproduction difficult; and, fourthly, multiple pregnancies which are closely spaced may impact negatively on a woman's health.

5 This article uses the term 'coerced sterilisation' to refer to a situation where incentives, misinformation or intimidation tactics are used to compel a woman to consent to undergo a surgical procedure to permanently end her ability to reproduce (see Essack & Strode (n 4 above) 27). Eg, at the 2011 African Regional Dialogue, facilitated by the Global Commission, one participant described her experience of coerced sterilisation as follows: 'Women with HIV are not expected to fall pregnant. One day I could tell my doctor was angry. I had broken his trust when I said I was pregnant. He was disappointed. I had failed my doctor, I felt irresponsible and guilty. He said, "I don't want you to go through this again", so I was sterilised. I was the bad woman. I was HIV positive. I compromised my health' (civil society participant, Swaziland); *HIV and the law* (n 3 above) 65.

6 This article uses the term 'forced sterilisations' to refer to a situation in which a woman is surgically sterilised without her knowledge, or the opportunity to provide consent to the procedure (see Essack & Strode (n 4 above) 27). Accordingly, she only discovers that she has been sterilised after the procedure has taken place. Eg, in a South African study, one of the participants described her experience as follows: 'I was going for a Caesarean section. That was the only thing I had signed for. I don't know the rest, I found that out later when I had gone to [a] gynaecologist. I had asked if it is possible for me to have a baby. He said, "No, you were closed up." "In which way, is my womb there?" He said, "No, the womb is there, you did a tubal ligation" (participant 4). A Strode *et al* "'She made up a choice for me": Twenty-two HIV-positive women's experiences of involuntary sterilisation in two South African provinces' (2012) 20 *Reproductive Health Matters* 1 6.

being permanently sterilised in order to prevent future pregnancies.<sup>7</sup> The Global Commission on HIV and the Law found this to be a global human rights' issue, noting that<sup>8</sup>

the reproductive medical clinic is not a welcoming place for many HIV-positive women. Coercive and discriminatory practices in health care settings are rife, including forced HIV testing, breaches of confidentiality and the denial of health care services, as well as forced sterilisations and abortions.

Likewise, the literature reveals widespread allegations of coerced or forced sterilisation of women living with HIV in, *inter alia*, Chile, Venezuela, South Africa, Tanzania, Thailand, Uganda and Zambia.<sup>9</sup>

Limited research has been undertaken on why HIV-positive women would be targeted for sterilisations. However, in a recent South African study, participants reported that health care workers gave them one of four reasons for this 'practice': Firstly, they were HIV positive and therefore should not have more children. Secondly, sterilisations would prevent more babies being born with HIV. Thirdly, this would lower the number of children left as orphans. Fourthly, as pregnancies could have a negative impact on an HIV-positive woman's health, she should be stopped from harming herself.<sup>10</sup>

Although litigation is underway in several countries,<sup>11</sup> there has been no reported African judgments on this issue, than the *LM and Others v the Government of the Republic of Namibia* case.<sup>12</sup> This recent decision of the Namibian High Court deals directly with the alleged discriminatory and coerced sterilisation of three women living with HIV.<sup>13</sup> The case is significant, not only because it is the first of its kind in sub-Saharan Africa, but also as there is a possibility of similar litigation in a number of other countries.<sup>14</sup>

7 See, generally, P Patel 'The coerced sterilisation of HIV-positive women in Namibia' (2009) 75 *Agenda* 38-44; P Nair 'Litigating against the forced sterilisation of HIV-positive women: Recent developments in Chile and Namibia' (2010) 23 *Harvard Human Rights Journal* 223-231.

8 *HIV and the law* (n 3 above) 65.

9 As above. Open Society Initiative *Against her will: Coerced and forced sterilisation of women worldwide* (2011) <http://www.opensocietyfoundations.org/publications/against-her-will-forced-and-coerced-sterilization-women-worldwide> (accessed 7 February 2013).

10 As above.

11 *HIV and the law* (n 3 above) 65.

12 Case 1603/2008.

13 As above.

14 The Women's Legal Centre in Cape Town, South Africa, have recently lodged a claim for damages, on behalf of a woman living with HIV who alleges that she was wrongfully and unlawfully coerced into being sterilised (personal communication, Ms Sonja Bornman, 1 November 2012). In Kenya it has been reported that more than 40 women living with HIV will approach the courts for redress regarding their alleged coerced sterilisation. *The Star* 23 August 2012 <http://allafrica.com/stories/201208240201.html> (accessed 7 February 2013). See also F Kasiva *Robbed of choice: Forced and coerced experiences of women living with HIV in Kenya* (2012) African Gender and Media Initiative, Nairobi.

This article describes and critiques the *LM* judgment. It concludes with brief comments on the way forward for similar litigation in other Southern African countries.

## 2 *LM and Others v Government of the Republic of Namibia*

### 2.1 Facts

The three plaintiffs were all HIV-positive women, who alleged that they had been sterilised without their informed consent. They further alleged that the reason that they had been coerced into being sterilised was because they were HIV positive.<sup>15</sup>

The first plaintiff, LM, was 26 years old at the time of the sterilisation. She was in hospital to deliver her third child (her first was stillborn).<sup>16</sup> On 13 June 2005, she signed a form giving consent to an operation. This form stated that she was to undergo a Caesarean section and bilateral tubal ligation.<sup>17</sup> The consent document was a single form for both procedures.<sup>18</sup> LM had been in labour for 14 to 15 hours before she was given the consent form to sign,<sup>19</sup> and she signed it whilst on a stretcher outside the theatre.<sup>20</sup> The hospital records did not indicate the type of information that was given to her as part of the consent process prior to the bilateral tubal ligation procedure.<sup>21</sup> These same records also do not reflect whether she was given information on any alternative methods of contraception.<sup>22</sup> LM testified that a nurse told her that she was to be sterilised since all women who are HIV positive go through that procedure.<sup>23</sup> According to expert testimony for the plaintiff by Dr Kimberg, the prognosis for reversal of her sterilisation procedure was poor.<sup>24</sup>

The second plaintiff, MI, had previously given birth to two children.<sup>25</sup> She signed a standard consent form for an operation on 8 December 2007.<sup>26</sup> MI also signed the form at the height of her labour.<sup>27</sup> On the form it indicated that she was giving her consent for a 'Caesar + BTL due to previous Caesar'.<sup>28</sup> She also signed a second,

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15 *LM* case (n 12 above) para 2.

16 Para 10.

17 As above.

18 Para 16.

19 Para 18.

20 Para 16.

21 Para 10.

22 As above.

23 Para 16.

24 Para 10.

25 Para 20.

26 Para 10.

27 Para 36.

28 Para 10.

separate consent form for the sterilisation (the BTL).<sup>29</sup> The form that she signed included a place on it for the medical practitioner performing the operation to sign a *pro forma* statement indicating that they had explained the procedure and related aspects of sterilisation to the patient.<sup>30</sup> However, in her particular file, this part of the form had been left unsigned by the surgeon.<sup>31</sup> There were no hospital records to indicate that MI was counseled on the proposed sterilisation, or on whether she had been informed of other alternative methods of contraception.<sup>32</sup> MI testified that she was not asked by the doctor whether she wanted to be sterilised, but rather was told that she was going to be sterilised whether she liked it or not.<sup>33</sup> Furthermore, it was her evidence that the hospital staff had made it clear that there was a policy in place that all women living with HIV should be sterilised.<sup>34</sup> An expert witness testified that MI's prognosis for reversal of her sterilisation procedure was very poor.<sup>35</sup>

The third plaintiff, NH, was 46 years old and had seven children.<sup>36</sup> On 13 October 2005, NH consented to a Caesarean section and a bilateral tubal ligation. This was done by signing a standard consent form to an operation, and a second separate consent form giving consent to the sterilisation.<sup>37</sup> NH signed the forms after having been in labour for a prolonged period.<sup>38</sup> Like LM, she signed the forms whilst on a stretcher waiting to go into the theatre.<sup>39</sup> The hospital records indicate that NH was booked for an elective Caesarean, due to her advanced age, the number of previous deliveries, her HIV status, and her prolonged labour.<sup>40</sup> The consent form included a signed *pro forma* statement from the surgeon, confirming that he had explained the procedure and its related implications to the patient.<sup>41</sup> An expert witness testified that from a surgical point of view, the prognosis for reversing her sterilisation was good, but the chance of another pregnancy was low due to the advanced age of the plaintiff.<sup>42</sup>

In summary, as is shown in Table 1 below, all three plaintiffs were sterilised immediately after or during a Caesarian section. They all had children from previous pregnancies. One plaintiff was under the age of 30. They signed consent forms whilst in active labour, and immediately prior to the birth of their children. Two of the three

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29 Para 11.

30 As above.

31 As above.

32 As above.

33 Para 20.

34 Para 21.

35 Para 10.

36 Para 11.

37 As above.

38 Para 25.

39 As above.

40 Para 33.

41 Para 28.

42 Para 11.



plaintiffs signed an additional consent form which dealt specifically with the sterilisation. In all three cases, their hospital records did not reflect any documentation of the process of obtaining their consent to the sterilisation, or of whether the women had been told that alternative, non-permanent forms of birth control were available to them.

**Table 1: Summary of circumstances under which the plaintiffs 'consented' to sterilisation**

	FIRST PLAINTIFF	SECOND PLAINTIFF	THIRD PLAINTIFF
<b>Age</b>	26	-	46
<b>Number of children previously born alive</b>	1	3	6
<b>Situation at time of signing informed consent form</b>	In labour for 14–15 hours	At height of labour	Prolonged labour
<b>Nature of forms signed</b>	(1) form consenting to a C/S + BTL	(1) form consenting to a C/S + BTL (2) form for a BTL – surgeon did not sign this, confirming the procedure had been explained	(1) form consenting to a C/S + BTL (2) form for a BTL
<b>Place where informed consent form was signed</b>	On a stretcher outside the theatre	-	On a stretcher outside the theatre
<b>Offered alternative forms of contraception?</b>	No information on this in hospital record	No information on this in hospital record Health passport indicated that she wished to be sterilised	Health passport indicated that she wished to be sterilised
<b>Reason for sterilisation</b>	Informed that all HIV-positive women are sterilised	Informed that there was a policy to sterilise all HIV-positive women	-

The plaintiffs instituted two civil actions against the government of the Republic of Namibia for the unlawful sterilisation procedures that were performed on them. These were:

- (i) a claim for damages, grounded in the civil law, that the surgical procedures were unlawful as they were performed without the plaintiff's consent, or alternatively that they were unlawful as the medical practitioners had breached their duty of care that they owed to the three plaintiffs;<sup>43</sup>

<sup>43</sup> Para 1.

- (ii) a claim based on the Constitution of the Republic of Namibia, that the sterilisations were done as part of a wrongful and discriminatory practice of discrimination based on the women's HIV status. This amounted to a breach of their basic human rights, as guaranteed by the Constitution.<sup>44</sup>

## 2.2 Issues

Based on the evidence before it, the Namibian High Court held that it was required to decide on two issues: firstly, whether the three plaintiffs had given their informed consent to the sterilisation procedures and, secondly, whether they were discriminated against due to their HIV status.

## 2.3 Judgment

### 2.3.1 Consent to the sterilisation

With regard to the first claim, the Namibian government raised the defence of *volenti non fit injuria* (to one consenting no harm is done),<sup>45</sup> arguing that all three plaintiffs had signed consent forms indicating that they had agreed to their sterilisations.<sup>46</sup> The Court held that if a defendant relies on this defence, there is an onus on them to establish that all its elements existed.<sup>47</sup> The core of informed consent is knowledge, appreciation and agreement to all aspects of the transaction, including its consequences.<sup>48</sup> Furthermore, any consent provided 'must be given freely and voluntarily and should not have been induced by fear, fraud or force'.<sup>49</sup> The Court held that this resulted in a factual rather than a legal inquiry by the Court, which must establish whether consent was properly and voluntarily obtained in the particular circumstances.<sup>50</sup>

The judgment shows that two issues relating to this defence emerged through the evidence. Firstly, was adequate information provided to the patients in order for their consent to the sterilisation to be informed? Secondly, was consent provided in circumstances which facilitated the plaintiffs' making a voluntary decision regarding their sterilisation?

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44 Para 2.

45 Para 9.

46 As above.

47 Paras 27 & 13.

48 As above.

49 Para 14.

50 Para 28.

Each of these issues is now considered:

**(i) Information**

The Court held that, to assess whether the patient has given informed consent to the procedure, it must be established whether they have been provided with adequate information to make an informed choice.<sup>51</sup> This is not an absolute right, and in some circumstances the doctor is not required to disclose specific details if, for example, the patient is already aware of the information.<sup>52</sup> From the facts it appears that in Namibia, contraceptive choices are a topic covered in the antenatal classes offered to pregnant women. Clinic staff facilitates group counselling sessions at which pregnant women are told about various contraceptive options for use after their current pregnancy, and they may at this point elect sterilisation as one of these choices.<sup>53</sup> If they elect an option such as sterilisation, this is noted on their health passport, which is taken with them to hospital when they go for the delivery of their baby.<sup>54</sup>

The Court held that the Namibian government was not able to prove that they had provided the plaintiffs with sufficient information to make an informed choice on whether or not to be sterilised. There appeared to be three rationales for this. Firstly, the notes made in the three hospital files did not document the nature of the information that had been provided to the plaintiffs;<sup>55</sup> there was also no record of whether they had been told of alternatives to sterilisation.<sup>56</sup> Secondly, two of the consent forms were an inadequate reflection of the women's agreement to the sterilisation, as the first plaintiff did not sign a separate consent form for the sterilisation, and the second plaintiff's form giving consent to be sterilised was not completed by the surgeon. Thirdly, although the second and third plaintiffs' health passports indicated that they wished to have a sterilisation whilst attending antenatal services, the Court held that this did not mean that they had consented to the actual procedure on the day of the surgery.<sup>57</sup>

**(ii) Voluntariness**

The Court held that any consent provided 'must be given freely and voluntarily and should not have been induced by fear, fraud or force'.<sup>58</sup> *In casu*, all three women were asked to give consent and sign

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51 Para 16.

52 FF van Oosten, quoted in P Carstens & D Permaine *Foundational principles of South African medical law* (2007) 458 para 26. Constitution of the Republic of South Africa, 1996.

53 *LM case* (n 12 above) para 28.

54 Paras 44 & 52.

55 Paras 20-23.

56 As above.

57 Paras 56 & 65.

58 Para 14.

the required forms whilst they were in active labour. The defendant's own witness conceded that this was 'highly undesirable'.<sup>59</sup> The Court held that consent should not be obtained in these circumstances – not only because it impacted on voluntariness, but also because it made the consent process hurried.<sup>60</sup>

It should be noted that the Court did not make a finding on the *quantum* of damages owed in respect of this first claim that their informed consent had not been obtained for the sterilisations, given that the parties had agreed that this issue be held over for adjudication at a later stage.<sup>61</sup>

### 2.3.2 Unfair discrimination

With regard to the second claim that the plaintiffs had been unfairly discriminated against, this was summarily dismissed by the judge on the basis that there was no credible and convincing evidence that the sterilisation procedures had been performed on them simply because they were HIV positive.<sup>62</sup> No further reasons were given for dismissing this claim.

## 2.4 Critique of the judgment

This discussion on the judgment is divided into two parts. These are the implications that it has for (i) the law of informed consent; and (ii) the outlawing of the alleged discriminatory practice of forced or coerced sterilisation of women living with HIV.

### 2.4.1 Implications of judgment for the law of informed consent to medical treatment

In Namibian law, it is a well-established principle that consent will only be valid if it is based on knowledge concerning the nature and effect of the act being consented to.<sup>63</sup> The *LM* case adds to this body of law, by requiring – for the first time – the documenting of what information has been provided to the patient. This places an additional burden on medical practitioners who must make notes on the nature of the information they have provided to the patient, in order to facilitate rational decision making. This is a break with the past, when simply recording the patient's decision was generally regarded as sufficient proof that they met the standard of advising the patient of any material risk in the procedure.<sup>64</sup> In this way, the *LM*

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59 Para 35.

60 Para 69.

61 Para 8.

62 Para 83.

63 In paragraph 10 of the judgment, the Court held that the South African case of *Castel v De Greef* 1994 4 SA 408 (C) 421 426B is the leading judgment on informed consent

64 As above.

case was a victory for patients' rights, and adds to the existing patient protections during the consent process.

The Court did not, however, address the issue of what information is required to be provided to a woman before a sterilisation, despite international standards being available on this point.<sup>65</sup> For example, the World Health Organisation (WHO) has identified six key pieces of information that every patient should be informed of, before a sterilisation.<sup>66</sup>

- 1 Sterilisation is a surgical procedure.
- 2 It has both risks and benefits.
- 3 The procedure will prevent future pregnancies.
- 4 Sterilisation is considered a permanent procedure.
- 5 Refusing to be sterilised will not result in the loss of any benefits.
- 6 Non-permanent forms of contraceptive alternatives are available.

In this instance, it appears that there was only evidence that the women were told that the procedure was a surgical one, as they all signed consent to surgery forms.<sup>67</sup> It is possible that the second and third plaintiffs had some information on the nature and implications of sterilisations, as they had elected this form of contraception during their antenatal classes. However, there was no evidence to confirm the nature of this information. Accordingly, it could be argued that the summation of evidence does not indicate that any of the other five WHO standards were met during the consent process.

With regard to the standard of information that should be provided before a sterilisation, the Court did, however, comment that patients should at a minimum be informed of both the advantages and disadvantages of sterilisation, as well as of alternative contraception methods.<sup>68</sup> It also noted:<sup>69</sup>

Even though individual counselling may be an ideal situation in which to do proper and skilled counselling, one should not close one's eyes (figuratively speaking) to the realities encountered at state hospitals. I can see no reason why group counselling cannot be adequate and sufficient, provided that skilled counsellors are engaged and information is conveyed in languages which are understood by the patients requiring such counselling.

The *LM* case is also important from a patients' rights perspective, as it adds to our understanding of voluntariness. The Court found that obtaining consent during labour did not promote autonomous

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65 WHO *Medical eligibility criteria for contraceptive use* (2010) [http://whqlibdoc.who.int/publications/2010/9789241563888\\_eng.pdf](http://whqlibdoc.who.int/publications/2010/9789241563888_eng.pdf) (accessed 9 February 2013).

66 As above.

67 WHO (n 65 above) paras 10-11.

68 Para 70.

69 Para 79.

decision making, particularly as it made the procedure rushed.<sup>70</sup> This is an important finding, as other studies have found that many women felt coerced into being sterilised when they were asked to make this decision, whilst in labour and enduring great pain.<sup>71</sup> This finding has implications for the way in which hospitals obtain consent for a sterilisation, and it seems to imply that although it may be convenient and cost-effective for a sterilisation to be undertaken at the same time as a Caesarean section, consent to the sterilisation should be obtained before the onset of active labour. It may also mean that in the longer term, there ought to be law reform in Namibia to ensure that there are special protections for women undergoing a sterilisation. In this context, Strode, Mthembu and Essack – writing about the situation in South Africa – argue for amendments to the Sterilisation Act,<sup>72</sup> to place an obligation on hospital authorities to counsel women before a sterilisation, and to require a specific time period between the date of providing consent and the execution of the procedure.<sup>73</sup> These authors submit that this will enhance voluntary decision making.<sup>74</sup>

#### 2.4.2 Implications of judgment for outlawing of coerced or forced sterilisation of women living with HIV

Sadly, the judgment does not take forward the issue of forced or coerced sterilisation of women living with HIV. It is difficult to understand Hoff J's cursory dismissal of the second claim on discrimination. In essence, the Court held that the plaintiffs had not discharged their onus of showing that the discrimination had occurred.<sup>75</sup>

Herbstein and Van Winsen submit that the phrase 'burden of proof' refers to the onus which rests on a litigant to establish the factual basis for a claim or defence.<sup>76</sup> In this instance, the plaintiffs had alleged that<sup>77</sup>

the sterilisations were done as part of a wrongful practice of discrimination against them based on their HIV status and that this amounts to a breach of their basic human rights as guaranteed by the provisions of the Constitution of the Republic of Namibia.

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70 Para 34.

71 Eg, Strode *et al* (n 6 above) 5 set out the following two quotes from participants in their study, who were asked to consent whilst in labour: 'They made me sign this paper after I had collapsed in the toilet' (participant 1); 'I was under an emergency of getting a child. They should not have operated on me during the time of distress when I was in labour' (participant 17). Also see the International Community of Women Living with HIV/AIDS (ICW) *The forced and coerced sterilisation of women living with HIV in Namibia* (2009).

72 Act 44 of 1998.

73 Strode *et al* (n 6 above) 7.

74 As above.

75 *LM* case (n 12 above) para 2.

76 AC Cilliers *et al* Herbstein & Van Winsen (2009) 891.

77 *LM* case (n 12 above) para 2.

Accordingly, *in casu*, it is submitted that the onus of proof rested on them to prove that the health care workers acted in a discriminatory way when coercing them into being sterilised because they were HIV positive. It is assumed that, to meet this burden of proof, the plaintiffs would need to show that the health care workers treated them in a discriminatory manner, and this could be done through their own evidence of the events, other corroborating facts, or witness testimony and/or the submission of documentary proof.

*In casu*, there is no official state policy which recommends the sterilisation of women living with HIV in Namibia, and no evidence of a discriminatory reason for the sterilisation in the women's files. Thus, it appears that there was no documentary proof which could be put forward to support their allegations. However, it is assumed that the plaintiffs gave their own evidence on why they perceived the actions of the health care workers to be discriminatory in order to discharge the onus. It is therefore of concern that their evidence is not described in any detail in the judgment. A brief reference is made to the versions of the first and second plaintiff's evidence, with Hoff J noting that the first plaintiff testified that before she was taken to the theatre, a nurse came into the delivery room and told her that she would be sterilised, since 'all women who are HIV positive go through that procedure'.<sup>78</sup> The judgment states further that the second plaintiff testified that she was made to understand that there was a policy in place that women who are HIV positive should be sterilised.<sup>79</sup> It is argued that these averments make out a *prima facie* case of a violation of article 10 of the Constitution of the Republic of Namibia (the equality clause). However, this is ignored by the judgment, as there is no mention of whether the plaintiffs' evidence was subject to cross-examination and found to be plausible or unreliable.

Furthermore, it is of concern that the judge did not address the issue of the inferences that could have been drawn to corroborate the plaintiffs' evidence in this regard. It is clear from the summary of evidence that some of the proven facts corroborated the versions of the first and second plaintiffs. These facts include (i) that all the health care workers involved in the sterilisations were aware of the plaintiffs' HIV status, as it was noted in their files that they were on anti-retroviral treatment;<sup>80</sup> and (ii) that the sterilisations were undertaken as though it was an emergency, with consent being hurriedly obtained outside the theatre, and whilst the women were in labour, despite this being contrary to international guidance regarding sterilisations.<sup>81</sup> The sterilisation of the first plaintiff was particularly problematic as she did not indicate a desire to be sterilised during antenatal classes, was below the age of 30 (which WHO sets as a

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78 Para 33.

79 Para 21.

80 Paras 17, 20 & 25.

81 WHO *Medical eligibility criteria* (n 65 above).

threshold for sterilisations),<sup>82</sup> and was only giving birth to her second child. In this context, it is unclear why the Court did not draw any adverse inferences from these proven facts.

In the case of *AA Onderlinge Assuransie Bpk v De Beer*,<sup>83</sup> it was held that it is not necessary for a plaintiff in a civil claim to prove that the inference which he or she asks the court to make is the only reasonable inference possible in the circumstances. Instead, the Court held that the plaintiff will discharge the onus which rests on him or her if they can convince the Court that the inference being advocated is the most readily, apparent and acceptable inference from a number of possible inferences. In this instance, it is argued that HIV-related discrimination and a desire to ensure that HIV-positive women do not reproduce is the most readily, apparent and acceptable inference in the circumstances.

It is argued that the Court's failure to consider why three HIV-positive women – delivering babies at different times – all believed that they had been coerced into being sterilised simply because they were HIV positive is a key weakness in the judgment. This leaves this issue unaddressed, despite the fact that the Namibian courts have in the past recognised that treating persons with HIV arbitrarily is a form of unfair discrimination. For example, in *Nanditume v Minister of Defence*, the Labour Court held that 'no person may be excluded from enlistment into the Namibian Defence Force solely on the basis of such person's HIV status where such person is otherwise fit and healthy'.<sup>84</sup>

Finally, although there is limited international jurisprudence on discriminatory sterilisations, the recent dissenting opinion by one of the judges of the European Court of Human Rights in *VC v Slovakia*, which found the sterilisation of Roma women in Czechoslovakia to be a discriminatory practice, gives hope for further development in this area.<sup>85</sup> In this case, the dissenting judgment found that the sterilisation of VC violated article 14 – the right to equality – in the European Convention on Human Rights,<sup>86</sup> as she had been coerced into being sterilised as a direct result of her 'ethnic origin'.<sup>87</sup>

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82 As above.

83 1982 2 SA 604 (A).

84 (2002) AHRLR 119 (NaLC 2000) para 40.

85 *VC v Slovakia* (Slovakia) application 18968/07. In this matter, the applicant was a woman of Roma ethnic origin, who was sterilised during the delivery of her second child via Caesarean section. The applicant had been in labour for several hours when she was asked whether she wanted to have more children. She responded positively, but was told by the medical personnel that if she had more children, either she or the baby would die. Accordingly, she told the medical personnel 'Do what you want to do.' She then signed a note indicating that she had requested sterilisation.

86 This article prohibits discrimination on any ground, including sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

87 *VC v Slovakia* (n 85 above), dissenting opinion of Judge Mijovic.



### 3 Litigation in other parts of Southern Africa

The *LM* case was a clear victory for patients' rights, as the Court held that the mere existence of signed consent forms for a sterilisation were insufficient, and that there was an onus on health care workers to document the information that they had provided to the patient, and that they had to ensure that consent was obtained in circumstances that promoted voluntariness. Nevertheless, the judgment failed to address the issue of the forced or coerced sterilisation of women living with HIV as a form of unfair discrimination. It is submitted that the failure of the Court to recognise that this 'practice' of coerced sterilisation of women living with HIV as a form of systemic discrimination requires further reflection. This also has implications for pending litigation in other countries. The following are preliminary suggestions on what is needed to strengthen claims of unfair discrimination in other cases:

- 1 *Research*. In *VC v Slovakia*, the applicant relied on a large-scale study showing that, although Roma women made up only 7 per cent of the population, they accounted for 60 per cent of all sterilisations undertaken. This clearly indicated a discriminatory bias in the health system towards sterilising Roma women.<sup>88</sup> It is submitted that this type of 'evidence' is clearly compelling and further research is required in Southern Africa, to build a similar quantitative evidence base through hospital record reviews that show a that disproportionate number of HIV-positive women are being sterilised. Alternatively, even if it is not possible to show that HIV-positive women are being disproportionately sterilised, at least research should be undertaken to show that the cohort of women being sterilised is younger and more likely to be HIV infected.<sup>89</sup>
- 2 *Amici curiae*. Organisations working with women living with HIV may be used to join the proceedings as *amici curiae*, and present evidence or existing research documenting the experiences of HIV-positive women, and why they perceive the actions of health care workers to be discriminatory.
- 3 *Alternative legal strategies*. In the *LM* case the plaintiffs argued that their constitutional rights to equality had been violated. However, it may in future matters be worth considering using the equality provisions in HIV-specific laws rather than the civil law in order to challenge the practice. For example, Angola, Madagascar, Mauritius, Mozambique and Tanzania all have HIV laws which outlaw unfair discrimination on the basis of a person's HIV

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88 *VC v Slovakia* (n 85 above) para 45.

89 There have already been a number of studies documenting the experiences of women living with HIV (eg Essack & Strode (n 4 above); Strode *et al* (n 6 above); International Coalition of Women Living with HIV (n 71 above); and Kasiva (n 14 above)). There do not appear to have been any quantitative studies on the extent of forced sterilisations that have taken place in Southern Africa.

status.<sup>90</sup> It is possible that, as such provisions are HIV-specific, the remedies created in such laws may provide more effective relief.

#### 4 Conclusion

The *LM* judgment is a significant one from a patient rights' perspective, as it recognises consent as a process rather than an outcome. However, it failed to advance the campaign against coerced or forced sterilisations of women living with HIV. It appears that, worldwide, courts are being slow to accept this form of discrimination as unlawful. The most recent majority decision by the European Court of Human Rights on a similar issue also avoided a finding of unfair discrimination when the Court held that it was unnecessary to examine article 14 (the prohibition of discrimination) when deciding whether the applicant had been sterilised without her consent.<sup>91</sup> In contrast, the dissenting judgment held that a finding on this issue was important as it would send a strong message that governments can no longer use racial stereotypes to defend abuse masquerading as medicine.<sup>92</sup>

*Quo vadis?* It appears clear that more evidence will have to be put before a court to support an allegation of unfair discrimination relating to HIV-positive women in the future. Alternatively, different legal strategies may need to be investigated.

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90 A Storde *et al* 'Are there laws and policies protecting people infected and affected by HIV/AIDS in Southern Africa? An update of a review of the extent to which countries within the South African Development (SADC) region have implemented the HIV/AIDS and Human Rights International Guidelines' (2010) *Obiter* 58 62.

91 VC case (n 85 above).

92 As above.

## Gender equality in Botswana: The case of *Mmusi and Others v Ramantele and Others*

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### Summary

*On 12 October 2012, the High Court of Botswana declared the Ngwaketse rule of customary law, which provides that only the last-born son may inherit his parents' dwelling house, as unconstitutional. The rule excludes women from inheriting their parents' dwelling house regardless of their rank in the birth order. This article examines the decision of the Court. It notes with commendation that, although the decision will not of itself stop the disempowerment of women in Botswana, it constitutes a critical step towards gender mainstreaming in the country. The article also lauds the Court for its extensive use of comparative human rights jurisprudence and international human rights law in the determination of the claim. The advantage of this approach is that it sets the growth of Botswana's human rights jurisprudence in line with international standards and best practices. Nevertheless, this article notes that the judge failed to reconcile the two conflicting constitutional provisions that were at issue in the case: section 3, which affords the applicants equal protection of the law, and section 15, which permits discrimination in inheritance and other matters governed by one's personal law. The article suggests that the judge should have adopted and applied the harmonisation approach to settle this tension. Further, the article notes that the judge misapplied precedents on the question of the role of public opinion in the determination of constitutional disputes before him. Be that as it may, the abolition of the concerned Ngwaketse rule of customary law is cause for celebration for women of Botswana, Africa and beyond.*

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## 1 Introduction

Custom and tradition are often used to justify the oppression of women. The Botswana case of *Mmusi and Others v Ramantele and Others (Mmusi case)*<sup>1</sup> demonstrates in a spectacular fashion how custom and tradition may be deployed to undermine women's rights. In this case, custom was invoked to disinherit the applicants on the grounds of their gender. The High Court of Botswana ruled that a rule of customary law emanating from this custom was unconstitutional.

The courts of Botswana have always sought to protect the human rights of women whenever the opportunity presented itself. In 1992 both the High Court and Court of Appeal of Botswana held as void sections 4 and 5 of the Citizenship Act<sup>2</sup> in the celebrated case of *Attorney-General v Dow (Dow case)*,<sup>3</sup> for being inconsistent with the Constitution of Botswana.<sup>4</sup> The said provisions were giving a right to Botswana men who are married to non-Batswana women to pass Botswana citizenship to their children, but denied Botswana women who were married to non-Batswana men the right to pass citizenship to their children. Both courts held that these provisions undermined women's equality, dignity and freedom from discrimination. Commenting on the significance of the case, Seng stated that the case gave great satisfaction not only to the applicant in the case, but also to 'women's rights movements worldwide'.<sup>5</sup> Perhaps the *Mmusi* decision takes over from where *Dow* left off in pushing back the frontiers of emancipation for the women of Botswana, Africa and the world. This article critiques the *Mmusi* decision, identifying its strengths and weaknesses. It singles out for commendation the way in which Justice Key Dingake utilised international law, human rights law and comparative jurisprudence to decide the matter. Nevertheless, it criticises the judge for failing to adopt and apply proper interpretation techniques to settle the tension between the conflicting provisions of the Constitution. It also critiques the judge's failure to locate the place of public opinion in the adjudication of constitutional disputes, especially those touching on human rights. The article concludes that, although the judgment has shortcomings, its practical value is monumental.

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1 MAHLB-000836-10.

2 Citizenship (Amendment) Act 17 of 1984.

3 1992 BLR 119.

4 Cap 01:01, Laws of Botswana.

5 MP Seng 'In a conflict between equal rights for women and customary law: The Botswana Court of Appeal chooses equality' (1993) 24 *Toledo Law Review* 564.

## 2 Litigation in the *Mmusi* case

### 2.1 Background of the case

The material facts of the case may be stated briefly as follows: On 15 May 2007, the first applicant sued the first respondent before the Lower Customary Court in the *Ngwaketse* area for an order declaring, among other things, that she was entitled to inherit the dwelling house forming part of her late father's estate, who had died intestate. The Customary Court dismissed the applicant's claim on the ground that under *Ngwaketse* customary law,<sup>6</sup> a woman cannot inherit her father's dwelling house. Dissatisfied with the ruling of the Lower Customary Court, the applicant appealed to the Higher Customary Court, where Kgosi Lotlaamoreng<sup>7</sup> ordered that the parties' elders must convene a meeting where they should identify the child who will remain in the dwelling house. On further appeal, the decision of Kgosi Lotlaamoreng was overturned by the Customary Court of Appeal, holding that, according to long-standing traditions and customs of the *Bangwaketse*,<sup>8</sup> if the inheritance is distributed, the family home is given to the last-born son.<sup>9</sup> Thus, the Customary Court of Appeal entered judgment in favour of the first respondent and ordered the applicant to vacate her father's dwelling house within 30 days from the date of the order. Dissatisfied by the decision of the Customary Court of Appeal, the applicant, this time joined by a further two of her sisters, brought an application before the High Court of Botswana challenging the rule of *Ngwaketse* customary law,<sup>10</sup> which denies women the right to inherit a family residence forming part of their late father's estate solely on the basis of their sex. They argued that the rule violated their right to equality under section 3(a) of the Constitution of Botswana.<sup>11</sup> The applicants' application was fiercely opposed by their nephew and the Attorney-General, who maintained that the rule that excludes the applicants from inheriting their father's dwelling house was part of the *Ngwaketse* culture and thus must remain undisturbed. The effect of the judgment of the Customary Court of Appeal is that, no matter where women are located in the birth order, they are not entitled to inherit from their parents the

6 The *Bangwaketse* are one of the largest ethnic groups found in the southern part of Botswana.

7 *Kgosi* means chief; a tribal leader.

8 One of the largest tribes in Botswana situated in the southern part of the country and which has Kanye Village as capital.

9 *Mmusi* case (n 1 above) para 10.

10 *Ngwaketse* customary law is the customary law of the *Bangwaketse*.

11 Sec 3(a) thereof states: 'Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his place of origin, political opinion ... but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely (a) life, liberty, security of the person and the protection of the law ...'

family home through intestate inheritance, despite the fact that their brothers enjoy the right of such inheritance.<sup>12</sup>

Before the High Court the applicants argued that the customary rule in question undermined their rights to equality or equal protection of the law under section 3(a) of the Constitution of Botswana. On the other hand, the respondents' central argument was that, since Botswana was a 'culturally-inclined nation', the rule must be saved as it formed an integral aspect of the *Ngwaketse* inheritance customs and traditions. The respondents argued that the time had not yet arrived to upset the rule in question. More critically, the Attorney-General argued that, although the Constitution of Botswana contained provisions on non-discrimination and equality, in terms of its section 15(4)(c), discrimination could be permitted in relation to devolution of property upon death or other matters of personal law. Naturally, the presiding judge was being called upon to employ interpretation techniques that will enable section 3(a) (guaranteeing applicants' rights to equality and protection of the law) to co-exist within a single unitary constitutional scheme with section 15(4)(c), which permits discrimination on matters of inheritance and personal law. As will be shown during the course of this article, the judge avoided dealing with the conflict between these two provisions.

## 2.2 Judgment of the High Court

After surveying relevant decisions of foreign municipal and international tribunals and provisions of relevant international human rights instruments, the judge entered judgment in favour of the applicants. His view was that the rule of *Ngwaketse* customary law concerned violated the applicants' rights to equality and dignity guaranteed under section 3(a) of the Constitution. He argued that the differential treatment embodied in the rule of *Ngwaketse* customary law was offensive to modern thinking and unjustifiable. He criticised the rule as perpetuating an unacceptable culture of male dominance that reserves for women positions of subordination and subservience. The judge held that the exclusion of women from inheritance in the manner that the impugned rule sought to do was fundamentally unjust and constituted degrading treatment and an assault on the dignity of women. He also stressed that courts of law, as the conscience and voice of contemporary society, must do their part to ensure that the ideal of gender parity is achieved. In this regard, the learned judge remarked:<sup>13</sup>

It seems to me that the time has now arisen for the justices of this court to assume the role of the judicial midwives and assist in the birth of a new world struggling to be born, a world of equality between men and women as envisioned by the framers of the Constitution.

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12 *Mmusi* case (n 1 above) para 24.

13 *Mmusi* case (n 1 above) para 217.

More critically, the learned judge concluded his judgment by calling upon the government of Botswana to repeal all discriminatory laws which may in themselves or by their effect undermine the rights of women. In this connection, the Court assertively delivered itself thus:<sup>14</sup>

In conclusion, I wish to point out that there is an urgent need for parliament to scrap/abolish all laws that are inconsistent with section 3(a) so that the right to equality ceases to be an illusion or a mirage, but where parliament is slow to effect the promise of the Constitution, this Court, being the fountain of justice and the guardian of the Constitution, would not hesitate to perform its constitutional duty when called upon to do so.

### 3 General observations on the judgment

#### 3.1 Strengths of the judgment

As indicated above, perhaps the *Mmusi* decision is the most seminal and comprehensive judgment where a court in Botswana has sought to advance the agenda of gender parity after the watershed *Dow* case. The *Mmusi* decision has been described by the Deputy-Director of the Southern Africa Litigation Centre, Priti Patel, as 'the best judgment ever'.<sup>15</sup> Although it is not necessarily correct that the *Mmusi* decision is 'the best judgment ever', it is, however, an important judgment that contributes in a significant way to the growth of the human rights jurisprudence and praxis of Botswana and beyond. Some of the strongest points or aspects of the judgment are the use of comparative jurisprudence and principles of international human rights law.

##### 3.1.1 Use of comparative jurisprudence

The importance of the eclectic application of judicial decisions of foreign municipal courts by other local courts cannot be over-emphasised. In this regard, the inimitable Aguda JA stated in his separate opinion in the *Dow* case:<sup>16</sup>

At this juncture, I wish to take judicial notice of that which is known the world over that Botswana is one of the few countries in Africa where liberal democracy has taken root. It seems clear to me that all the three arms of government – the legislature, the executive and the judiciary – must strive to make it remain so, except to any extent as may be prohibited by the Constitution in clear terms. It seems clear to me that in so striving, we cannot afford to be immune from the progressive movements going on around us in other liberal and not so liberal democracies, such movements manifesting themselves in international agreements, treaties, resolutions, protocols and other similar understandings as well as in the respectable

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14 *Mmusi* case (n 1 above) para 218.

15 See R Moyo 'Botswana women granted right to inherit' *IOL News* 13 October 2012 <http://www.iol.co.za/news/africa/botswana-women-granted-right-to-inherit-1.1402244> (accessed 30 April 2013).

16 *Attorney-General v Dow* [1992] BLR 119 (CA) 168.

and respected voices of our learned brethren in the performance of their adjudicatory roles in our jurisdictions.

Similar sentiments were repeated by Collins AJ (as he then was) in the local case of *Ahmed v Attorney-General*,<sup>17</sup> where he stated that it was necessary for the courts of Botswana 'to join hands and share our progressive liberal democracy with like-minded countries, especially through paying close attention to each other's judicial pronouncements on constitutional issues dealing with fundamental rights and freedoms',<sup>18</sup> warning against the 'dangers of any attempt to inculcate a culture of isolationism against the unstoppable juggernaut of globalisation'.<sup>19</sup> Dingake J, himself, was fully aware of the value of comparative jurisprudential analysis in the *Mmusi* case. He relevantly and correctly observed therein that comparative law offers richer and wider model solutions to legal problems.<sup>20</sup> He further stated that the matrix of world jurisdictions can offer diverse solutions than can be thought up in a lifetime, even by the most distinguished jurist.<sup>21</sup> He crisply observed that the use of comparative law in judicial decision making makes it unnecessary to re-invent the wheel of justice each time a new situation arises for judicial determination in a particular jurisdiction.<sup>22</sup> In line with the views espoused above, in the *Mmusi* case, Dingake J impressively engaged in an explorative journey, traversing foreign jurisdictions, borrowing and adapting perspectives from them on how to deal with the matter before him. He interrogated how superior courts of Ghana,<sup>23</sup> Kenya,<sup>24</sup> India,<sup>25</sup> Nigeria,<sup>26</sup> South Africa,<sup>27</sup> Tanzania,<sup>28</sup> the United States<sup>29</sup> and the United Kingdom<sup>30</sup> had interpreted provisions of their respective constitutions dealing with the rights to equality, dignity and freedom from discrimination. Given the authoritativeness and eminence of some of the judges who presided over some of the foreign cases relied upon in *Mmusi*, there can be no doubt that these foreign decisions

17 [2002] 2 BLR 431 (HC).

18 *Ahmed* (n 17 above) 440.

19 As above.

20 *Mmusi* case (n 1 above) 33.

21 As above.

22 As above.

23 The learned judge relied on the following Ghanaian cases: *Fianko v Aggrey* [2007-2008] GLR (SC) 1135 1145; *Nartey v Nartey & Another* [1962] 1 GLR 184; *Akrofi v Akrofi* [1965] GLR 13.

24 From Kenya he cited *Re Wachokire Succession Cause 192 of 2000* discussed in UNDP *The role of the judiciary in promoting gender justice in Africa* (2008) 19.

25 From the Supreme Court of India he relied on *Madhu Kishwar v State of Bihar* [1996] AIR (SC); *Cracknell v State of Uttar Pradesh* AIR [1952] AK 746.

26 See *Mojekwu v Mojekwu* [1997] 7 NWLR 283.

27 See *Bhe v Magistrate, Khayelitsha & Others* 2005 1 SA 580 (CC).

28 See *Nothman v Borough of Barnet* [1978] 1 ALL ER 1243.

29 *Brown & Others v Board of Education* 347 US 483 (1954); *Plessy v Ferguson* 163 US 537 1896).

30 *Ephraim v Pastory* (2001) AHRLR 236 (TzHC 1990).



influenced the learned judge in no small measure. The jurisprudence of Botswana was made richer.

### 3.1.2 Application of principles of international law

Botswana is a dualist state. It has inherited the dualism tradition from her erstwhile coloniser, Great Britain. This means that, in Botswana, provisions of international instruments do not create justiciable rights, and that they are unenforceable within Botswana's legal order unless they are legislatively incorporated in its municipal legal scheme. Owing to Botswana's disinterest in ratifying and domesticating international treaties and conventions, Botswana courts have been hamstrung in applying the provisions of these international instruments. Conservative and strict constructionist judges consider international law as a no-go area in the process of judicial determination of local disputes.<sup>31</sup> For them, international law could only be resorted to in the limited instances of aiding in the construction of an enactment as required under section 24 of the Interpretation Act.<sup>32</sup> However, some judges have cleverly attempted to indirectly rely on provisions of international law to give direction to Botswana's human rights jurisprudence path. For instance, in the *Ahmed* case, the Court asserted that<sup>33</sup>

[a]fter all, if Botswana is party to international agreements, treaties, protocols, etc for the sake of far-sighted domestic reward (rather than paying simple lip-service), then the laws of those countries who are parties to such agreements are inextricably part of the process.

On the same point, Aguda JA also stated the following in the *Dow* case:<sup>34</sup>

I take the view that in all these circumstances a court in this country, faced with the difficulty of interpretation as to whether or not some legislation breached any of the provisions entrenched in chapter II of our Constitution which deal with fundamental rights and freedoms of the individual, is entitled to look at the international agreements, treaties and obligations entered into before or after the legislation was enacted to ensure that such domestic legislation does not breach any of the international conventions, agreements, treaties, and obligations binding upon this country save upon clear and unambiguous language.

In the *Mmusi* case, the judge emphatically rejected the argument by the Attorney-General of Botswana, Ms Athaliah Molokomme, that, since Botswana has not domesticated relevant international

31 See, eg, the views of Tebbutt P in the case of *Kenneth Good v Attorney-General* 2003 (2) BLR 67 CA 345-346.

32 Cap 01:01, Laws of Botswana. Sec 24 provides: 'For the purposes of ascertaining that which an enactment was made to correct and as an aid to the construction of the enactment a court may have regard to any relevant international treaty, agreement or convention and to any papers laid before the National Assembly in reference to the enactment or to its subject matter, but not to the debates in the Assembly.'

33 *Ahmed* case (n 17 above) 440.

34 *Dow* case (n 3 above) 170.

instruments guaranteeing gender parity, it was not competent for the Court to consider them for purposes of the determination of the matter. The Court observed that it would not limit the use of international law to a construction of enactments only as required by section 24 of the Interpretation Act, observing that 'though not binding, [international law] is persuasive and can offer useful guidance on the nature and scope of existing constitutional rights'.<sup>35</sup> He continued:<sup>36</sup>

It is axiomatic that by ratifying [these] international legal instruments, states parties commit themselves to modify the social and cultural patterns of conduct that adversely affect women through appropriate legislative, institutional and other measures, with a view to achieving the elimination of harmful cultural and traditional practices 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 women and men.

The judge proceeded to survey the provisions of international instruments such as the International Covenant on Civil and Political Rights (ICCPR),<sup>37</sup> the African Charter on Human and Peoples' Rights (African Charter),<sup>38</sup> and decisions of adjudicatory organs of these instruments, namely, the Human Rights Committee and the African Commission on Human and Peoples' Rights (African Commission). The judge went beyond using the provisions of international treaties as mere guides in interpretation and cited them to bolster the provisions of the Constitution of Botswana that guarantee human rights.<sup>39</sup> It is safe to say this is the first case to deal extensively with the question of the influence of international law and decisions of its bodies on Botswana's legal landscape. Finally, and most crucially to women generally, the decision underscores the fact that their rights to equality, dignity and freedom from discrimination are irreducible and non-negotiable. The judgment proclaims in no uncertain terms that women's rights are human rights and must be respected by all and sundry.

Although all Southern African countries have adopted constitutions with appreciably comprehensive bills of rights, they also practise customary law which is wrought with harmful practices that violate the rights of women. As indicated above, these human rights violations are rampant in rural areas where they are justified on the basis of custom, culture or religion. In most African settings, custom readily translates itself into law. Thus, in many instances,

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35 *Mmusi case* (n 1 above) para 56.

36 *Mmusi case* (n 1 above) para 187.

37 International Covenant on Civil and Political Rights, 16 December 1955, opened for signature 16 December 1966, entry into force 23 March 1976 <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 1 May 2013).

38 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29.

39 Eg, see para 184 where the judge relies on the equality clause of the African Charter.

discriminatory customary practices and traditions against women, such as the impugned rule of *Ngwaketse* customary law, find legal validity and legitimacy on the basis of customary law. Given the entrenched patriarchal character of customary law and its institutions and the discriminatory societal relationships in traditional set-ups, women's rights are always subordinated to the interests of men. Since most African societies are governed by customary law, especially in rural areas, stemming the tide of violations of the rights of women in these areas presents a serious challenge. These challenges exist largely due to the inaccessibility of institutions for recourse such as courts of law and women's general lack of knowledge about their rights.

As the *Mmusi* case bears testimony, one area where the rights of women are often trampled is that of the law of inheritance. Inheritance is an important issue touching on the question of the distribution of resources in society. It also partly accounts for relational power differences between men and women because of the exclusion of women from inheriting property which mostly define the social status of a person in an African community. Although the movement for the recognition of women's rights is gaining currency on the continent and the language of women's rights is inching itself into constitutions and statutes of many Southern African states, there remains a yawning chasm between legal policy and actual practice.<sup>40</sup> Whereas statutes guarantee equal rights and opportunities between men and women, discrimination against women is still endemic in the villages, fields, cattle posts and other obscure corners of African countries. *Mmusi* has not abolished the oppression of women in Botswana, but most certainly it is a critical step in that direction.

### 3.2 Shortcomings of the judgment

#### 3.2.1 Failure to apply the harmonisation principle

Whereas the applicants invited the Court to nullify the *Ngwaketse* customary law rule concerned on the ground that it is *ultra vires* section 3 of the Constitution, on the other hand the respondents wanted the rule to be saved on the basis that, although section 3 of the Constitution prohibits discrimination and promotes equality between sexes, discrimination is permissible 'with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law' in terms of section 15(4)(c) of the Constitution. A few observations are worth noting here: It is clear that the *Ngwaketse* customary law rule that was under attack permitted differential treatment between men and women insofar as inheritance is concerned. *Ex facie* this, it will be in contravention of section 3 of the Constitution which guarantees fundamental rights and freedoms

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40 AM Richardson 'Women's inheritance rights in Africa: The need to integrate cultural understanding and legal reform' (2004) 11 *Human Rights Brief* 19.

and specifically lists sex as a prohibited ground for discrimination.<sup>41</sup> Section 15(3) also expressly prohibits discrimination on the basis of sex. On the other hand, section 15(4)(c) of the same Constitution, being part of the same Bill of Rights as section 3, permits discrimination on issues of inheritance and personal law. Indeed, the learned Attorney-General impressed upon the judge that he must save the offensive rule on the basis of the said section 15(4)(c).

It appears that the Constitution of Botswana gives a right with one hand and takes it away with the other. Whereas the Constitution prohibits discrimination in some of its clauses, it entrenches discrimination in other provisions. Thus, a conflict arose in the case. This tension can only be settled by the application of the doctrine of harmonisation, which requires that the provisions of the Constitution must be interpreted in a manner that ensures their peaceful co-existence. Surprisingly, the judge did not acknowledge the existence of conflict between the provisions of the Constitution and proceeded to deal with the matter as if all the relevant constitutional provisions were converging. Although the judge did not acknowledge the tension between the constitutional provisions in his judgment, the fact that sections 3 and 15 of the Constitution sat ill with one another prompted him to say the following:<sup>42</sup>

I am conscious of the argument advanced by the respondents that I must apply section 15 to the dispute and not section 3(a) of the Constitution. I am unable to understand the logic of such argument. Section 3(a) is a substantive section that confers rights. It is distinct from section 15. If a litigant, as in this case, chooses to proceed in terms of section 3(a), and succeeds to meet the requirements of the said section, then his/her challenge is entitled to succeed. (See *Stratosphere Investments (Pty) Ltd t/a Club Havana and Others v Attorney-General* Case No MAHLB-000576-08 (HC)). The applicant in this case has met all the requirements of section 3(a).

With respect, dealing with conflicting constitutional provisions in this manner is jurisprudentially and conceptually unsound. The judge was being called upon to explain why he would choose one provision of the Constitution and ignore similar provisions of the same Constitution. As explained above, the situation required him to harmonise the relevant conflicting provisions to give effect to the Constitution as a whole. Where harmonisation fails, the judge was required to give precedence to the provision that guarantees a right over the one which attenuates it.

In the case of *Kamanakao I v Attorney-General*,<sup>43</sup> the High Court of Botswana (*per* Nganunu CJ and Dow and Dibotelo JJ) ruled that the provisions of the Constitution of Botswana have no hierarchical ranking. This is to say, no provision(s) of the Constitution of Botswana

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41 This provision also prohibits discrimination on the basis of sex.

42 *Mmusi* case (n 1 above) 212.

43 [2001] (2) BLR 54.

is or are superior to others<sup>44</sup> and, thus, that in interpreting them, an interpretation that gives harmony to all provisions of the Constitution must be preferred over that which causes dissension between them. In other words, conflicting provisions must be reconciled. The Court further observed that it was not permissible to strike out a provision of the Constitution on account that it is in conflict with another provision of the same Constitution. The principle of harmonisation or reconciliation of provisions of the Constitution was canvassed in detail by Lugakingira J in *Christopher Mtikila v Attorney-General*.<sup>45</sup> In that case, the judge stated that when a tension exists between two provisions of a constitution, the principle of harmonisation must be called to aid. In terms of this principle, the entire constitution must be read as a single, integrated compact, and provisions must not be interpreted in a mutually-destructive manner that one provision sustains the other. If this balancing exercise is to succeed, the Court is required to give effect to all the contending provisions. The Court further observed that, where harmonisation proves difficult, the Court must purposively interpret the right-guaranteeing provision and, to that end, disregard the clear words of a countervailing provision, if their application would result in a failure of justice.<sup>46</sup> In this connection, Chitaley and Rio render the position thus:<sup>47</sup>

[I]t must be remembered that the operation of any fundamental right may be excluded by any other article of the Constitution or may be subject to an exception laid down in some other article. In such a case it is the duty of the Court to construe the different articles in the Constitution in such a way as to harmonise (*sic*) them and try to give effect to all the articles as far as possible and it is only if such reconciliation is not possible, one of the conflicting articles will yield to the other.

The propositions set out above are part of the common law and thus are part of Botswana law.<sup>48</sup> The ideology of the harmonisation approach rests in the realisation that, in the end, the law must guarantee fundamental rights and freedoms in their full breadth unless a restriction is justifiably necessary and this restriction is permissible in a democratic society. However, if reconciliation proves futile, then a right-giving provision must be retained and the one that unjustifiably limits a right must give way. In the famous case of *Sturges v Crownshield*,<sup>49</sup> Marshall CJ of the Supreme Court of the United States contended that 'where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural meaning and common words be varied, construction becomes necessary, and a departure from the obvious meaning of

44 *Kamanakao* (n 43 above) 666.

45 Civil Case 5 of 1993 (High Court of Tanzania).

46 *Mtikila* (45 above) 9.

47 VV Chitaley & S Rio *The Constitution of India* (1970) 716.

48 The common law is part of Botswana law. See EK Quansah *Introduction to Botswana legal system* (2005) 4.

49 17 US 122 (1819).

words is justifiable' and that this model of construction is the more instructive where the injustice occasioned by the application of a countervailing provision is 'so monstrous that all mankind would, without hesitation, unite in rejecting the application'.<sup>50</sup>

In South Africa, the harmonisation principle was applied by Nugent J in *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)*.<sup>51</sup> In this case, the Court was asked to reconcile the provision guaranteeing the right to press freedom, on the one hand, and the one guarding against potential harm or prejudice to the administration of justice which would possibly have been occasioned by a television broadcast of a particular programme, on the other. After commenting on permissible limitations of rights under the South African Constitution, the learned judge observed that, where constitutional provisions are mutually discordant, a court must adopt an interpretation that is aimed at harmonising them. The judge stated that they could not be weighed against one another but should be interpreted in a manner that enables their peaceful coexistence within the constitutional scheme in line with the dictates of justice.<sup>52</sup>

To achieve harmonisation, a creative and dynamic interpretation of the Constitution is required. Given that constitutions are not amended regularly, it is the duty of the courts to interpret their provisions, taking into account the ever-changing circumstances of modern life, bearing in mind at all times that the overriding and guiding rule is the protection of fundamental rights and not whittling them down. Commenting on the art of interpretation of constitutional provisions within the context of the Constitution of Botswana, Aguda JA (as he then was) stated the following in *Dow*:<sup>53</sup>

The overriding principle must be an adherence to the general picture presented by the Constitution into which each individual provision must fit in order to maintain in essential details the picture of which the framers could have painted had they been faced with circumstances of today. To hold otherwise would be to stultify the living Constitution in its growth ... stultification of the Constitution must be prevented if this is possible without doing extreme violence to the language of the Constitution. The ... primary duty of judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity.

The above sentiments were echoed by the Supreme Court of Zimbabwe (*per* Gubbay CJ) in the watershed Zimbabwean case of *Zimnat Insurance Co Ltd v Chawanda*.<sup>54</sup> In that case, the learned Chief Justice observed that the expectations of the masses for a better life were surging to the fore all over the world and that judges are duty

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50 *Sturgesd v Crownshield* (n 49 above) 23.

51 [2007] SCA 56 (RSA).

52 *Midi Television* (n 51 above) paras 8 & 9.

53 *Dow* case (n 3 above) 166.

54 1991 2 SA 825.

bound to assist in the realisation of these aspirations by 'moulding and developing the process of social change'.<sup>55</sup> In yet another decision of the Supreme Court of Zimbabwe, penned by Gubbay CJ, the Court observed that courts of law must at all times interpret right-rendering provisions of statutes in a manner that expands their reach rather than one which diminishes their meaning and content. The learned judge observed that linguistic treatment of a right-enacting statute must have an eye on the 'spirit as well as the letter of the provision, and taking full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges'.<sup>56</sup> In *Attorney-General, The Gambia v Jobe*,<sup>57</sup> Lord Diplock said:<sup>58</sup>

A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.

The Supreme Court of Swaziland had occasion to deal with a situation where relevant and applicable constitutional provisions were conflicting in the case of *Jan Sithole and Others v Government of the Kingdom of Swaziland*.<sup>59</sup> One of the questions that the Court had to determine was how sections 25 and 79<sup>60</sup> of the Constitution of Swaziland<sup>61</sup> may be accommodated within a unitary constitutional scheme. The Court settled this tension by applying the harmonisation principle. The Court in *Mmusi* should have also adopted and applied the harmonisation principle as comprehensibly set out above and, failing this approach, the judge should have placed precedence over a provision that gives a right (section 3(a)) rather than the one which takes it away (section 15(4)(c)). This is the principled way of settling the tensions within a constitutional scheme such as those presented by sections 3 and 15 of the Constitution of Botswana. It was a bit mechanical and slipshod for the judge to simply say that because the applicants had succeeded in meeting the requirements of section 3, it was not necessary to deal with section 15 as urged by the respondents. One cannot help but observe that the respondents had also met the requirements of the defence to the applicants' case under section 15. It is therefore submitted that the judge erred in ignoring the urge of the respondents on the applicability of section 15

55 Chawanda (n 54 above) 832.

56 *Smith v Ushewokunze & Another* 1998 2 BCLR 170 (SC).

57 [1985] LCR (Const) 556.

58 Jobe (n 57 above) 565.

59 Appeal 59/08 (unreported), judgment delivered on 21 May 2009. In this connection, see the powerful dissenting opinion of Justice Masuku.

60 Sec 25 of the Constitution of Swaziland guarantees the right to freedom of association. However, sec 79 prohibits individuals from using political parties to be elected to public office. It prescribes that every individual will be elected to public office on merit.

61 Act 001 of 2005.

because the applicants had in his view met the threshold for protection under a different provision of the Constitution. Since section 3 guarantees fundamental rights and section 15 seeks to limit them for no policy reasons whatsoever (at least within the context of *Mmusi*), then it is submitted that the latter section must yield.

### 3.2.2 Role of public opinion in judicial decision making

In an attempt to urge the Court to save the impugned rule of *Ngwaketse* customary law, the Attorney-General of Botswana, who appeared *amicus curiae* before the Court, ironically<sup>62</sup> sought to argue, *inter alia*, that it 'would be absurd to declare the rule sought to be impugned unconstitutional because such law is recognised or practised by the overwhelming majority of the population of Botswana'.<sup>63</sup> The learned Attorney-General further argued that the rule under attack was being practised by over 91 per cent of the population of Botswana, them being descendants of the Tswana and Kalanga tribes. She submitted that it would therefore be out of order for the Court to nullify a rule of law that enjoys such wide practice. Specifically addressing this argument, the learned judge referred to the case of *S v Makwanyane*, where the following appears:<sup>64</sup>

Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution.

Relying on the aforesaid passage in the *Makwanyane* case, the Court reasoned that public opinion has no room in constitutional interpretation in Botswana:<sup>65</sup>

This Court also rejects outright any suggestion, no matter how remote, that the Court must take into account the mood of society in determining whether there is a violation of constitutional rights as this undermines the very purpose for which the courts were established.

62 'Ironically' because prior to her appointment as Attorney-General in 2005, she was a fierce gender activist. Thus, one would have ordinarily expected her to argue for the abolition of the gender-biased rule, more so because as an *amicus*, she was not required to defend the government which has sanctioned the rule through its customary courts, but rather to impartially and dispassionately advise the court. The role of an *amicus* is not to argue a matter on behalf of any party to the *lis*, but rather to broaden perspectives of the court on controversial matters because it is expected to raise new contentions which are relevant to the court, which are usually beyond the expertise of the court and the parties. For a discussion on this, see O Jonas 'Human rights enforcement and the question of standing before the High Court of Botswana: A comparative analysis' 2012 (2) *East African Journal of Peace and Human Rights* 409-411.

63 *Mmusi* case (n 1 above) para 195.

64 1995 3 SA 391 (CC) paras 77-88.

65 *Mmusi* case (n 1 above) para 197.



He continued to emphatically indicate that his Court 'shun[s] the apologetic value-oriented model that derives its substance from moral choices of the majority or the public mood or opinion'.<sup>66</sup> With respect, it is submitted that the judge was in error to interpret the above passage to mean that the Constitutional Court of South Africa 'shuns' public opinion in the determination of constitutional claims. What that passage seems to be saying is this: In interpreting the Constitution, the Constitutional Court will take into consideration the norms and aspirations of society, but that the language and spirit of the Constitution should not be compromised thereby. This is to say, the Constitutional Court will reject public opinion where it is at variance with the Constitution. Du Plessis argues in a similar fashion that courts of law should not and cannot be indifferent to popular opinion. He argues that whenever public opinion is ascertainable and strong, the courts must acknowledge this and, to the extent possible, deal with these opinions, explaining why they are in line or inharmonious with the spirit and values of the Constitution.<sup>67</sup> In the *Mmusi* case, the Court seems to suggest that public opinion has no room whatsoever in constitutional adjudication. If this was the position of the Court, then perhaps the Court went a bit off the mark. Courts of law cannot be insulated from the aspirations of people; however, these aspirations cannot replace principle and be the basis of decisions of courts. In this connection, Du Plessis correctly argues that a delicate balance must be struck between apology (judicial reliance on public opinion) and utopia (the absolute rejection of public opinion).<sup>68</sup> Given the indeterminacy of the question of the possible role of public opinion in the determination of constitutional claims, perhaps Dingake J's views on the matter cannot be rejected outrightly.<sup>69</sup> However, the point that is being made here is that the aforesaid passage in *Makwanyane* does not support the view that courts must 'shun' public opinion in the adjudication of constitutional matters.

#### 4 Conclusion

Despite its weaknesses, the decision in *Mmusi* has no doubt made a significant contribution to the discourse of human rights in Botswana and beyond. It is a great stride for the emancipation of women, generally, and within the rules of inheritance in particular. Principally,

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66 *Mmusi* case (n 1 above) paras 83 & 197.

67 M du Plessis 'Between apology and utopia: The Constitutional Court and public opinion' (2002) 1 *South African Journal on Human Rights* 12.

68 Du Plessis (n 67 above) 37-40.

69 For a comprehensive treatment of public opinion on judicial decision making in constitutional claims, see A Abebe 'Abdication of responsibility or justifiable fear of illegitimacy? The death penalty, gay rights and the role of public opinion in judicial determinations in Africa' (2012) 60 *American Journal of Comparative Law* 603.

the case has bolstered the movement of the empowerment of women and gender parity both at home and abroad. It restates the fundamental argument that it is no longer acceptable (if ever it once was) to subjugate the human rights of women under the cloak of culture. Whereas it is desirable that Africans must preserve their Africanness and cultural heritage, it is important that this must be done within a normative framework of human rights and international best practice.<sup>70</sup> So much of culture will still be left even when gender-based discrimination under customary law were outlawed. Activists and advocates of the human rights of women should attempt to deconstruct the current social paradigm that holds that women's rights are inimical to Africanness and traditional culture and also redefine patriarchal notions of traditional culture in line with human rights law and international standards and practice. Whereas it is important that these issues be legislated upon, it is also important to acknowledge that harmful or prejudicial practices are engraved in the psyche of many African people as core beliefs and praxis. The enforcement of legislation alone, therefore, cannot yield much. People must be sensitised about the need to achieve gender parity so that they, themselves, can accept and respect the laws enacted to achieve this end. Ultimately, the rights of women to inherit can be meaningful only when all cultural constructs encompass and incorporate notions of women's rights. It makes little difference if women are liberated insofar as inheritance is concerned but still continue to live lives characterised by the deprivation of fundamental freedoms and rights.

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70 O Jonas 'The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A critical appraisal' (2012) 4 *Journal of African Studies and Development* 146.

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Doctoral candidate

**Ololade Shyllon**

Project Administrator; Doctoral candidate

**Olufemi Soyaju**

Programme Co-ordinator: LLM (International Trade and Investment Law in Africa); Doctoral candidate

**Norman Taku**

Assistant Director

**Armand Tanoh**

Project Manager: African Human Rights Moot Court Competition; Doctoral candidate

**Carole Viljoen**

Operations Manager

**Frans Viljoen**

Director

**Extraordinary/Honorary professors**

**Jean Allain**

Professor of Public International Law, Queen's University of Belfast, Northern Ireland

**Cecile Aptel**

Office of the High Commissioner for Human Rights, Geneva, Switzerland

**Danny Bradlow**

Head: International Economic Relations and Policy Department, South African Reserve Bank

**Jakkie Cilliers**

Director, Institute for Security Studies

**Mustaqeem de Gama**

Acting Director of International Trade and Economic Development, Department of Trade and Industry

**John Dugard**

Member, International Law Commission

**Johann Kriegler**

Retired Justice of the Constitutional Court of South Africa

**Edward Kwakwa**

Legal Counsel, World Intellectual Property Organisation, Geneva, Switzerland

**Cephas Lumina**

Independent Expert of the United Nations Human Rights Council

**Richard Maiman**

University of Southern Maine, USA

**David Padilla**

Formerly Assistant Executive Secretary, Inter-American Commission on Human Rights

**Mary Robinson**

President, Mary Robinson Foundation – Climate Justice, Northern Ireland

**Johann van der Westhuizen**

Justice of the Constitutional Court of South Africa

**Extraordinary lecturers**

**Elize Delport**

Consultant

**Oagile Dingake**

Justice of the Botswana High Court

**Solomon Ebobrah**

Co-ordinator and Senior Lecturer, Department of Jurisprudence and Public Law, Niger Delta University, Nigeria

**Nicole Fritz**

Executive Director, Southern Africa Litigation Centre

**Asha Ramgobin**

Executive Director, Human Rights Development Initiative

**Sarah Knuckey**

Director, Project on Extrajudicial Executions, New York University School of Law, USA

**Advisory board**

**André Boraine**

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**Sylvia Tamale**

Makerere University, Kampala, Uganda

**Johann van der Westhuizen**

Justice of the Constitutional Court of South Africa



**Projects and programmes**

- African Human Rights Moot Court Competition
- Master's Programme (LLM/MPhil) in Human Rights and Democratisation in Africa
- Master's Programme (LLM) in International Trade and Investment Law in Africa
- Master's Programme (LLM/MPhil) in Multidisciplinary Human Rights
- Gender Unit
- HIV/AIDS and Human Rights (with the Centre for the Study of AIDS)
- Advanced Human Rights Courses
- Indigenous Peoples' Rights in Africa
- Disability Rights

**Regular publications**

- African Human Rights Law Journal
- *African Human Rights Law Reports* (English and French)
- *Constitutional Law of South Africa*

## CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 December 2012

Compiled by: I de Meyer

Source: <http://www.africa-union.org> (accessed 31 May 2013)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Algeria	01/03/87	24/05/74	08/07/03	22/04/03		
Angola	02/03/90	30/04/81	11/04/92		30/08/07	
Benin	20/01/86	26/02/73	17/04/97		30/09/05	
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97		13/09/12	
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70				
Chad	09/10/86	12/08/81	30/03/00			11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	
Congo	09/12/82	16/01/71	08/09/06	10/08/10	14/12/11	
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03	05/10/11	
Democratic Republic of Congo	20/07/87	14/02/73			09/06/08	
Djibouti	11/11/91		03/01/11		02/02/05	<b>02/12/12</b>
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02		27/10/09	
Eritrea	14/01/99		22/12/99			
Ethiopia	15/06/98	15/10/73	02/10/02			05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	10/01/11	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99	25/05/05	
Ghana	24/01/89	19/06/75	10/06/05	25/08/04*	13/06/07	06/09/10
Guinea	16/02/82	18/10/72	27/05/99		<b>16/04/12</b>	17/06/11
Guinea-Bissau	04/12/85	27/06/89	19/06/08		19/06/08	23/12/11

Kenya	23/01/92	23/06/92	25/07/00	04/02/04	06/10/10	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05			
Malawi	17/11/89	04/11/87	16/09/99	09/09/08*	20/05/05	<b>11/10/12</b>
Mali	21/12/81	10/10/81	03/06/98	10/05/00*	13/01/05	
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03		
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	
Namibia	30/07/92		23/07/04		11/08/04	
Niger	15/07/86	16/09/71	11/12/99	17/05/04		04/10/11
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	01/12/11
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03	25/06/04	09/07/10
Sahrawi Arab Democratic Rep.	02/05/86					
São Tomé and Príncipe	23/05/86					
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04	
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06	
Sierra Leone	21/09/83	28/12/87	13/05/02			17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
South Sudan						
Sudan	18/02/86	24/12/72	30/07/05			
Swaziland	15/09/95	16/01/89	<b>05/10/12</b>		<b>05/10/12</b>	
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06*	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	21/10/05	24/01/12
Tunisia	16/03/83	17/11/89		21/08/07		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
<b>TOTAL NUMBER OF STATES</b>	<b>53</b>	<b>45</b>	<b>47</b>	<b>26</b>	<b>36</b>	<b>17</b>

\* Additional declaration under article 34(6)  
Ratifications after 31 July 2012 are indicated in bold