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Editorial

This issue of the *African Human Rights Law Journal* boasts a record number of contributions. This growth testifies to the increasing number of contributions submitted to the *Journal* and, we would argue, speaks both to its recognition as a respected outlet for scholarship on human rights in Africa, and to the greater visibility the *Journal* enjoys since becoming fully and freely accessible online.

The contributions appearing in the 'regular' part of the *Journal* span a wide array of thematic areas and approaches, and reflect the diverse nature of contemporary human rights concerns in Africa. Some are philosophical in nature, reflecting on the nature of 'African values', such as *ubuntu* (the article by Metz); and others are more historical in nature, for example, the article by Haskins that traces the link between contemporary homophobia in Africa and Roman law. A number of contributions look at institutional evolutions related to Africa, for example, the UN Universal Periodic Review, and the African Court on Human and Peoples' Rights (the articles by Smith and Naldi respectively).

Contributions reflecting a broad sub-regional and narrow country-specific focus are included in this issue. Fombad and Kamga investigate the rule of law in Central Africa and the potential of impact litigation in Francophone Africa. Assim and Sloth-Nielsen look at *kafalah* as an alternative care option in Islamic Africa. Countries under specific scrutiny are Kenya (environmental rights); South Africa (human trafficking); Uganda (transitional justice); Nigeria (urban planning and its impact on the urban poor); and Namibia (personal liberty).

This issue of the *Journal* contains two 'special focus' sections. The first relates to the South African Constitution. The year 2014 marked 20 years since the entry into force of the South African interim Constitution on 27 April 1994 – a watershed moment in South Africa's constitutional history. Three contributions reflect on this milestone. Two of these contributions (by Smith and Ngang respectively) deliberate on crucial aspects of South Africa's Constitution – equality and socio-economic rights. A third contribution (by Diala) charts some of the influence of these developments in a broader – African – context.

The second 'special focus' section concerns the commemoration of the adoption, in 2003, of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African

Women's Protocol). In 2013, the Centre for Human Rights, University of Pretoria organised a colloquium to mark ten years since this milestone. Some of the papers presented at this colloquium were reworked, and now appear as a 'special focus' section. These contributions are focused on article 14 of the Protocol, which deals with women's sexual and reproductive rights. One contribution (authored by Geldenhuys, Kaufulu-Kumwenda, Nabaneh and Stefiszyn) analyses the General Comment on articles 14(1)(d) and (e), adopted by the African Commission on Human and Peoples' Rights. Other contributions consider aspects that have not received much scholarly attention, namely, the meaning and implications of article 10(3) of the Protocol, which prescribes to state parties the prioritisation of social spending above military expenditure (the article by Klugman); the rights of women who have sex with women (the article by Muranda, Mugo and Antonites); and sterilisation (the contribution by Todd-Gher).

The editors convey their thanks to the independent reviewers mentioned below, who so generously assisted in ensuring the consistent quality of the *Journal*: Henriette Aasen; Adem Abebe; Prudence Acirokop; Horace Adjolohoun; Isaac Afunaduula; Hope Among; Samuel Amoo; Gina Bekker; Pierre Brouard; Ashwanee Budoo; Henriét de Ru; Ebenezer Durojaye; Precious Eriamatoe; Loretta Feris; Charles Fombad; Kristi Kenyon; Jonathan Klaaren; Josua Loots; Christopher Mbazira; Morris Mbondeni; Remember Miamingi; Mmatsie Mooki; Tom Mulisa; Gustav Muller; Rachel Murray; Tousy Namiseb; Charles Ngwena; Caroline Nicholson; Andrew Novak; Collins Odote; Benson Olugbuo; Azubike Onuora-Oguno; Yvonne Oyieke; Papa Sy; Rofiah Sarumi; Lola Shyllon; Sanele Sibanda; Franziska Sucker; Dire Tladi; and Karin van Marle.

AFRICAN HUMAN RIGHTS LAW JOURNAL

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African values and human rights as two sides of the same coin: A reply to Oyowe

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Summary

In an article previously published in this Journal, Anthony Oyowe critically engages with my attempt to demonstrate how the human rights characteristic of South Africa's Constitution can be grounded on a certain interpretation of Afro-communitarian values that are often associated with talk of ubuntu. *Drawing on recurrent themes of human dignity and communal relationships in the sub-Saharan tradition, I have advanced a moral-philosophical principle that I argue entails and plausibly explains a wide array of individual rights to civil liberties, political power, criminal procedures and economic resources. Oyowe's most important criticism of my theory is in effect that it is caught in a dilemma: Either the principle I articulate can account for human rights, in which case it does not count as communitarian, or it does count as the latter, but cannot account for the former. In this article, I reply to Oyowe, contending that he misinterprets key facets of my theory to the point of not yet engaging with its core strategy for deriving human rights from salient elements of* ubuntu. *I conclude that Oyowe is unjustified in claiming that there are 'theoretical lapses' that 'cast enormous doubts' on my project of deriving human rights from a basic moral principle with a recognisably sub-Saharan and communitarian pedigree.*

Key words: *African ethics; communitarianism; dignity; human rights;* ubuntu

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1 Introduction

In an article previously published in this *Journal* titled 'Strange bedfellows',[1] Anthony Oyowe critically engages with my attempt to demonstrate how the human rights characteristic of South Africa's Constitution[2] can be grounded on a certain interpretation of the African values that are often associated with talk of *ubuntu*, the Nguni term for humanness that is used to capture sub-Saharan approaches to morality.[3] Drawing on recurrent themes of human dignity and communal relationships in the sub-Saharan tradition, I have advanced a moral-philosophical principle that I argue entails and plausibly explains a wide array of individual rights to civil liberties, political power, criminal procedures and economic resources. Oyowe, however, maintains that human rights and African values do not belong together. More specifically, his most important criticism of my theory is in effect that it is caught in a dilemma: Either the principle I articulate can account for human rights, in which case it does not count as communitarian and an articulation of *ubuntu*, or it does count as the latter, but cannot account for the former.

In partly titling this article 'two sides of the same coin', the reader can guess where I am headed. Here I reply to Oyowe, contending that he misinterprets key facets of my theory to the point of attacking a strawman and not yet engaging with its core strategy for deriving human rights from salient elements of *ubuntu*. In a nutshell, Oyowe reads my theory as positing two distinct final goods to be promoted, namely, those of individual freedom and communal relationship, whereas I instead posit a single basic good, human dignity *qua* the capacity for communal relationship, that is to be respected. Human rights, I contend, are ways of treating people as special by virtue of their capacity to commune, not ways of balancing competing interests in freedom and community. Misreading my theory, Oyowe's criticisms misfire, or so I shall argue.

My primary aim is to resolve the dilemma that Oyowe poses, meaning that I do not address a variety of other points scattered amongst the buckshot of his objections. For example, I do not take up his reasons for thinking that I have an implausible understanding of how human rights essentially function.[4] Instead, I focus strictly on Oyowe's charge that there are 'theoretical lapses' that 'cast enormous

1 A Oyowe 'Strange bedfellows: Rethinking *ubuntu* and human rights in South Africa' (2013) 13 *African Human Rights Law Journal* 103.

2 Constitution of the Republic of South Africa, 1996.

3 The central article also appeared in this journal as T Metz '*Ubuntu* as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532.

4 I do not believe that rights are essentially claims that protect interests, whereas Oyowe does, and I maintain that to have a right is well understood as a matter of someone else having a duty, whereas he does not. For a reply to Oyowe on these abstract matters, the reader is invited to contact the author for unpublished comments.

doubts'[5] on my project of showing that *ubuntu*, interpreted as a moral-philosophical principle, is a promising foundation for typical elements of South Africa's Bill of Rights.[6]

I begin by briefly sketching the moral theory I have constructed that is informed by *ubuntu* and the way it promises to capture human rights salient in South Africa's Constitution (part 2), after which I spell out Oyowe's dilemma that I must choose between interpreting the theory in a communitarian way and it being able to entail and well explain human rights and their violations (part 3). I then reply to Oyowe, indicating how my theory is reasonably labelled 'communitarian', how it plausibly grounds many human rights, and how Oyowe does not yet understand the central strategy I employ for reconciling communitarian values and human rights (part 4). I conclude by briefly reflecting on what my approach, if sound, means for constitutional interpretation in South Africa (part 5).

2 Deriving human rights from *ubuntu*

The philosophical project at hand is an attempt to demonstrate that salient communitarian elements of pre-colonial sub-Saharan world views can be interpreted in a way that powerfully accounts for much of South Africa's Bill of Rights. In this section, I repeat enough of my earlier work to make Oyowe's target clear.

2.1 Nature of human rights

Oyowe and I do not disagree that much about what human rights are, or at least not on matters that would suggest that we are speaking past one another when using the phrase 'human rights'. This phrase refers in the first instance to weighty moral claims of individuals to receive certain treatment or objects, which claims they have by virtue of a quality they share with (nearly) all other human persons, and which must be fulfilled even if long-term benefits would be realised by not doing so.[7] For example, if people have a right to equality,[8] that means (amongst other things) that the state may not discriminate against them on grounds of race or ethnicity, even if a majority of those in society would be happier or more culturally 'pure' as a result. Furthermore, Oyowe agrees with me that if human rights are justified, they probably are by virtue of human dignity, that is, a superlative non-instrumental value characteristic of human beings, and a companion normative perspective that obligates agents to treat them with respect.[9]

5 Oyowe (n 1 above) 103.
6 Ch 2 Constitution of the Republic of South Africa.
7 Compare Oyowe (n 1 above) 114-115.
8 Sec 9 Constitution of the Republic of South Africa.
9 See Oyowe (n 1 above) 119.

Although I believe that the way I interpret *ubuntu* can ground a variety of kinds of human rights, in the following I concentrate particularly on 'negative' rights, that is, rights to be free from others' interference or to have the liberties to engage in behaviours that others might dislike. One reason for such a focus is that, as will become clear in the following section, Oyowe is most keen to demonstrate that *ubuntu* cannot capture negative rights. Another reason, however, is that it is well known that *ubuntu* and related value systems below the Sahara are routinely criticised for being unable to account for the value of individual liberty, namely, freedom from coercion to hold beliefs and to perform actions of which others disapprove. Although below I do briefly address some 'positive' rights, for instance, to culture[10] and to socio-economic goods,[11] it is most urgent to demonstrate that communitarian values, properly understood, can make good sense of a person's right to live in ways that do not comport with the lifestyles of the majority. Hence, the rights from South Africa's Constitution that I most often discuss are those to life, freedom and security of the person, privacy, freedom of religion, freedom of expression and the like.[12]

2.2 An interpretation of *ubuntu*

Having clarified the objects to be theoretically captured, I now lay out the *ubuntu*-based principle that I have used to do so. I lack the space to indicate why I believe that the principle is informed by sub-Saharan values and norms.[13] I instead focus on presenting my findings, that is, the results of my attempt to develop a comprehensive account of morality that is both African and philosophically compelling.

My theoretical interpretation of *ubuntu* and related moral perspectives starts with the acknowledgment that indigenous black societies below the Sahara have characteristically sought out communal relationships as a higher-order end. As I have contended in earlier work,[14] communal relationships are well understood in the sub-Saharan tradition as the combination of what I call 'identity' and 'solidarity'. Part of what it is to enter into community with others is to identify with them, or share a way of life with them, by which is meant roughly enjoying a sense of togetherness and engaging in cooperative projects. Another part of communion is solidarity, or caring for others' quality of life, which amounts to helping others for altruistic reasons and typically consequent to sympathy with them. What African thinkers typically mean by 'community', or at least one

10 Secs 30-31 Constitution of the Republic of South Africa.
11 Secs 26, 27 & 29 Constitution of the Republic of South Africa.
12 Secs 11-18 Constitution of the Republic of South Africa.
13 On which see T Metz 'Toward an African moral theory' (2007) 15 *Journal of Political Philosophy* 321 and T Metz 'African conceptions of human dignity' (2012) 13 *Human Rights Review* 19.
14 Metz (nn 3 & 13 above).

morally-attractive way to understand what they mean by it, is as consisting of the combination of identity and solidarity.

To begin to see how this approach is appealing as a philosophical ethic, consider that 'friendliness' is how English speakers would typically label communal relationships of identity and solidarity. To be friendly is not much other than to share a way of life with others and to care for their quality of life and for their sake. And, so, an initial way to understand African ethics from a theoretical perspective is to suggest that morally-wrong actions are to be identified as those that are, roughly, unfriendly. Lying, stealing, cheating, coercing, abusing, breaking promises, refusing ever to help and the like are plausibly immoral insofar as they put distance between the one acting and the one acted upon; they are subordinating rather than co-ordinating; they are expected to harm rather than to benefit; and they are motivated by attitudes of cruelty, selfishness and the like. That is the compelling moral perspective that I find in the sub-Saharan tradition that differs from typical Western accounts of wrongness as failure to maximise the general welfare (utilitarianism) or disrespect of an individual's autonomy (Kantianism).

Now, in order to capture the nature of wrongness with specificity, one must indicate precisely how a given agent is to respond to friendly or communal relationships. One suggestion would be that an agent ought to produce as much friendliness or community and to reduce as much unfriendliness or anti-sociality as he can, given the options available to him. However, such an account of how to respond to communal relationships plainly cannot account for human rights, particularly negative ones.[15] If seriously harming an innocent person would have the effect of enhancing communion relative to not doing so, then such a consequentialist approach would permit intentionally inflicting the harm. In contrast, I want to account for the intuition that individuals have rights not to be harmed or otherwise interfered with for the greater good, even the good of more communal relationships in the long run. So, the question has been this: How can one account for human rights, given an ethic according to which a moral agent ought to seek out communal relationships as a higher-order end?

My strategy for answering this question has been to appeal to the value of human dignity, taking a cue from both the Western and African traditions. From the former, I have noted that the strongest and most influential account of human rights up to now has been a Kantian one, according to which upholding human rights are ways of treating people, and specifically their capacity for autonomy, with respect. From the latter, I have recognised the widespread appeal to the dignity of human life amongst sub-Saharan peoples,[16] which

15 As indicated in Metz 'Toward an African moral theory' (n 13 above) 338, and Metz (n 3 above) 539-540.

16 For citations, see Metz 'African conceptions of human dignity' (n 13 above).

often prompted behaviour that we would call 'recognition of human rights' (but that they themselves have much more often labelled 'respect').

For instance, despite the intimate attachments in small-scale sub-Saharan societies, they were well known for extending hospitality to strangers passing through, respecting all human beings as part of an encompassing family or as beings with whom to relate communally.[17] For another example, a recurrent practice in indigenous African societies has been to base policy on consensus, amongst either elected leaders or all adults. Instead of aggregating votes and doing whatever would maximise the satisfaction of interests, respect for the dignity of individuals has been understood to require a practice of seeking everyone's agreement (or at least input) before proceeding.[18]

Of course, African societies were not perfect when it came to exhibiting what we would today call a 'human rights culture'. Sexism, for one, has been a salient problem, from an egalitarian standpoint. Regardless of whether sub-Saharan societies violated human rights in the past, my point is that some of the communitarian values they have recurrently espoused can be interpreted in a way that makes good sense – to an open-minded interlocutor anywhere in the world, and not merely in Africa – of which human rights people have and why.

Within characteristically African practices and especially beliefs there is the idea of human dignity, which I draw upon to create a novel moral theory.

Specifically, I posit a conception of human dignity according to which individuals have a superlative non-instrumental value insofar as they are in principle capable of entering into community with others. My proposal is that we have human rights insofar as we are beings that can both exhibit friendliness and be treated in a friendly way. What makes us more special than anything else in the mineral, vegetable and animal kingdoms is, roughly, our inherent capacity both to commune with others and to be communed with by others. Where the Kantian finds value in people's capacity to govern themselves, a more characteristically African view deems it to inhere in their capacity to relate to others.

Here, then, is my favoured reconstruction of *ubuntu* as a normative principle:[19] One must honour a person who has a dignity insofar as he can be both the subject and object of communal relationships. Alternately stated, an act is wrong insofar as it degrades a person's

17 For a representative analysis, see K Gyekye 'African ethics' in E Zalta (ed) *Stanford encyclopedia of philosophy* (2010) http://plato.stanford.edu/entries/african-ethics/ (accessed 31 July 2014).

18 For just one example, see Wiredu's discussion of the ideas of human dignity and rights amongst the Ghanaian Akan in K Wiredu *Cultural universals and particulars: An African perspective* (1996).

19 Applied to persons, for now setting aside other beings such as animals.

special ability to enter into mutual relationships of identity and solidarity. Or, referring to the maxim that 'a person is a person through other persons', so widely invoked to capture *ubuntu*, I recommend interpreting it as a prescription to become a real person (to develop one's humanness) by prizing friendly relationships with those who must be treated with respect in virtue of their capacity for them.

2.3 From *ubuntu* to human rights

The last step to take in this section is to show how the moral-philosophical principle of respecting people's capacity for communal relationships entails and plausibly explains human rights. Here is the key rationale. Suppose that what is special about human beings is their capacity to be in communal relationships. In that case, one should neither stunt that capacity for the sake of something worth less than it, nor treat (innocent) others in an anti-social way.[20] Respecting another's dignified capacity both to exhibit friendliness and to be befriended means treating it as the most important value, and hence entails (in the case of innocents) not impairing their ability to be friendly as well as not failing to be friendly towards them.

Now, characteristic negative human rights violations are behaviours that *do* impair others' ability to be friendly as well as constitute grave forms of unfriendliness. What genocide, slavery, human trafficking, apartheid and totalitarianism have in common is more or less that those who engage in these practices treat people, who are special by virtue of their capacity for friendly relationship, in an extraordinarily unfriendly way (when unnecessary to rebut any unfriendliness on their part). As I explained in the article on which Oyowe focuses, many human rights are plausibly viewed as[21]

> protections against enmity, against an agent treating others as separate and inferior, undermining their ends, seeking to make them worse off, and exhibiting negative attitudes toward them such as power seeking and *Schadenfreude*.

Raping someone to feel a sense of power and torturing an innocent person for fun are actions that stunt another's capacity for identity and solidarity for a trivial end and evince enormous division and ill-will, the opposites of community, toward him. Instead of expressing togetherness, one creates distance; instead of engaging in co-ordinated behaviour, one subordinates; instead of helping another, one harms; and instead of being altruistic and sympathetic, one is indifferent or cruel.

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20 Unless a comparable unfriendliness (the opposites of the ideal of community, involving distance, subordination, harm and cruelty) towards them is necessary to rebut their initial unfriendliness, that is, roughly, unless they are guilty.

21 Metz (n 3 above) 546.

This present rationale also plausibly accounts for positive rights. One way of treating people as special by virtue of their capacity for communal relationships is to recognise the respects in which they have actualised that capacity, which rationale makes sense of rights to the protection and enhancement of culture.[22] Another way to treat people as dignified because of their capacity to be party to relationships of identity and solidarity is to enable them to actualise that capacity, where food, education, housing, health care and the like are naturally relevant.[23] Failures of the state either to acknowledge people's actual communities or to help them commune with one another would be failures to treat people's capacity for communal relationships as the highest value and hence would be degradations of it.

In sum, supposing that individuals have a dignity by virtue of their capacity for friendliness, roughly an agent must treat them (when innocent) in a friendly way, where human rights violations are ways of treating (innocent) individuals in grossly unfriendly ways. Such an explanation of what a human rights violation is constitutes a promising rival to the standard Western, Kantian view that it is essentially a degradation of autonomy. It is a moral-philosophical gem mined from African worldviews, one worth studying under a loupe.

3 Oyowe's dilemma

According to Oyowe, I have not demonstrated that a communitarian ethic can support human rights and, furthermore, according to him, any ethic that can support human rights cannot be communitarian. Much depends, therefore, on what he means by 'communitarian'.

Oyowe maintains that there are two key aspects to communitarianism: a descriptive or metaphysical thesis and a prescriptive or moral one. The former is the claim that individuals necessarily, perhaps causally, depend on the community at least for their existence and development into a normal adult human being, while the latter is the claim that community is a non-instrumental good normally to be favoured in cases of conflict with other goods.[24]

First, Oyowe maintains that my conception of dignity conflicts with the descriptive thesis about how individuals come to be. He claims 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'.[25] He further maintains that I have implicitly reversed the metaphysical relationship, so that

22 For more on how the present understanding of *ubuntu* can ground a right to culture, see T Metz 'African values, human rights and group rights' in O Onazi (ed) *African legal theory and contemporary problems* (2014) 131 142-144.

23 For additional discussion of socio-economic rights, see Metz (n 3 above) 550-551.

24 Oyowe (n 1 above) 105.

25 Oyowe 108.

community is thought to depend for its realisation on the individual, namely, her capacity for dignity or her individual choice.

Second, turn now to the prescriptive facet of communitarianism. On this score, Oyowe maintains that since I routinely prize liberty and negative rights to be free from interference, I am implicitly committed to individual freedom (or personal autonomy or something similar) as a final good that is distinct from that of community. A large majority of Oyowe's article then discusses the implications of a position that deems good for its own sake both individual freedom and communal relationship, and he naturally finds the implications unattractive: either liberty as a good outweighs community, in which case the communitarianism is lost, or community outweighs liberty, in which case the human rights are lost; or they are of equal value, in which case the theory is indeterminate in cases of conflict. As Oyowe says:[26]

> [T]he onus is on Metz to show that communal harmony and individual freedom are indeed compatible … [B]y 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.

However, I as explain in the next section, this is not at all what I meant. I do not posit two distinct final goods, community and freedom, that are to be compared and weighed up against each other in cases of conflict. Instead, I argue that to express respect for the sole basic value of the dignity of the capacity for community *just is* (in part) to uphold individual freedom.

4 Reply to Oyowe

Oyowe's view is that I am a closet Western liberal who accords final value to individual freedom and that this is the only strategy by which I could conceivably account for human rights. Any genuine appeal to communitarianism would mean prizing community over liberty and hence failing to account for at least negative human rights. In this section, I clarify the nature of my strategy for reconciling communitarian values and human rights, focusing in particular on showing how it avoids Oyowe's claims in the previous section that my position is neither descriptively nor prescriptively communitarian.

4.1 Descriptive communitarianism

Consider first the charge that my theory cannot account for the metaphysical thesis that individuals necessarily depend on a community for their existence and that it rather implies that a given community is constructed out of individuals who exist prior to it and then make a voluntary choice to enter it. By 'community' in this

26 Oyowe 112.

context, Oyowe does not mean what I meant above by 'communal relationships', 'communion' and (on occasion) 'community'. What I mean by the latter is the combination of relationships of identity and solidarity, which can be realised at a dyadic level, between two people alone. What Oyowe means by 'community' is instead something like society as a whole which, he points out, is essential for bringing the individual into existence or enabling her to flourish.

I have two replies to these claims. First, they cannot be sensibly construed as defining elements of communitarianism since they are sociological banalities that no one would reasonably reject. Much too often in the literature, communitarians believe they are targeting liberalism and other 'individualist' philosophies by noting that individuals cannot exist or flourish on their own. However, I am simply not aware of any influential Western, liberal or individualist thinker who has claimed that it is possible for, say, a baby to grow up into a normal adult without socialisation, or an adult to make substantial achievements as a Robinson Crusoe on a deserted island without a cultural tradition, emotional support, substantial resources, peer recognition and so on. Who has made, or would make, such patently false empirical claims?

What leads Oyowe and communitarians to continually assert the descriptive thesis usually rests on a misreading of the social contract tradition. It is well known that social contract theorists characteristically imagine a 'state of nature' in which there is no state, institutional justice or other form of government, and then pose the question of under what conditions individuals would be reasonable to agree to form one. This thought experiment routinely gets misinterpreted in two ways.

For one, critics mistakenly hold that the state of nature includes the absence of non-governmental relationships such as the family. However, the big guns of the Western tradition, such as Hobbes,[27] Locke[28] and Rawls,[29] simply do not think in these terms. Their thought experiments are focused on the absence of political organisation or policy, nothing more.

For another, and more deeply, the state of nature, for them, is not supposed to represent what the world was like or even could be like, *contra* the readings of communitarians. Instead, it is supposed to bring out what is of normative importance for evaluating some facet of government. So, when Rawls imagines persons behind a veil of ignorance seeking generally useful means for achieving ends, he is not committed to the absurd view that individuals could in the real world live apart from each other, shorn of particularities. Instead, Rawls is in effect claiming that what is morally important about people is their

27 T Hobbes *Leviathan* (1651).
28 J Locke *Second treatise of government* (1690).
29 J Rawls *A theory of justice* (1971).

capacity for autonomy, and that a conception of justice needs to be appraised in light of how it bears on that capacity.

In short, it is a category mistake to suppose that Western liberals, even social contract theorists, maintain that individuals could exist without families and societies that enable them to flourish. Hence, pointing out the obvious fact that individuals depend on society cannot be what differentiates communitarianism from their perspectives.

My second reply to the charge that my views flout the metaphysical element of communitarianism is that they in fact imply nothing metaphysical. To contend that what makes individuals special is their capacity for communal relationships, regardless of whether that capacity has been exercised to a certain degree, neither asserts nor implies any view about how individuals have existed or could exist in relation to the societies in which they have been raised and now live. It simply points to what gives them a dignity. Oyowe is incorrect, therefore, when he says that, on my view,[30]

> [t]he 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 community ... Metz implicitly represents the individual as necessarily occupying a place outside of those relationships that constitute community.

No, I do not. I coherently can, and hereby do, explicitly claim that individuals could not have a dignity by virtue of their capacity for communal relationships without having been reared by families that in turn have been supported by other families in the form of a society and that individuals almost never voluntarily join a society from outside of it. When I consider an individual's ability, apart from how it has been exercised in relation to others, I am not asserting that he could live apart from them or have that ability without having been supported by them; I am merely focusing, for the philosophical moment, on what I take to be a morally valuable facet of her.

4.2 Prescriptive communitarianism

If my analysis in the previous subsection was correct, and there is no reasonable disagreement amongst interlocutors about whether individuals and their capacities can exist apart from a social context, then the real issue as to whether my view counts as communitarian is a normative one. Here, recall, Oyowe believes that my 'theory is less communitarian than it purports to be … [and] 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'.[31] He maintains that they are incompatible since I am committed to the view that they are two

30 Oyowe (n 1 above) 108-109.
31 Oyowe 112.

different goods, and it is clear that they sometimes conflict with one another.

As I indicated above, my theory does not posit *two* distinct final goods to be *promoted*: those of individual freedom and communal relationship. I must *not* be viewed as 'trying to accommodate two potentially-conflicting non-instrumental values'.[32] Instead, I posit a *single* basic good, that of human dignity *qua* capacity for communal relationship, and I maintain that it is to be *respected*.

My key claim is that part of what it means to treat someone as special by virtue of her capacity for communal or friendly relationship is to commune with or be friendly towards her (at least when she has not misused that capacity), and that what it means to be friendly towards a person is to avoid subordinating her, amongst other conditions such as avoiding harming her and acting consequent to negative attitudes such as cruelty. Hence, co-ordinating rather than subordinating, that is, upholding another's negative right to be free from interference, *just is* (in part) what it is to treat someone with respect in virtue of her capacity for communal relationships.

To illustrate my position, consider an example of someone who has a right to privacy of a sort that would permit him to engage in gay sex without consequent legal coercion. I explain the right in terms of respectful treatment. This person has a dignity insofar as he is a being that by nature has the capacity to be friendly and to be befriended, and treating that superlatively valuable element of him with respect means not restricting his capacity to be friendly for something worth less than it and not treating him in an unfriendly way (if he has not acted in an unfriendly way towards others). And as it would both seriously stunt his capacity to be friendly, as well as be quite unfriendly, to lock him up in a small cage for decades, I conclude that it would be wrong to do so; indeed, a human rights violation.

Although Oyowe sometimes indicates an awareness that I am deontologist, one who denies that morality is a consequentialist matter of maximising good states of affairs, he never comes to grips with my dignity and respect-based strategy for grounding human rights such as negative ones to be free from interference. Failing to recognise and discuss the view that human rights are ways of honouring people's capacity for communal relationships, his criticisms miss their target, applying to some view that I have never advanced.

Oyowe is drawn towards a consequentialist interpretation of my work probably because he finds it to be the only properly communitarian theory. I suspect this issue is at the core of our substantive dispute. Oyowe in effect maintains that only a view that posits communal relationships as a final good to be promoted can count as communitarian, or sufficiently so, and that leads him to ascribe such a consequentialism to me.

32 Oyowe 123.

Here are three reasons to find my respect-based principle to be prescriptively communitarian, and not to think that one must be a consequentialist with regard to the value of community in order to count. Recall that my theoretical rendition of *ubuntu* is the claim that right acts are those that respect people by virtue of their capacity for communal relationships, ones of identity and solidarity. It is communitarian, first, in that it conceives of the basic good in terms of the capacity for communal relationships. Western principles normally conceive of the basic good in terms of properties intrinsic to an individual, ones that make no essential reference to others. So, for instance, the Kantian says that dignity inheres in the individual's capacity to govern herself, while the utilitarian maintains that moral status inheres in the individual's ability to experience pleasure and pain. In contrast, my view is essentially relational, deeming basic value to consist not merely of properties internal to a person, but rather extrinsic ones. What is special about a person, I maintain, is her ability to relate to others communally. That is an important difference from the liberal and individualist traditions in the West.

A second reason for finding my principle to be communitarian is that its key elements are derived from the beliefs and practices of a wide array of indigenous sub-Saharan peoples, who are invariably described as adhering to communitarian ways of life.[33] Of course, one will find some similar elements in the Western tradition, for instance in the work of Karl Marx[34] and, more recently, the ethic of care.[35] However, communitarian ideals are much more characteristic of the African tradition than they are of the Western. It is well known not only that the conception of communal relationships that I work with is often pursued on moral grounds by traditional African societies, but also that they subscribe to the ethical perspective that individual human beings have a dignity that demands respect. Putting those two ideas together as I have, it seems fair to call the view that we have a dignity by virtue of our capacity for communal relationships an 'Afro-communitarian' perspective.

Third, and finally, other views salient in the African philosophical tradition that accept human rights are widely called 'communitarian'. For example, Kwame Gyekye, who has also worked to explain the respects in which African thought is best interpreted as accepting human rights,[36] calls his view 'moderate communitarianism' and nearly everyone, including those thinkers who reject his view, call it the same thing. And notice that Oyowe himself calls Gyekye's view –

33 For just one example, consider K Wiredu 'Social philosophy in postcolonial Africa: Some preliminaries concerning communalism and communitarianism' (2008) 27 *South African Journal of Philosophy* 332.

34 K Marx 'On James Mill' (1843) in D McLellan (ed) *Karl Marx: Selected writings* (1977) 114.

35 N Noddings *Caring* (1984).

36 K Gyekye *Tradition and modernity* (1997) 35-76.

which grounds human rights on human dignity[37] – 'moderate communitarianism'.[38] My view is therefore entitled to a similar label.

I conclude, therefore, that the principle I have constructed in light of values and norms associated with *ubuntu* is communitarian and, furthermore, that Oyowe has not provided any reason to doubt that it fails to entail and plausibly explain a wide array of human rights. Oyowe uses terms such as 'disingenuously',[39] 'deeply disturbing'[40] and 'betraying a deep-seated incoherence'[41] to characterise my attempt to ground human rights on a philosophical interpretation of ideas associated with *ubuntu*. I hope this reply has made it clear that, while such characterisations might apply to the views Oyowe discusses, he has not provided reasons to think they apply to mine.

5 Conclusion

I conclude this article by briefly considering what my account of human rights entails for how to understand the Constitution. As is well known to South African jurists, the epilogue of the interim Constitution explicitly mentioned *ubuntu* as a value to guide the post-apartheid era,[42] but such did not appear in the final Constitution that was eventually ratified. In light of the absence of explicit mention of *ubuntu* in the final Constitution, should justices avoid making any appeal to it when interpreting it? And rather than viewing the Bill of Rights as grounded on ideals of sub-Saharan peoples, might it not be more apt to view it as anti-African, a mere expression of the will of the 'conqueror', to use Ramose's term?[43] In particular, Ramose and others contend that what is commonly called the 'property clause', according to which no one may be deprived of property (except in terms of law of general application),[44] is unjustified by sub-Saharan values because it precludes compensatory justice.

The issue is complicated, and cannot be resolved adequately here. However, I note three things in reply. First, attempting to provide a theoretical justification for characteristic elements of the Bill of Rights does not imply that I believe that chapter of the Constitution to be perfect. Second, a plain reading of the rest of the section on property allows the state to effect redistribution for the sake of a legitimate public purpose, including an equitable allocation of land,[45] meaning

37 Albeit dignity conceived as God-given life or the capacity autonomy, not as the capacity for communal relationship. See Gyekye (n 36 above) 63-64.
38 Oyowe (n 1 above) 104.
39 Oyowe 121.
40 Oyowe 123.
41 Oyowe 119.
42 Constitution of the Republic of South Africa, Act 200 of 1993.
43 M Ramose 'An African perspective on justice and race' (2001) 3 *Polylog*, http://them.polylog.org/3/frm-en.htm (accessed 14 July 2014).
44 Sec 25(1) Constitution of the Republic of South Africa.
45 Secs 25(2)-(9).

that the property clause is not to blame for the inadequate compensatory justice in post-apartheid South Africa.[46] Third, a significant element of why apartheid was wrong is that land was taken unjustly, which suggests that some kind of right to property is aptly constitutionally enforced.[47]

It is no doubt true that some of those who benefited from apartheid struggled to ensure that certain rights protecting individuals and minorities were put into the Constitution. And it is also true that those who benefited from apartheid have by and large continued to flourish under the new constitutional dispensation. However, from these points it does not follow that the Bill of Rights is 'un-African' or the like. The claim advanced in this article is that *ubuntu* grounds an approach to morality that makes good sense of human rights such as those to life, privacy and freedom of religious practice (amongst others). It is far from obvious that upholding those kinds of rights would make it impossible or even difficult for a state to advance compensatory justice. And given the importance of the idea of respect for human dignity among black sub-Saharan peoples, disregarding such rights would hardly count as 'African'.

Finally, should justices avoid appealing to *ubuntu* since it is nowhere mentioned in the Constitution? Again, the matter is complicated, ultimately requiring one to defend a theory of how to interpret legal documents. I favour a purposive approach, largely for reasons that Dworkin has championed,[48] but also because the Constitution itself explicitly prescribes such an interpretive method![49] In black and white, the Constitution instructs those interpreting it not to stick to the black and white. If, therefore, when reading the Bill of Rights one 'must promote the values that underlie an open and democratic society based on human dignity'[50] and 'must promote the spirit, purport and objects of the Bill of Rights' when interpreting any legislation,[51] it follows that justices must appeal to *ubuntu*, supposing it is true that it is what entails and best explains salient human rights.

In this article, my aim has been to continue the project of putting flesh on the South African Constitutional Court's mere assertion that the 'spirit of *ubuntu* … suffuses the whole constitutional order … [and] is a unifying motif of the Bill of Rights'.[52] I have sought to show not

46 But compare L Ntsebeza 'Land redistribution in South Africa: The property clause revisited' in L Ntsebeza & R Hall (eds) *The land question in South Africa* (2007) 107 120-124.

47 For a defence of the Constitution's property clause from a 'pro-poor' standpoint, see T Metz 'The desirability of a property clause' (2013) 25 *Stellenbosch Law Review* 312.

48 Eg, R Dworkin *Law's empire* (1986).

49 Sec 39 Constitution of the Republic of South Africa.

50 Sec 39(1) Constitution of the Republic of South Africa.

51 Sec 39(2) Constitution of the Republic of South Africa.

52 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) para 37. See also *Dikoko v Mokhatla* (2006) ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) para 113.

merely that *ubuntu* is consistent with human rights or should be invoked to interpret hard cases, but more boldly that it provides a moral-theoretical foundation for which human rights should take centre stage in constitutional deliberation about such matters.

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Islamic *kafalah* as an alternative care option for children deprived of a family environment

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Summary

The inclusion of kafalah *of Islamic law in the United Nations Convention on the Rights of the Child is the first time an exclusively Islamic concept is recognised in a binding international instrument. The drafting of CRC was set against the background of compromise as it relates to the provision of alternative care for children deprived of a family environment. Islamic* kafalah *represents one of such compromises in an attempt to accommodate the differences of the various state parties to CRC. However, many scholarly works on children's rights refer to Islamic* kafalah *only within the context of its 'discovery' during the drafting process of CRC and, as such, the meaning, extent and practice of* kafalah*, as an alternative care option for children deprived of parental care, has not been the subject of much study. This is unlike the case with other forms of alternative childcare like foster care and adoption. Other studies more focused on Islam and human rights refer to* kafalah *only within the broader context of discussing the links and divergences between Islamic law and human rights, or children's rights more specifically. This article specifically focuses on* kafalah *as an alternative care option for children deprived of a family environment in comparison with other forms of alternative childcare. The extent to which* kafalah *is internationally*

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recognised and practised is also addressed. A number of themes are analysed in the article, including what the concept of kafalah *entails, what its legal implications are, what factors distinguish it from other forms of alternative care, and what the international dimensions to* kafalah *are in relation to the subject of intercountry adoption. In light of all these questions, an understanding of* kafalah *will contribute to international children's rights jurisprudence in the context of child care and protection.*

Key words: kafalah*; alternative care; family environment; adoption; children's rights*

1 Introduction

The United Nations Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (African Children's Charter), the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) and the 2009 United Nations Guidelines for the Alternative Care of Children (UN Guidelines),[1] among others, all place a high premium on the need for children to grow up in a family environment. This is a necessary precondition for the full and harmonious development of a child's personality.[2] Against this background, CRC, the African Children's Charter and the UN Guidelines give an additional level of assistance and protection to children deprived of their natural family environment.[3] This is justifiable in light of the fact that children who lack the security of a family are more vulnerable to the violation of all other rights that they are entitled to as children and rights-bearing individuals in society.[4]

Children deprived of a family environment include orphans, street children and abandoned children generally, whether or not in institutional care, and their number runs into millions the world over.[5] The phenomena of HIV and AIDS, armed conflict and poverty, among others, have resulted in millions of orphans and destitute children in Africa.[6] States have an obligation to provide alternative care for these children,[7] and the mechanisms for ensuring this as contained in CRC,

1 UN General Assembly, A/RES/64/142, 2010.
2 Para 4, Preamble to the African Children's Charter; para 6, Preamble to CRC; para 1, Preamble to the Hague Adoption Convention.
3 Art 20 CRC; art 25 African Children's Charter.
4 Art 4 UN Guidelines.
5 LM Shapiro 'Inferring a right to permanent family care from the United Nations Convention on the Rights of the Child, the Hague Convention on Intercountry Adoption, and selected scientific literature' (2008) 15 *Washington and Lee Journal of Civil Rights and Social Justice* 194. See also CRC Committee, General Comment 6, 2005.
6 T Davel 'Intercountry adoption from an African perspective' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 257.
7 Art 20(2) CRC; art 25(2)(a) African Children's Charter; para 5 UN Guidelines.

the African Children's Charter and the UN Guidelines include adoption, foster care, institutional placement and Islamic *kafalah*.[8] This article analyses Islamic *kafalah* as an alternative care option for children deprived of a family environment in comparison to other forms of alternative childcare.

2 Recognition of Islamic *kafalah* in international law

The inclusion of *kafalah* in CRC is the first time an exclusively Islamic concept is recognised in a binding international instrument.[9] Prior to this development, however, *kafalah*, as a subject of international law, was first mentioned in the 1986 UN Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986 Declaration).[10] The 1986 Declaration contains the first internationally agreed upon standards of care for children whose parents are 'unavailable' or 'inappropriate'.[11] *Kafalah* is also recognised in the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.[12] It is provided as one of the measures that can be taken to ensure the 'protection of the person or property of the child'.[13] In the UN Guidelines, *kafalah* is recognised as an 'appropriate and permanent solution' for children who cannot be kept in, or returned to, their original families.[14] In effect, *kafalah* can be regarded as an internationally-recognised form of alternative care for children deprived of their natural family environment as well as one of the measures for providing 'a global system for improving the protection of children in international situations'.[15]

During the drafting process of CRC, the inclusion of adoption as a form of alternative care generated debates from Islamic states' delegates due to the prohibition of adoption under Shari'a.[16] Although adoption was recognised and practised in Arabic societies

8 Art 20(3) CRC; art 25(2)(a) African Children's Charter.

9 G van Bueren *The international law on the rights of the child* (1995) 100; art 20(3) CRC.

10 http://www.un.org/documents/ga/res/41/a41r085.htm (accessed 6 August 2013).

11 N Cantwell & A Holzscheiter 'Article 20: Children deprived of their family environment' in A Alen *et al* (eds) *A commentary on the United Nations Convention on the Rights of the Child* (2008) 16.

12 http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=70 (accessed 6 August 2013).

13 Art 3(e) 1996 Hague Convention on Parental Responsibility and Child Protection.

14 Para 2(a) UN Guidelines.

15 N Lowe 'The Jurisdictional Rules under the 1996 Hague Convention on the Protection of Children' (2010) *Journal of Family Law and Practice* 14.

16 The first objection was raised by the permanent representative of Bangladesh, stating that adoption would result in complex problems relating to inheritance

before the introduction of Islam, it was eventually abolished.[17] Consequently, the inclusion of *kafalah* as an alternative care option in CRC was a compromise, in order to accommodate the cultural and religious differences of the various state parties to CRC.[18] Article 21 of CRC on adoption was initially drafted to read that '[s]tate parties … shall undertake measures, where appropriate, to facilitate the process of adoption of the child'.[19] The implication of this was that states *must* put in place mechanisms for adoption. This was hardly acceptable to the Islamic states, since it meant that states were obligated to provide for adoption in the first place. Eventually, a compromise was reached to the effect that states are not obliged to recognise or set up a system of adoption, by qualifying the provision from the outset. Article 21 of CRC reads: 'States Parties that recognise and/or permit the system of adoption …'[20] This approach was considered more realistic as it accommodated the various concerns raised, coupled with the fact that adoption is not the only solution for children requiring alternative care.[21]

Since the drafting of CRC, such concerns as to the place of adoption in addressing the right of children without parental care to alternative care have become even more prominent in international policy discourse and international law around adoption and, more particularly, intercountry adoption. The inclusion of *kafalah* in the text of CRC is significant in that it reflects the role of cultural and religious factors in the drafting of international instruments and the place of compromise in resolving differences among state parties.[22] However, despite this compromise, some Muslim states ratified CRC with

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rights in Islamic jurisdictions. S Detrick *The United Nations Convention on the Rights of the Child: A guide to the* 'travaux preparatoires' (1992) 312.

17 Van Bueren (n 9 above) 95.

18 K Hashemi 'Religious legal traditions, Muslim states and the Convention on the Rights of the Child: An essay on the relevant UN Documentation' (2007) 29 *Human Rights Quarterly* 212; D Johnson 'Cultural and regional pluralism in the drafting of the UN Convention on the Rights of the Child' in M Freeman & P Veerman *The ideologies of children's rights* (1992) 95; Detrick (n 16 above) 26.

19 Detrick (n 16 above) 26; Johnson (n 18 above) 95. Some delegates from Latin America, Asia and Africa also raised objections on grounds of inability to adequately control the process. Another text suggested by Libya was rejected because it contained no guidelines in relation to adoption at all, whether domestic or intercountry. It read that states should, 'in accordance with their domestic law and legislation, provide an alternative family for a child who does not have a natural family'.

20 Art 21 CRC; see also art 24 of the African Children's Charter that uses 'recognise' but avoids 'permit'.

21 Johnson (n 18 above) 104; R Hodgkin & P Newell *Implementation handbook for the Convention on the Rights of the Child* (2007) 280; S Vite & H Boechat 'Article 21: Adoption' in Alen *et al* (n 11 above) 19.

22 Johnson (n 18 above) 95; M Sait 'Islamic perspectives on the rights of the child' in D Fottrell (ed) *Revisiting children's rights: Ten years of the UN Convention on the Rights of the Child* (2000) 34; Cantwell & Holzscheiter (n 11 above) 31.

reservations to the adoption provisions.[23] Examples include Egypt, Jordan and the Maldives.[24] The CRC Committee has expressed concerns over such reservations since the text of article 21 of CRC makes them unnecessary. The introductory part of article 21 already makes it clear that the provisions on adoption do not apply to these countries.[25] Consequently, the CRC Committee has, through its concluding observations on reports from such countries, recommended a withdrawal of the reservations, thereby prompting a review of such reservations by some of the states involved.[26]

3 Understanding Islamic *kafalah*

3.1 Brief historical background

Adoption was recognised and practised in pre-Islamic Arab societies, whereby the adopted son (legally) became as one born to the adoptive parents. Consequently, the rules of affinity and consanguinity were applicable, in which case marriage between an adopted child and any member of the adoptive family was impossible.[27] However, the Prophet Mohammed, himself, once had an adopted son (Zayd), the wife of whom he once had occasion to see unveiled and got attracted to. Subsequently, his adopted son divorced his wife in favour of his father.[28] Controversy thus arose among the Prophet's followers concerning the marriage between the Prophet and the divorced wife of his adopted son, subsequent to which a revelation followed that adoption constituted 'no real relationship'.[29] According to the Holy *Qur'an*:[30]

> ... nor hath He made those whom ye claim [to be your sons] your sons. This is but a saying of your mouths. But Allah sayeth the truth and he showeth the way. Proclaim their real parentage. That will be more

23 AD Gonzalez 'The Hague International Adoption Act and its interaction with Islamic law: Can an imperfect enforcement mechanism create cause for concern?' (2006-2007) *Gonzaga Journal of International Law* 10; Hashemi (n 18 above) 219.

24 LJ Leblanc 'Reservations to the Convention on the Rights of the Child: A macroscopic view of state practice' (1996) 4 *International Journal of Children's Rights* 357; A Bisset-Johnson 'What did states really agree to? Qualifications of signatories to the United Nations Convention on the Rights of the Child' (1994) 2 *International Journal of Children's Rights* 399; Gonzalez (n 23 above) 10; Hashemi (n 18 above) 219.

25 The introduction to article 21 of CRC reads; 'States parties that recognize and/or permit the system of adoption …'

26 Vite & Boechat (n 21 above) 20; Hodgkin & Newell (n 21 above) 294; Hashemi (n 18 above) 221.

27 R Roberts *The social laws of the Qu'ran* (1990) 49.

28 AA Sonbol 'Adoption in Islamic society: A historical survey' in EW Fernea (ed) *Childhood in Muslim Middle East* (1995) 52; Roberts (n 27 above) 50.

29 D Pearl & W Menski *Muslim family law* (1998) 408; Sonbol (n 28 above) 52; Roberts (n 27 above) 50.

30 Ch 4 Holy *Qur'an* 33:4-6, quoted in D Olowu 'Children's rights, international human rights and the promise of Islamic legal theory' (2008) 12 *Law, Democracy and Development* 73; Roberts (n 27 above) 50.

> equitable in the sight of Allah. And if ye know not their fathers then [they are] your brethren in the faith and your clients.

Thus, the legal conception of adoption as understood in 'Western' laws was abolished. The abolition of adoption further gained support because adoption in pre-Islamic Arabia was practised together with certain acts that were not supported by Islam. For instance, a family could disclaim a member and a person could renounce his biological family. Such practices were popular because adoption into another family was always a possibility.[31] Such actions were considered unacceptable in the creation of a new Islamic community in Mecca and Medina at the time.[32] Consequently, although some scholars argue that adoption in Islam is *mubah* and have called for a reform of Muslim legal traditions to conform to the formal notion of adoption, the general and popular position is that adoption is prohibited in Islam, the practice of which amounts to a sin of apostasy (*kufr*).[33] The eventual inclusion of *kafalah* in CRC reflects the current Islamic populist position on adoption.

3.2 Islamic law and children deprived of a family environment

The first right recognised in Islam is the establishment of parentage through blood ties; all other rights derive from this.[34] The most important of such rights are inheritance, custody, fosterage, maintenance and guardianship.[35] The family is therefore seen as a shield of defence from the violation of these rights, and as a necessary tool for the wholesome development of children. Consequently, caring for orphans and vulnerable children generally is a key tenet of Islam in order to provide them with the safety and security that a family environment offers.[36]

Indeed, there is greater agreement between the major Islamic sects[37] on the matter of caring for such children than on any other matter of law, and the *Qur'an* provides specially for the subject.[38] For instance, upon taking in a 'foundling' (*laqit*), the child must never

31 Olowu (n 30 above) 73; Sonbol (n 28 above) 52.

32 Pearl & Menski (n 29 above) 408.

33 Sonbol (n 28 above) 51; Gonzalez (n 23 above) 4.

34 S Ishaque 'Islamic principles on adoption: Examining the impact of illegitimacy and inheritance related concerns in the context of a child's right to identity' (2008) 22 *International Journal of Law, Policy and the Family* 7; UNICEF and International Centre for Demographic Studies and Research (ICDSR) *Children in Islam: Their care, upbringing and protection* (2005) 12.

35 Van Bueren (n 9 above) xxi.

36 UNICEF and ICDSR (n 34 above) 73 79. In Islam, it makes no difference whether or not these children have parents. The emphasis is on ensuring their sustenance through the provision of basic needs. Poverty is thus a cause for concern in relation to the proper care of children.

37 The Shiahs and the Sunni; the basic difference between them lies in the extent of authority of Muslim leaders after the Prophet Mohammed.

38 Roberts (n 27 above) 40.

again be abandoned.[39] There is a moral duty and an obligation to render social assistance to children (and adults) who lack the basic necessities of life, whether or not they ask for it.[40] It is also a spiritual duty, the neglect of which renders a person's prayers in vain.[41] Further, traditional records reveal that the Prophet Mohammed once declared:[42]

> Do you like your heart to be tender, and your wishes fulfilled? Be merciful to the orphan. Touch softly his head, and feed him from your food. Your heart will be tender and you will attain your wishes.

Another *hadith*[43] on the injunction to treat orphans and abandoned children with kindness, mercy and dignity states:[44]

> A person who touches with compassion the head of an orphan will be rewarded for each hair his hand touches. Whoever treats kindly a female or male orphan who is under his sponsorship [*kafalah*], I shall be his companion in Paradise.

In the words of the Prophet, 'I and the person who looks after an orphan and provides for him, will be in Paradise like this' (putting his index and middle fingers together).[45] To be acceptable, such good deeds must be based on the correct intention (*niyyah*), which is to do it with sincerity and without ulterior motives.[46]

Many legal precepts revealed to and established by the Prophet Mohammed came in response to the circumstances of the time, thereby making pragmatic leadership and proactive solutions possible.

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39 JJ Nasir *The Islamic law of personal status* (2002) 155. 'A foundling is a newborn baby, abandoned by its parents on grounds of poverty or shame [or young child found in the street and who does not know his family] and so unable to fend for itself. Care of a foundling is a religious duty, if there is any risk that the baby might otherwise die.'

40 Olowu (n 30 above) 68.

41 Sait (n 22 above) 43.

42 Related by Abu-Al-Darda, al Tabanani, quoted in M Hassan *Islam: Its conception and principles* (undated) 113 and in Olowu (n 30 above) 67.

43 While the *Qu'ran* represents the primary and most authoritative source of Islamic law because it is based on the revealed word of Allah, *hadith* refers to the individual reports on the practices of the Prophet by his closest family members and companions. These reports are collectively known as the *Sunnah* and are considered a secondary source of Islamic law. A third source is the *ijma*, which are legal rules agreed upon by a consensus of opinions of learned Islamic scholars within the Muslim community at large. The *ijmas* are relied upon in matters where no clear or direct injunction can be found in the *Qu'ran* or the *Sunnah*. The final source of Islamic law is the *qiyas*. These are analogies, inferences and deductions drawn from time to time by Islamic jurists in the resolution of issues that are not dealt with by any of the other sources.

44 Al-Tabarani in Al-Mu'jam al-Kabir 8/239 *Hadith* 7821, on the authority of Abu Umama in UNICEF and ICDSR (n 34 above) 76.

45 *Hadith* narrated by Sahl bin Sa'd (ra); see 'Good deeds: 1000 keys to paradise No.4: Look after orphans' http://1000gooddeeds.com/2009/08/24/4-lookafterorphans/ (accessed 7 August 2013).

46 As above.

In relation to children deprived of a family environment, for instance,[47]

> [t]he fact that increasing numbers of Muslim males fell in battle [the Battle of *Uhud*] acted as a catalyst to the verses which enjoined kindness to orphans while retaining the practice of polygamy.

Also, the early life of the Prophet, having himself been left a destitute orphan, greatly influenced the emphasis on caring for orphaned children.[48]

3.3 Meaning and implications of Islamic *kafalah*

The term *kafalah* is traced to the Islamic law of obligations, which 'permits a person to enter into a contract committing himself to certain undertakings in favour of another person provided that person has a material or moral interest in such undertaking'.[49] Through *kafalah*, a family takes in an abandoned child, a child whose natural parents or family are incapable of raising him or her or who is otherwise deprived of a family environment, without the child being entitled to the family name or an automatic right of inheritance from the family.[50] By definition, *kafalah* is 'the commitment to voluntarily take care of the maintenance, of the education and of the protection of a minor, in the same way as a father would do it for his son'.[51]

However, the *Qur'an* is very specific on the matter of property and wealth distribution through inheritance and they devolve on the basis of blood relationship only. There are specific allotments for each member of the family and an individual can only control the inheritance of about one-third of his property or estate.[52] Apparently, the *Qur'an* did not contemplate an automatic right of inheritance through adoption in relation to the non-biological children or members of the family. Consequently, *kafalah*[53]

> creates the following effects: exercise of the parental authority and the obligation of maintenance of the caregiver on the one hand, and persistence of the family bonds and preservation of the child's family status on the other.

In other words, *kafalah* is the provision of alternative care without altering the child's original kinship status because in Islam; the link

47 Pearl & Menski (n 29 above) 3.
48 Sonbol (n 28 above) 50 54.
49 Olowu (n 30 above) 54.
50 Van Bueren (n 9 above) xxi.
51 Art 116 Family Code of Algeria, quoted in ISS/IRC 'Fact Sheet No 50: Specific case: KAFALAH' (2007) 1 http://www.iss-ssi.org/2009/assets/files/thematic-facts-sheets/eng/50.Kafala eng.pdf (accessed 7 August 2013).
52 Sonbol (n 28 above) 48-50.
53 ISS/IRC (n 51 above) 1.

between an adopted child and his biological parents must remain unbroken.[54]

Nonetheless, children taken into families under *kafalah* are not left out of the property distribution process as the *Qur'an* enjoins Muslims to assign portions of their wealth to others who, though unrelated to them by blood, are equally dependent on them. Consequently, such persons are provided for from the required one-third portion of an individual's personal estate, which is subject to the owner's prerogative and which can be exercised through a will or given as an outright gift (*sadaqa*).[55] For instance, the *Quranic* injunction 'and in their wealth, there is acknowledged right for the needy and destitute' (or 'and those sworn to you leave them their share') has been interpreted to mean a duty to 'render assistance to every needy person, *including children*, who lack the basic necessities of life'.[56] Consequently, although a child adopted under *kafalah* has no legal right to inherit from the adoptive family, in practice such a child is assigned an inheritance through testamentary succession. This is a deliberate attempt at ensuring equality between natural and adopted children, thereby minimising the differences between adoption and *kafalah*.[57] This is significant because the practice of *kafalah* does not permit discrimination between *kafalah* children and those born to the household in order to avoid a sense of deficiency or inferiority in the former.[58] *Kafalah,* which presupposes an 'unlimited entrustment' of a child to a new family, is the highest form of protection and alternative care for orphans and abandoned children in Islam.[59] It also represents a form of social security for such children.[60] More significantly, *kafalah*'s unlimited nature results in a permanent bonding relationship between the child and the family in question. The child becomes a part of the family and is raised in the same manner as the natural children of the family.[61] This is important since *kafalah* is seen not only as a meritorious deed, but also as a religious duty.

In the practice of *kafalah*, a child is usually placed in a family that is as closely related to his natural family as possible without the new parents totally displacing the original parents. Thus, there are three features which distinguish *kafalah* from adoption: non-severance of

54 K Nundy 'The global status of legislative reform related to the Convention on the Rights of the Child' (2004) vii http://www.unicef.org/policyanalysis/files/The_Global_Status_of_Legislative_Reform_Related_to_CRC.pdf (accessed 7 August 2013); Hashemi (n 18 above) 221.

55 Sonbol (n 28 above) 48-50.

56 Sonbol 54.

57 Hashemi (n 18 above) 219. Sudan and Jordan are examples of states where this practice is established.

58 Sonbol (n 28 above) 44.

59 Niels'The new frontiers of placement: Kafalah, European adoption and international placement' (2007) 1 http://poundpuplegacy.org/node/7258 (accessed 7 August 2013).

60 Sonbol (n 28 above) 64.

61 Sait (n 22 above) 38.

family ties; non-transference of inheritance rights; and no change in the child's family name.[62] The new family takes care of the child as an act of personal charity or for compensation, depending on the circumstances of the case.[63] Thus, not all children deprived of a family environment have to be poor before being eligible for *kafalah*; *kafalah* was not always based on charity. For example, one means of rewarding men who survived the battle of *Uhud* was by allowing them to take responsibility over wealthy orphans and control their wealth.[64] However, given that the context has changed over time, the emphasis is on providing a family-based alternative care for orphans and other abandoned children because they are destitute and require proper care and attention for proper overall development. As such, *kafalah* is, in the main, a primary moral obligation for Muslims towards such children.[65]

3.4 *Kafalah* compared to other alternative care options

In providing for alternative care options, CRC, the African Children's Charter and the UN Guidelines give priority to family-based options such as foster care, *kafalah* and adoption while making institutional care a subsidiary option where necessary, thereby making it a secondary form of alternative care in the hierarchy of options.[66] Although the idea of ranking is contested in international law, the apparent priority given to family-based options serves to underscore the importance of a family environment to the proper development of the child.[67] Further, the options listed prior to institutional placement are ranked in order of permanence, that is, from the least permanent form of alternative care to the most permanent.[68] The principle of the best interests of the child, however, remains the primary focus in any circumstance.

While article 25 of the African Children's Charter does not expressly make reference to *kafalah* as one of the alternative care options, like article 20 of CRC, the wording of the former suggests that the care options listed are non-exhaustive.[69] By implication, therefore, *kafalah* falls within the scope of article 25 of the African Children's Charter since *kafalah* represents a family-based form of alternative care.

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62 ISS/IRC (n 51 above) 1.

63 Olowu (n 30 above) 73.

64 Sonbol (n 28 above) 54; Pearl & Menski (n 29 above) 3.

65 Sonbol 55.

66 Art 20(3) CRC; art 25(2)(a) African Children's Charter; Cantwell & Holzscheiter (n 11 above) 16. The use of the phrase 'if necessary' before listing or permitting institutional placement is indicative of this.

67 Cantwell & Holzscheiter (n 11 above) 19.

68 The order provided in art 20(3) of CRC reads as follows: 'foster care', '*kafalah*' and 'adoption'.

69 Art 25(2)(a) of the African Children's Charter ACRWC provides that alternative family care 'could include, *among others*, foster placement, or placement in suitable institutions for the care of children'. See also art 20(3) of CRC.

3.4.1 *Kafalah* and foster care

Foster care is a system of care whereby children deprived of parental or family care are placed in the care of individuals to whom they are unrelated. In recent times, however, foster care has evolved to include care by relatives of the child in question. This is known as 'kinship foster care'.[70] Historically, placement in foster care was temporary, pending reunification with the family, but has now evolved into an alternative care option that may not be temporary but quite permanent or transformed into adoption.[71] Although fostering covers a wide range of child care arrangements, its unique characteristic is that it does not confer full parental responsibilities upon the foster parents. Generally, parental responsibilities for children in foster care are shared between the state and the foster parents. Consequently, it is essentially a form of social parenting that is subject to legal controls by the state.[72] Foster care is a specialised state-financed service, particularly in more developed countries, aimed at providing a comprehensive approach to caring for children unable to be cared for by their parents for a period. Thus, there is a wide variety of forms and models of foster care all over the world and they are discussed in a vast array of international literature.[73]

Kafalah is similar to (long-term) foster care in the conferment of some (not full) parental rights and responsibilities for a child's upbringing in respect of both the person and property of the child.[74] Further, fostering is recognised and permitted under Islam (unlike adoption) as an alternative care form which is distinct from *kafalah*. However, foster children are not permitted to marry anyone with whom they were fostered, but those adopted under *kafalah* may marry anyone from that family. Both foster and *kafalah* children have no inheritance rights except as *sadaqa* (gift).[75]

3.4.2 *Kafalah* and kinship care

Kinship care refers to 'family-based care within the child's extended family or with close friends of the family known to the child, whether

70 Cantwell & Holzscheiter (n 11 above) 37; DJ Herring 'Kinship foster care: Implications of behavioural biology research' (2008) 56 *Buffalo Law Review* 495.

71 SL Waysdorf 'Families in the AIDS crisis: Access, equality, empowerment and the role of kinship caregivers' (1994) 3 *Texas Journal of Women and Law* 145.

72 A Bainham *Children: The modern law* (1998) 191.

73 L Lee-Jones 'Foster care and social work from the perspective of the foster child' unpublished LLM thesis, University of Cape Town, 2003 11; H Johnson 'Literature review of foster care' (2005) http://www.crin.org/docs/literature%20review%20of%20foster%20care.pdf (accessed 12 August 2014). New models of foster care also continue to be developed, eg, the 'cluster foster care' model. See J Gallinetti & J Sloth-Nielsen 'Cluster foster care: A panacea for the care of children in an era of HIV/AIDS or a MCQ?' (2010) 4 *Social Work/Maatskaplike Werk* 486-496.

74 K O'Halloran *The politics of adoption: International perspectives on law, policy and practice* (2009) 9.

75 Sonbol (n 28 above) 64.

formal or informal in nature'.[76] Kinship care is premised on a broad interpretation of family to include all the people involved in caring for a child, which differs from society to society and even from family to family through a wide range of social relationships.[77] Traditionally, the extended family comprises everyone related by blood, marriage, and adoption, with older children having a supervisory role to play in the care of younger children in the family.[78] Kinship care is also based on the assumption that blood relationship is central to the definition of family.[79]

Generally, kinship care is practised informally, either spontaneously or at the request of parents, and places no legal responsibilities on the caregivers.[80] Consequently, until quite recently, in modern children's statutes there were no specific state obligations to children without parental care who have been informally absorbed into kinship care, since its role and status are not expressly provided for.[81] An exception to this general trend is Namibia where the (draft) Child Care and Protection Act expressly recognises the role and status of kinship care as an alternative care form for children without parental care.[82]

In recognition of the fact that kinship care is the most widespread form of alternative care for vulnerable children, states are expected to[83]

> devise appropriate means ... to ensure their welfare and protection in such informal care arrangements, with due respect for ... the rights and best interests of the child.

Additionally, the African Children's Charter recognises the role of persons other than parents in the upbringing of children.[84] This is

76 Para 29(c)(i) UN Guidelines.

77 M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339; SG Rankin 'Why they won't take the money: Black grandparents and the success of informal kinship care' (2002) 10 *Elder Law Journal* 153; GA Paupeck 'When grandma becomes mom: The liberty interests of kinship foster parents' (2001) 70 *Fordham Law Review* 527; A Leonard 'Grandparent kinship caregivers' (2004) 6 *Marquette Elder's Advisor* 149.

78 CR O'Donnell 'The right to a family environment in Pacific Island cultures' (1995) 3 *The International Journal of Children's Rights* 90.

79 E Bartholet *Nobody's children: Abuse, neglect, foster drift and the adoption alternative* (1999) 2; Van Bueren (n 9 above) xxii.

80 International Social Service (ISS) 'A global policy for the protection of children deprived of parental care' 2005 6 http://www.crin.org/docs/A%20Global%20Policy%20for%20the%20Protection.pdf (accessed 12 August 2014); Cantwell & Holzscheiter (n 11 above) 19.

81 ISS (n 80 above) 7.

82 See ch 8 of Namibia's draft Child Care and Protection Act; the Bill was approved by cabinet in 2012, and was mentioned during the opening of parliament in February 2013, signifying imminent adoption into law.

83 Para 18 UN Guidelines.

84 See art 20 of the African Children's Charter on parental responsibilities.

evidenced by the avoidance of the technical and narrow expression 'legal guardian' in relation to parental responsibilities.[85]

Kinship care has positive values such as promoting continuity in upbringing and family autonomy, especially during family crises such as divorce or separation. It also supports the extended family traditions and the value of keeping siblings together.[86] However, kinship care has suffered some setbacks (particularly in Africa) due to the weakening of kinship ties, at least in terms of physical proximity, as a result of modernity, disease, poverty and armed conflict, among others.[87] This increases the necessity for kinship care to be legally recognised and assisted by states in the interest of children who are absorbed in such alternative care. The CRC Committee has advocated state support for kinship care despite the non-recognition of its extent, role and status in domestic and international law and practice.[88] With the specific inclusion of kinship care in the UN Guidelines and its emergence in modern children's statutes, such as the draft Namibian Child Care and Protection Act, it is expected that states will pay attention to kinship care in terms of support for the protection of the children concerned.[89] In order to address some of the challenges faced by kinship carers, South Africa and Uganda provide good examples due to the decision that kinship carers should have access to simple procedures conferring necessary parental responsibility on them.[90]

K*afalah* is similar to kinship care to the extent that they both generally promote continuity in upbringing in relation to children's cultural and religious backgrounds.[91] This is primarily due to the fact that, in both cases, the closest relatives available usually absorb the children (on an informal, largely spontaneous and unregulated basis). Generally, such relatives usually share several elements (like culture and religion) in common with the children involved. Both *kafalah* and

85 B Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *South African Public Law* 25. Compare art 18 of CRC on parental responsibilities.

86 Save the Children UK *Kinship care: Providing positive and safe care for children living away from home* (2007) 3. See also para 17 of the UN Guidelines.

87 P Onyango & S Bali 'Regional practice: The African situation' in J Doek *et al* (eds) *Children on the move: How to implement their right to family life* (1996) 141.

88 The UN Guidelines also serve the purpose of filling this gap (n 1 above).

89 See UM Assim 'Understanding kinship care of children in Africa: A family environment or an alternative care option?' unpublished LLD thesis, University of the Western Cape, 2014.

90 J Sloth-Nielsen & B Mezmur 'HIV/AIDS and children's rights in law and policy in Africa' in Sloth-Nielsen (n 6 above) 286. This makes it easy for such caregivers to make some important decisions, for instance in relation to medical surgery on behalf of the children in their care rather than being prevented by virtue of not being their biological parents or guardians.

91 Art 20(3) CRC; art 25(3) African Children's Charter.

kinship care are thus able to provide stability and continuity for the progressive growth and development of the child.[92]

3.4.3 *Kafalah* and adoption

Adoption refers to the creation of a legal and permanent parent-child relationship through a child's acquisition of new family ties which are equivalent to biological ties and extinguish (completely or partially) a pre-existing (biological) parent-child relationship.[93] *Kafalah*, on the other hand, represents the Islamic alternative to adoption.[94] However, while Islam places a great premium on raising the child within a family environment, the maintenance of one's identity, traceable to one's natural parents, occupies a more central position. Thus, adoption is considered a phenomenon which blurs natural bloodlines.[95] By investing an adopted child with legal rights (especially inheritance rights from the adoptive parents), adoption is considered to be a disruption of 'the pattern of family relationships that Islamic law recognises'.[96]

Broadly, adoptions may be 'full' or 'simple', on the one hand, or 'open' or 'closed', on the other.[97] An adoption is full where the pre-existing parent-child relationship is terminated and the child is fully integrated as part of the new family, including the extended family.[98] On the other hand, an adoption is simple where the pre-existing parent-child relationship is not terminated, but a new parent-child relationship is established between the child and the adoptive parents, upon whom parental responsibilities for the child are conferred.[99] There is a growing preference for simple adoptions, particularly in African countries, due to the fact that a complete severance from one's original family background is considered quite alien to the traditional African society.[100]

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92 Arts 14 & 20 CRC; art 9 African Children's Charter. See also art 7 of the Child Rights Act 2003 of Nigeria which provides, *inter alia*: 'Whenever fostering, custody, guardianship and adoption are at issue, the right of the child to be brought up in and to practice his religion shall be a paramount consideration.'

93 Vite & Boechat (n 21 above) 19. See also D Tolfree *Roofs and roots: The care of separated children in the developing world* (1995) 165; Bainham (n 72 above) 205; P Welbourne 'Adoption and the rights of children in the UK' (2002) 10 *The International Journal of Children's Rights* 269; Bartholet (n 79 above) 24.

94 Detrick (n 16 above) 26; Johnson (n 18 above) 95.

95 Pearl & Menski (n 29 above) 408; Detrick (n 16 above) 312; Sonbol (n 28 above) 57.

96 Olowu (n 30 above) 73.

97 Vite & Boechat (n 21 above) 16; W Duncan 'Children's rights, cultural diversity and private international law' in G Douglas & L Sebba (eds) *Children's rights and traditional values* (1998) 17; W Duncan 'Intercountry adoption: Some issues in implementing the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption' in Doek *et al* (n 87 above) 84.

98 Vite & Boechat (n 21 above) 16.

99 Permanent Bureau, Hague Conference on Private International Law *The implementation and operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice* (2008) 121.

100 Vite & Boechat (n 21 above) 17.

An adoption is considered open where it allows for future informal relations among all parties to the adoption. It is closed where there is no such allowance; usually, the adopting parents and the biological parents do not meet or get to know one another. The facilitators of the adoption usually determine who should adopt the child in question. Closed adoptions are generally on the decrease with open adoptions becoming more popular.[101] Further, the closure of an adoption does not preclude the child from seeking to find out about and be reunited with his biological family upon attaining the age of majority. In an open adoption, the adoptive and birth family or parents maintain some contact and relations with each other for the child's benefit. The forms of contact, which can range from letters to visits, are agreed upon by all the parties.[102]

Two features of an adoption can be observed in *kafalah*: permanence and elements of a simple and/or open adoption. As already discussed, *kafalah* creates a permanent bonding relationship between the child and the caregivers and the child is integrated into the new family as though that was the case from the outset. Hence, *kafalah*, like adoption, results in the creation of a new and permanent family relationship. Additionally, as with simple and open adoptions, the child under *kafalah* maintains the legal bond (and a continuing relationship, albeit informally) with his family of origin in terms of identity, coupled with the possibility of remaining vested with a right of inheritance or support in relation to his original family's estate, if any.[103] However, *kafalah* is distinguishable from adoption in that the process is usually not as formal and rigorous as a formal adoption. In addition, the general rule applicable to adoptions revolves around the severing of links with birth parents and, in fact, many legal systems of the world do not provide for simple adoptions.[104]

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101 Duncan (1998) (n 97 above) 84.

102 For more information on the types of adoption, see C Craft 'What is an open adoption?' http://adoption.about.com/od/parenting/f/whtopenadoption.htm (accessed 6 August 2013); Adoption.com 'Closed adoption' http://closed.adoption.com/ (accessed 6 August 2013); Vite & Boechat (n 21 above) 17; Duncan (1998, n 97) 17; Duncan (1996, n 97 above) 84.

103 Duncan (1998) (n 97 above) 36; Vite & Boechat (n 21 above) 19.

104 Permanent Bureau (n 99 above) 121. There are studies dealing with a current interest in simple adoptions for varying reasons and the tensions existing among the various competing rights involved in the adoption process. Some examples of this include the right to privacy and identity. For more information on this, see: B Mezmur 'Intercountry adoption in an African context: A legal perspective' unpublished LLD thesis, University of the Western Cape, 2009 186-192; M Freeman 'The new birth right? Identity and the child of the reproduction revolution' (1996) 4 *The International Journal of Children's Rights* 273; R Snow & K Covell 'Adoption and the best interests of the child: The dilemma of cultural interpretations' (2006) 14 *The International Journal of Children's Rights* 109; RJ Simon & A Alstein *Adoption across borders: Serving the children in transracial and intercountry adoptions* (2000); Evan B Donaldson Adoption Institute 'Beyond culture camp: Promoting healthy identity formation in adoption' November 2009 http://adoption.about.com/od/parenting/a/beyond_culture_camp.htm (accessed 6 August 2011); K Evans *The lost daughters of China: Adopted girls, their journey to America, and the search for a missing past* (2000).

4 Islamic *kafalah* in practice: Links with adoption

4.1 *Kafalah* in domestic jurisdictions

Despite the prohibition of adoption in Islam generally, adoption takes place in various alternative forms under the umbrella of *kafalah*.[105] In Bangladesh, Iran and Pakistan, for instance, adoption is recognised as guardianship, under which a child is placed in care of a competent family by judicial decree while ensuring the child's knowledge of his or her paternity.[106] In Syria, the adoption alternative is known as 'filiation', in which case the child must be of unknown parentage or the offspring of an unlawful marriage. This is unlike adoption where one or both parents of the child may be known.[107] However, the use of 'permit/recognise'[108] in relation to adoption under CRC is not redundant because non-recognition of adoption does not amount to it being illegal.[109] For instance, states such as Egypt, Pakistan and Lebanon permit adoption for non-Muslims even though it remains prohibited under the Shari'a for Muslims.[110] In practice, permission is not usually given for the adoption of a lost child who is old enough to know his name because it is presumed that the family is in search of him; but those who were lost or abandoned as babies or infants can be adopted. This approach is tied to the need to preserve family lineage through bloodlines. However, the latter category of children is presumed illegitimate in terms of identifiable family bloodlines and since this has an attendant negative social stigma in Islamic society, adoption becomes an option in their case.[111]

In Islamic states that permit adoption (statutorily), there are certain circumstances in which it is permitted even for Muslims to adopt despite the Shari'a and *kafalah*. Egypt is again an example (besides Tunisia, Morocco, Pakistan and other parts of South Asia) where, as a result of the fact that the *Qur'an* is often interpreted to meet the demands of the changing society, adoption (even intercountry) is allowed though on a limited basis. For instance, the outright adoption of an orphan (*yateem*) by a relative is allowed.[112] Also, permitting adoption for children of unknown relatives is considered a 'social welfare measure aimed at serving the interests of the abandoned

105 Sonbol (n 28 above) 39; Hashemi (n 18 above) 220.

106 Hashemi (n 18 above) 220.

107 As above. This is without prejudice to the fact that abandoned children whose parents cannot be traced are put up for adoption. Under filiation, however, the fact of unknown parentage (or unlawful marriage) is a precondition for filiation.

108 See art 21 of CRC.

109 Hashemi (n 18 above) 221.

110 Vite & Boechat (n 21 above) 21; Hodgkin & Newell (n 21 above) 294; Hashemi (n 18 above) 221.

111 Sonbol (n 28 above) 60. See also TA Volkman (ed) *Cultures of transnational adoption* (2005) 381.

112 Nasir (n 39 above) 145; Pearl & Menski (n 29 above) 409; Volkman (n 111 above) 390 395.

children'.[113] In other states, like Indonesia, there has been a gradual withdrawal from religious traditions so as to recognise and permit adoption, while some communities in South Asia allow adoption because it is not considered a prohibited practice, but one towards which religion is indifferent (*mubah*).[114] However, in some other states like Algeria, Kuwait and Yemen, adoption remains prohibited under both Shari'a and statutory law. It is considered void and without legal effect unless for purposes of bequeathing property or giving a gift, subject to the provisions of a will. In addition, there are legal requirements for *kafalah* applicants to fulfil and *kafalah* may be revoked at any time at the initiative of any of the parties, even the child.[115]

4.2 *Kafalah* across borders

While the formal recognition of *kafalah* in CRC represents a breakthrough in international law, the institution of *kafalah* is largely unknown, particularly among 'Western professionals'.[116] Also, while variations exist in relation to state practice on *kafalah*, the international placement of children under *kafalah* is quite rare except for placements of children with nationals of their home country living abroad, and who are in most cases relatives of the children involved.[117]

Generally, there are three approaches to international *kafalah*, determined by state law and practice: countries which strictly do not recognise or permit international *kafalah* (Egypt, Iran, Mauritania); countries that deal with international *kafalah* on a case-by-case basis (Algeria, Morocco, Jordan, Pakistan); and countries that provide legislation on adoption or the conversion of *kafalah* into adoption, where relevant (Tunisia, Indonesia).[118] The effect of this is that, while adoption is generally rejected in the first category of countries, the notion of *kafalah* at the international level is equally rejected. Thus, children without parental care in such states can only find alternative care within the nation, except if they have relatives who live abroad and who take them in. In the second category, the absence of

113 Pearl & Menski (n 29 above) 409. In Somalia, eg, adoption (in-country and intercountry) is recognised even in the codified Muslim law.

114 Nasir (n 39 above) 145; Volkman (n 111 above) 393; Hashemi (n 18 above) 221; Sonbol (n 28 above) 62.

115 S Besson 'Enforcing the child's right to know her origins: Contrasting approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) *International Journal of Law, Policy and the Family* 137; Volkman (n 111 above) 387 398. In Algeria, a *kafalah* applicant should be a Muslim having a decent home and under 60 years (male) or under 55 (female). Medical certificates are also required and if the *kafalah* is to be intercountry, a special permission of the relevant court would be attached to the guardianship order.

116 ISS/IRC (n 51 above) 2.

117 As above. See also Olowu (n 30 above) 54.

118 ISS/IRC (n 51 above) 2.

national applications for *kafalah* makes international *kafalah* an option to be considered, provided certain conditions are fulfilled.[119] The situation in Morocco is particularly unique due to the fact that attempts have been made to formalise *kafalah* in order to safeguard the practice from abuses more common with *kafalah* at an informal level.[120] In the third category of countries, despite the prominence of Islamic law, adoption is recognised and permitted, with its full legal consequences, but only for adoptive parents who are nationals residing in the country or abroad, and who are of the same religion as the child.[121]

Despite the rarity of intercountry *kafalah*, the practice of *kafalah* internationally is subject to several challenges, chief of which is the lack of acknowledgment of *kafalah* in some (particularly Western) countries. In Italy, for example, it is difficult, if not impossible, for children from Morocco or other Islamic countries to be absorbed by 'an Italian family or a family from their country residing in Italy'.[122] This is due to the fact that securing the relevant documents for the movement of such children from the authorities of destination countries may prove difficult since those countries do not understand, appreciate or reckon with *kafalah* and the children may find themselves in a state of legal limbo.[123] This would in turn impact on the realisation and exercise of other rights of the child, particularly rights that flow from the exercise of parental responsibilities such as consent to medical procedures and freedom of movement.

Generally, these are rights that automatically follow from the completion of a successful adoption process. In the United Kingdom and Canada, for instance, the non-acknowledgment of *kafalah* and the fact that Islamic law generally does not permit adoption have sometimes served as the basis upon which children, adopted under Pakistani law, are refused entry into England and Canada to join their sponsors or caregivers who are settled there.[124] This is despite arguments by immigration adjudicators that the Islamic *kafalah* is

119 Some of the prescribed conditions in the 2002 Moroccan Law on *kafalah* include the practice of Islam by the *kafalah* caregivers as well as being morally fit, financially able, having no criminal record with regard to crimes against children and having no contagious disease.

120 Y Rabineau 'Le regime de la *kafala* au Maroc et ses consequences au regard de Droit Francais' October 2008 http://www.jafbase.fr/docMaghreb/FichesRabineau/kafala9.pdf (accessed 6 August 2013). The Moroccan law on *kafalah* covers some procedural matters such as exist under the 1993 Hague Convention on Intercountry Adoption. eg, the determination of eligibility of the child and the suitability of the *kafalah* caregivers or applicants.

121 ISS/IRC (n 51 above) 2.

122 Niels (n 59 above) 1.

123 A Mens 'Intercountry adoption: Do the existing instruments work?' in S Meuwese *et al* (eds) *100 years of child protection* (2007) 1.

124 Pearl & Menski (n 29 above) 409.

more or less the same as adoption in Western countries.[125] However, this position (non-acknowledgment of *kafalah*) has been undergoing gradual changes.

4.3 *Kafalah* and the 1993 Hague Convention on Intercountry Adoption

Intercountry adoption, though a sub-set of adoption, has become the subject of significant interest in recent years. In addition, a separate legal framework regulates its practice, the 1993 Hague Adoption Convention, building on article 21 of CRC on intercountry adoption.[126] The Hague Adoption Convention was drafted in response to the need to safeguard the best interests of the child in the context of intercountry adoption by guarding against trafficking in children, the commercialisation of the adoption process and all forms of abuse generally.[127] Consequently, the Hague Adoption Convention provides the measures of implementation for CRC on intercountry adoption.[128] This is done by setting minimum standards to be complied with by all parties involved in the adoption process, in relation to formal, procedural and other requirements. These include the eligibility of the applicants, the adoptability of the child and counselling of all parties, among others.[129] The Hague Adoption Convention therefore occupies a central position and plays an important role, given that there is increasingly a high rate of international mobility of children across borders due to factors such as armed conflict, divorce and poverty.[130] These factors, along with issues to do with illegitimacy, conservative abortion laws and minimal use of contraceptives, make Africa a huge market for the supply of children for intercountry adoption to Western countries. Thus, apart from child protection or humanitarian ideals, intercountry adoption currently has socio-political and socio-economic dimensions to it.[131]

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125 SM Ali 'Establishing guardianship: The Islamic alternative to family adoption in the Canadian context' (1994) 14 *Journal of Muslim Minority Affairs* 202; Pearl & Menski (n 29 above) 410.

126 Permanent Bureau (n 99 above) 22.

127 See the Preamble and art 1 of the Hague Adoption Convention.

128 J Murphy *International dimensions in family law* (2005) 186; O'Halloran (n 74 above) 135; J Sloth-Nielsen *et al* 'Intercountry adoption from a Southern and Eastern Africa perspective' (2010) *International Family Law* 86; Hodgkin & Newell (n 21 above) 280.

129 See generally the 1993 Hague Adoption Convention and other works dealing on the specific theme of intercountry adoption and the 1993 Convention, including the history and growth of intercountry adoption such as G Parra-Aranguren 'History, philosophy and general structure of the Hague Adoption Convention' in Doek *et al* (n 87 above) 63; Permanent Bureau (n 99 above); Vite & Boechat (n 21 above); E Bartholet 'What's wrong with adoption law?' (1996) 4 *International Journal of Children's Rights* 263; Hodgkin & Newell (n 21 above); Sloth-Nielsen *et al* (n 128 above); Mezmur (n 85 above).

130 CMI Moolhuysen-Fase 'Opening speech' in Doek *et al* (n 87 above) 4.

131 For more on the socio-political and socio-economic dimensions of intercountry adoption, see: H van Hooff 'A family for every child: International adoption of

Article 2(2) of the Hague Adoption Convention provides that 'the Convention covers only adoptions which create a permanent parent-child relationship' (both simple and full). This is interpreted to mean adoption in the strict formal and legal sense, since the Hague Adoption Convention 'does not cover adoptions which are only adoptions in name but do not establish a permanent [legal] parent-child relationship'.[132] Consequently, the Hague Adoption Convention excludes other long-term (and permanent) alternative care arrangements like *kafalah*.[133] The Egyptian and Moroccan delegates to the 17th session of the Hague Conference on Private International Law in 1993 suggested the inclusion of *kafalah* in the Hague Adoption Convention regime. This was, however, not realised due to the non-availability of statistics on the frequency of intercountry *kafalah* and evidence related to the abuse of the process[134] during the 1990, 1991 and 1992 Special Commission meetings held prior to the drafting of the Hague Adoption Convention.[135] To date, there are over 90 contracting states to the 1993 Hague Adoption Convention with a very few Islamic or largely Islamic states included.[136]

Notwithstanding the current status or non-status of *kafalah* under the Hague Adoption Convention, there have been interesting developments in relation to intercountry *kafalah* in recent years. In 2002, Italy ratified the Hague Adoption Convention and it entered into force by Law 476/98. Since *kafalah* was not within the scope of that law, *kafalah* was not acknowledged for purposes of allowing Muslim children adopted from Morocco or elsewhere to be united

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American children in the Netherlands' 2010 http://poundpuplegacy.org/node/42574 (accessed 6 August 2013); LA Serbin 'Research on international adoptions: Implications for developmental theory and social policy' (1997) 1 *International Journal of Behavioural Development* 83; L Kislinger 'Inter-country adoption: A brief background and case study' undated http://www.adoptionpolicy.org/pdf/backgroundCS.pdf (accessed 6 August 2013); Mezmur (n 85 above) 475.

132 Art 2 1993 Hague Adoption Convention; G Parra-Aranguren 'Explanatory report on the Hague Convention' 1994 http://www.hcch.net (accessed 6 August 2013).

133 Duncan (1996) (n 97 above) 84; O'Halloran (n 74 above) 168. The decision to exclude *kafalah* from the Hague Convention regime was also premised on a need to avoid definitional problems with regard to varying forms of alternative childcare. However, the 1993 Hague Adoption Convention provides in its article 4(b) that intercountry adoption can only be considered after alternative care options within the child's state of origin have been attempted without success.

134 The CRC Committee has more recently raised concerns about the practice of *kafalah* in some states such as Egypt, Jordan, Syrian Arab Republic and Brunei Darussalam. The concerns have to do with difficulties with implementing the law on *kafalah* and a violation of the non-discrimination principle of children's rights. The discrimination is evidenced by the fact that 'in practice more girls than boys benefit from *kafalah*'. See Hodgkin & Newell (n 21 above) 281.

135 Permanent Bureau (n 99 above) 22; Gonzalez (n 23 above) 6; Duncan (1996) (n 97 above) 86; Duncan (1998) (n 97 above) 32; Vite & Boechat (n 21 above) 21. Another reason given for the non-inclusion of *kafalah* in the Hague Adoption Convention regime was the need to avoid definitional problems with regard to long-term fostering arrangements so as to avoid complicating simple alternative child care arrangements.

136 See the 'Status Table' http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (accessed 6 August 2013).

with their caregivers in Italy. This position changed in 2005 by a decree of the Constitutional Court of Italy (347 of 29 July 2005). Based on this, the peculiarities of *kafalah* were recognised, thereby giving an opportunity for Muslim children from Morocco and elsewhere to be adopted and cared for under *kafalah*, by Muslims in Italy.

In 2008, the Italian Court of Cassation decided on the compatibility of the Islamic institution of *kafalah* with the Italian system.[137] A case had arisen based on the application by a Moroccan couple (legal immigrants in Italy) for a visa allowing a child (Hazem El Houary) to join them in Italy as their child under *kafalah*. The Ministry of Foreign Affairs which brought an appeal before the Court of Cassation argued that the law which permitted children to join their parents or guardians in Italy required strict interpretation and, since foster care but not *kafalah* was one of the permissible circumstances listed in the law, the refusal to issue a visa for Hazem to join the Moroccan couple was justified. The Court, however, held that the permissible circumstances in the law must be read in a 'constitutionally adequate' way, since only an interpretation which adequately balances constitutional values can be 'deemed to be consistent with the Constitution'.

In this case, 'the opposing values at issue are the protection of minors and the protection of the boundaries of the state from illegal immigrants'. Besides the fact that the couple in this case were legal immigrants, the Court decided that more importance ought to be placed on the protection of children, even if they are foreigners. In addition to this, the Court pointed out that *kafalah* was expressly recognised by CRC and Moroccan law and, as such, preventing the child from joining her guardians 'would penalise all legitimate or abandoned children coming from Islamic countries, and therefore violate the principle of equality'. The Court noted further that, 'for many of those children, the *kafalah* represents their only protection from abandonment'.

Under the French Civil Code, a foreign child may not be adopted where such adoption goes against his personal law or religion.[138] This agrees with the position of the CRC Committee on the subject, that is, adoption should be an available option to children of all religions, subject to the provisions of article 21 of CRC.[139] Thus, where adoption cannot be considered for Muslim children in need of care, *kafalah* of Islamic law should be considered before other forms of alternative care are reviewed.

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137 For more details, see Court of Cassation Decision 19734/2008, available at *Polamar Osservatorio di diritto costituzionale* http://www.unisi.it/dipec/palomar/italy004_ 2008.html#4 (accessed 12 August 2014).

138 See arts 370-373 of the French Civil Code, cited in Mezmur (n 121 above) 295.

139 CRC Committee, Concluding Observations: India, February 2004 para 49(c).

Thus, in the case of *Harroudj v France*,[140] concerning the refusal of permission for a French national to adopt an Algerian girl child already in her care under *kafalah* of Islamic law, the European Court of Human Rights held that the refusal was not a violation of article 8 of the European Convention on Human Rights.[141] Earlier in 2007 when she initially applied to adopt the child,[142]

> [t]he Lyons *tribunal de grande instance* noted that *kafala* gave the applicant parental authority, enabling her to take all decisions in the child's interest, and gave the child the protection to which all children are entitled under the international treaties. The court also pointed out that under the French Civil Code, a child could not be adopted if the law of his or her country – Islamic law in this case – prohibited adoption, which it did in the case of Hind Harroudj, as Algerian family law did not authorise adoption.

The decision was also held not to be discriminatory either against the applicant or the child on the basis of nationality, as *kafalah* is 'explicitly acknowledged by the New York Convention of 20 November 1989 on the Rights of the Child as protecting the child's best interests in the same way as adoption'.[143] As such, the decision was based not only on the provisions of the French Civil Code, but also in compliance with international law on children's rights, with reference to alternative care.

5 Conclusion

As discussed in the introduction to the article, the importance of children growing up within a family environment makes the subject of alternative care for children without parental care very pertinent and all avenues to ensure this ought to be explored. All the relevant international instruments on the subject provide for the realisation of this right and some of the measures that can be taken to realise appropriate alternative care for the affected children. However, one fact that comes out clearly is that securing appropriate alternative care for children without parental care cannot be achieved in isolation from the consideration of cultural and religious factors. Thus, an examination of Islamic *kafalah* as a form of alternative care is relevant. This is due to the fact that most scholarly works on children's rights which refer to *kafalah* only do so within the context of its prominence during the drafting process of CRC and not much more is known about *kafalah* in terms of what the concept entails, what its distinguishing features and legal implications are as well how it is practised.

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140 *Harroudj v France* ECHR (4 October 2012) (Application 43631/09).

141 The right to privacy/respect for family life.

142 Netherlands Institute of Human Rights, Utrecht School of Law '*Harroudj v France*' http://sim.law.uu.nl/SIM/CaseLaw/hof.nsf/1d4d0dd240bfee7ec12568490035df05/9822050b81747d25c1257a8500506a55?OpenDocument (accessed 12 August 2014).

143 As above.

In this article, attempts have been made to fill those gaps by examining the historical background to *kafalah*, its meaning, legal implications and practice, both domestically and internationally, as well as making a comparison between *kafalah* and other forms of alternative care. Even in Africa where many states (apart from those that have the Shari'a as state law) have considerably large populations of Muslims, *kafalah* is not widely known. This gap ought to be filled in view of the current wave of child law reform going on around the continent. This would make it possible for all children without parental care to get an opportunity for alternative care placement appropriate to their backgrounds. A case in point is Tanzania/Zanzibar where the new Children's Act applicable to the semi-autonomous region of Zanzibar makes provisions for *kafalah* in the alternative care context.[144]

In light of the increasing mobility of families and children across international borders, it is important to understand the existing forms of alternative care so as to appropriately address the situations which arise from differences in cultural, religious and legal backgrounds. With regard to intercountry *kafalah*, it has been argued that the continued non-existence of international standards for regulating the transfer of children between states under *kafalah* raises practical problems, which 'may require the kind of regulations that are provided for in the 1993 Convention'.[145] A central conclusion to this is that, despite the non-inclusion of *kafalah* in the 1993 Convention regime, an understanding of the concept by the relevant authorities in various states would impact on a more logical and legal approach to the subject. This will guard against compromising the position and future of Muslim children in the public care and protection system with regard to alternative care by promoting the principles of equality and non-discrimination as in the Italian Court of Cassation case.[146] The support for CRC resulting in its almost universal ratification will also continue to be maintained when the subject of alternative care for Muslim is properly approached, subject to their best interests being secured. The manner in which the *Harroudj v France* case was handled highlights a proper understanding and approach for all parties involved.

In conclusion, the emphasis on the need to provide alternative care for children deprived of a family environment should be based on what form of care is most appropriate in particular cases and not on one form of alternative care being the best or most ideal. The best interests of the child remains the overriding principle in all matters affecting children and, since this is determined in particular cases, it must always be borne in mind that cultural, legal and religious factors impact on what emerges as the best interests of the child in particular

144 Sec 75 Part 8, Zanzibar Children's Act, 2010.
145 Duncan (1998) (n 97 above) 35.
146 Volkman (n 111 above) 390.

cases. This is the ideal approach that should underlie the subject of alternative care for all categories of children.

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A review of African states in the first cycle of the UN Human Rights Council's Universal Periodic Review

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Summary

Abebe titled his article on the first session of the UN Human Rights Council's Working Group on Universal Periodic Review 'Of shaming and bargaining: African states and the Universal Periodic Review of the United Nations Human Rights Council'. As the title suggests, he argues that African states 'deftly manipulated' the system, evolving from their traditionally-perceived role as '"subjects" of a condemnatory system' to 'conscious bargainers and participants in a much more co-operative forum'. With the benefit of hindsight, the first complete cycle of review having been concluded, and aided by qualitative and quantitative data, this article will seek to analyse the extent to which the African regional grouping has demonstrated solidarity inter se *and* extra se *during the review process. It will be demonstrated that African states have proven more engaged with the review process when commenting on other African states than external states. In the spirit of universal application of human rights, it is to be hoped that this will change in the second cycle. African states have also been more positive towards other African states' progress in human rights than states from other regions. Overall, African states adopted a soft, supportive approach in their comments during the interactive dialogues, although this may yet prove to be successful. Whilst some African states have embraced the opportunity to participate in the review process, a more substantive participation in the second cycle would help the process better achieve its objectives.*

Key words: *United Nations; Universal Periodic Review; Africa region*

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1 Introduction

Abebe titled his article on the first session of the UN Human Rights Council's Working Group on Universal Periodic Review 'Of shaming and bargaining: African states and the Universal Periodic Review of the United Nations Human Rights Council'.[1] As the title suggests, he argues that African states 'deftly manipulated' the system, evolving from their traditionally perceived role as '"subjects" of a condemnatory system' to 'conscious bargainers and participants in a much more co-operative forum'.[2] With the benefit of hindsight, the first complete cycle of review having been concluded, and aided by qualitative and quantitative data, this article seeks to analyse the extent to which the African regional grouping have demonstrated solidarity *inter se* and *extra se* during the review process.

First, however, the Universal Periodic Review process will be introduced. Its aims will be considered against the context in which the process was conceived. Universal Periodic Review was intended to be innovative; an inclusive, participatory approach to promoting the necessary respect for human rights. Such respect for human rights norms remains sadly lacking more than six decades after the Universal Declaration of Human Rights (Universal Declaration) was adopted. Whilst African states may sometimes feel a historic exclusion from the United Nations (UN) and human rights discourse, not least because many of them were not independent states at the time of the establishment of the UN and the adoption of the Universal Declaration, African states are represented in the Human Rights Council with cognisance taken of equitable geographical distribution.

African issues and views have certainly been prominent in the Council though, arguably, not excessively so. Perhaps there has been a greater focus on the troubled Middle East and North African region (Libya, Tunisia, Syria, Israel, Egypt). Despite African and Asian states' opposition to singling out states for comment, a number of new special procedures with African country mandates have been approved: Sudan, Mali, Eritrea and Côte d'Ivoire.[3]

With Universal Periodic Review, there is a unique opportunity to measure objectively the extent to which African states elect to comment on the human rights performance of each other and whether those comments are positive or negative. There is a similar

1 A Abebe 'Of shaming and bargaining: African states and the Universal Periodic Review of the United Nations Human Rights Council' (2009) 9 *Human Rights Law Review* 1.

2 Abebe (n 1 above) 3.

3 Country mandates are established for one year and are subject to annual renewal: Sudan established 2009; Mali 2013; Eritrea 2012; Côte d'Ivoire 2011. discontinued and a new mandate has been approved for 2014. For the present list of country mandates of Special Procedures, see the listing on the Office of the High Commissioner for Human Rights, http://www.ohchr.org/EN/HRBodies/SP/Pages/Countries.aspx (accessed 31 July 2014).

opportunity to examine the approach of the African regional group to third states: Is there evidence of internal regional solidarity against external states? It should be noted that, for the purpose of this article, the scope of 'African states' is that of the regional grouping designation used in the UN Human Rights Council, which almost coincides with membership of the African Union (AU) (Morocco participates in the Africa group at the Council but is not in the AU). It should further be noted that it is only possible to provide a snapshot of the phenomenon reported on in this article, with representative references to examples of the trends drawn from across the region. This article does not purport to, and cannot, exhaustively address the entire first cycle of Universal Periodic Review of African states.

2 The Human Rights Council and Universal Periodic Review

2.1 Establishing the Human Rights Council

The UN Human Rights Council was established as a subsidiary body of the UN General Assembly by a resolution of the General Assembly itself in March 2006.[4] Its status is monitored and subject to review by the General Assembly. However, following the first (five-year) review in 2011, the General Assembly decided it should retain this status until the next review of its work is undertaken between 2021 and 2026.[5] The Council replaced the Commission on Human Rights (a functional Commission of the UN's Economic and Social Council) whose early successes included the drafting of the Universal Declaration. Half a century later, the Commission found itself more often mired in controversy than hailed as a beacon for human rights' protection and promotion. The High Level Panel, charged by the then UN Secretary-General, Kofi Annan, with reviewing the functioning of the UN, noted with concern that '[s]tates have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticise others'.[6] Kofi Annan concurred, noting in his follow-up report to the UN General Assembly that[7]

> [t]he Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism … As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.

4 UN General Assembly Resolution 60/251, UN Doc A/RES/60/251, 15 March 2006.

5 UN General Assembly Resolution 65/281 Review of the Human Rights Council, UN Doc A/RES/65/281, 17 June 2011 para 3.

6 Report of the High Level Panel on Threats, Challenges and Changes, A More Secure World: Our Shared Responsibility UN Doc A/59/565 (2004) para 283.

7 K Annan In larger freedom: development, security and human rights for all, Report of the UN Secretary-General, UN Doc A/59/2005 (2005) para 182.

It was averred that some states viewed membership of the Commission as a guarantee (at least in part) against international investigation of, and/or condemnation of, their human rights record.[8] Alston argues that the demise of the Commission was heralded by[9]

> a rancorous debate among governments, often reflecting a north-south split. Accusations of politicisation, double standards and unprofessionalism led many commentators to conclude that the Commission had lost its credibility and prompted calls for far-reaching reforms of its operation.

However, he notes that[10]

> [t]he diagnosis that it had lost credibility was motivated by radically divergent perceptions of what it should have been doing and what it had done or failed to do. While many of the critics called for a conciliatory approach that would avoid confrontation with governments, others impugned its credibility precisely because it had failed to condemn governments that they considered to be responsible for egregious cases of human rights violations.

A very uncertain but clearly unsatisfactory state of affairs was resolved by the creation of the new Human Rights Council and the dissolution of the former Commission in 2006. No African states voted against or abstained from the enabling resolution. Indeed, Abebe notes that African states 'were active participants in the negotiations in New York on GA Resolution 60/251',[11] and it can thus be surmised that the development had broad support in the region, or at least few decriers. In the main, the Council assumed the responsibilities of the former Commission with a period of review, rationalisation and reform of its activities. However, it also was given clear guidance as to its functions by the General Assembly in the founding resolution and acquired new mechanisms to discharge its primary function of[12]

> promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner; address[ing] situations of violations of human rights, including gross and systematic violations, and mak[ing] recommendations thereon … [and] promot[ing] the effective coordination and the mainstreaming of human rights within the United Nations system.

The involvement with, and impact on, African states of some of these functions are discussed below. First, however, an overview of Universal Periodic Review.

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8 As above: 'In particular, states have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticise others.'

9 P Alston 'Reconceiving the UN human rights regime: Challenges confronting the new UN Human Rights Council' (2006) 7 *Melbourne Journal of International Law* 185, http://corrigan.austlii.edu.au/au/journals/MelbJIL/2006/9.html (accessed 31 July 2014).

10 As above.

11 Abebe (n 1 above) 3.

12 General Assembly Resolution 60/251 (n 4 above) paras 2-3.

2.2 Universal Periodic Review

A, if not the, major innovation of the new Human Rights Council was its capacity to undertake Universal Periodic Review. General Assembly Resolution 60/251 provided that the Council should[13]

> [u]ndertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies.

This system is unique in that every UN member state submits itself to review by any interested UN member or observer state.[14]

Further information on the review process was forthcoming in the Human Rights Council's Institution-Building Resolution of 2007.[15] This set out the modalities for the review process. Therein the basis of the review was stipulated as the UN Charter, the Universal Declaration, human rights treaties to which the state is a party (in practice this means both those of the UN and regional organisations), and voluntary pledges and commitments made by states.[16] The objectives of the review were and remain[17]

(a) [t]he improvement of the human rights situation on the ground;
(b) [t]he fulfilment of the state's human rights obligations and commitments and assessment of positive developments and challenges faced by the state;
(c) [t]he enhancement of the state's capacity and of technical assistance, in consultation with, and with the consent of, the state concerned;
(d) [t]he sharing of best practice among states and other stakeholders;
(e) [s]upport for co-operation in the promotion and protection of human rights;
(f) [t]he encouragement of full co-operation and engagement with the Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights.

In addition to these objectives, the second cycle of review will look at the level of progress towards compliance with the recommendations accepted during the first review cycle.[18]

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13 General Assembly Resolution 60/251 (n 4 above) para 5(e).

14 Palestine and the Holy See chose to comment on the reviews of several states, including some within the African regional group.

15 Human Rights Council Resolution 5/1 Institution-building of the United Nations Human Rights Council, UN DocA/HRC/RES/5/1, 18 June 2007.

16 Human Rights Council Resolution 5/1 (n 15 above) Annex para 1.

17 Human Rights Council Resolution 5/1 (n 15 above) Annex para 4.

18 Human Rights Council Resolution 16/21 Review of the work and functioning of the Human Rights Council, UN Doc A/HRC/RES/16/21, 25 March 2011 Annex para 6, adopted also by the General Assembly in General Assembly Resolution 65/281 (n 5 above).

Three documents form the basis of the review: information submitted or presented by the state itself (this has generally been in the form of a national report); a compilation prepared by the Office of the High Commissioner for Human Rights of the information contained in the reports of treaty bodies, special procedures, and other relevant official United Nations documents (essentially a summary of all existing UN documentation on the state – no mean feat to reduce this to the specified ten pages); and 'credible and reliable information provided by other relevant stake-holders' (that is, non-governmental organisation (NGO) reports and reports of other organisations).[19] Whilst the latter is innovative, formally acknowledging the contribution of NGOs and other stakeholders, utilising this source of information and the expertise of the special procedures and UN treaty bodies should mean that the discussions in the working groups and eventual outcomes are informed and based on credible facts. 'It is the responsibility accorded to expert inputs that will primarily distinguish the Council's more objective and systematic approach from the haphazard and unscientific country-focused discussions held by the Commission.'[20] Whether this aspiration has been realised is open to debate. There is some evidence that states will refer to the UN documentation or the stakeholders' reports when formulating questions and comments.[21] However, extensive (identifiably referenced) use was not made of these documents in the working group reports of the first cycle.[22]

As for the review itself, each state is allocated three hours for its individual review within a working group, with a strict timetable prepared in advance and adhered to. These working groups are chaired by a troika of Human Rights Council members, but the sessions are open to all UN member and observer states. Abebe criticises the failure of the Council to allow direct NGO participation in the interactive dialogues as a 'weakness' of the review process.[23] However, NGOs can make representations to the full Human Rights Council when the outcome of the reviews are being debated and discussed.[24] States are able to direct questions to states under review in advance. However, the central activity of each review occurs during an interactive dialogue: Any state[25] can make comments or

19 Human Rights Council Resolution 5/1 (n 20 above) Annex para 15.

20 Alston (n 9 above).

21 Eg, Switzerland draws attention to 'thousands of detainees who cannot exercise their rights, in contravention of the judicial safeguards guaranteed by international law' in Eritrea; Report of the Working Group on the Universal Periodic Review Eritrea, UN Doc A/HRC/13/2, 4 January 2010 para 54, citing the stakeholders' summary report.

22 All working group reports have been read and analysed for the research on which this article is based.

23 Abebe (n 1 above) 29.

24 This offers much less opportunity for challenging a state because the process is more of political rhetoric than examination at that stage.

25 Numbers can be limited to ensure compliance with the time limit and offer a degree of equality of treatment of states.

recommendations or pose questions to the state under review. That state can respond within the working group, or later in writing (or occasionally orally) to the next full Human Rights Council session. The Council will formally adopt the outcome of the review which comprises the three primary documents, the report of the working group on the interactive dialogue and all or any responses made by the state under review.

The first cycle of review ran from 2008 through 2011; the second cycle began in May-June 2012. This means that a complete initial set of documentation on all states is now available.

Interestingly, Alston notes that the process of periodic review is not new, it being mooted by some states as early as 1950 with an oft-forgotten 'futile and ultimately abandoned periodic review procedure' in operation for almost 25 years.[26] More pertinently, peer review has been established for a decade in Africa. The African Peer Review Mechanism,[27] however, is significantly different from universal periodic review as it is voluntary, involves country visits, and results in a plan of action drafted by the state under review to address identified governance deficiencies.[28]

3 The African group and Universal Periodic Review

So then attention must turn to the African states' participation in the Universal Periodic Review. In accordance with the enabling resolution, those states which were serving as members of the Council[29] were called upon to act as rapporteurs and serve on the troika appointed to undertake the review of other states. These duties appear, on the evidence of the working group reports and outcome documents, to have been discharged as fully by African regional grouping member states as by any other states. However, this is virtually an administrative and co-ordinating role as well as being partly subject to a lottery of nominations drawn from member states.

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26 Alston (n 9 above).

27 For all relevant public documentation, see http://www.aprm-au.

28 For an analysis of the first few reviews under this mechanism, see M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41; N Stulz 'African states experiment with peer reviewing: The APRM, 2002-2007' (2006-7) 13 *Brown Journal of World Affairs* 247.

29 Current members are Angola, Benin, Botswana, Burkina Faso, Congo, Côte d'Ivoire, Ethiopia, Gabon, Kenya, Libya, Mauritania, Sierra Leone and Uganda (May 2013). Previous members during the first cycle of review included Algeria, Cameroon, Djibouti, Egypt, Gabon, Ghana, Madagascar, Mali, Mauritius, Morocco, Nigeria, Senegal, South Africa, Tunisia and Zambia. It should be noted that South Sudan, joining the UN in 2011, was excluded from the first cycle of review although it is scheduled to be considered in the final session of cycle two in October/November 2016. Accordingly, South Sudan is not considered as a separate state in the analysis which follows, as it was part of Sudan during the first cycle and was thus considered during the Sudanese review which took place during the penultimate review session of the first cycle (2011).

To further situate this discussion, it is thus useful to identify the extent to which African states participated in the review process other than in those official capacities arising from membership of the Council and, of course, as subjects of their own review. To facilitate this, all African states' participation in Universal Periodic Review working groups has been mapped across those states upon whose review they chose to comment. This is not a perfect system as, on occasion, states (including African states) who wished to comment on particular states were unable to do so due to the pressure of time.[30] In such a situation, states were invited to submit comments on the extranet to which the state under review should respond before the final outcome of the review was adopted by the Human Rights Council in that particular instance. Nevertheless, it is the only feasible system to provide a snapshot of the extent of participation of African states in the working groups, the extent to which African states chose to comment on, question, otherwise praise or criticise the human rights performance of any other UN member state. The rigour of this is core to the notion of Universal Periodic Review as a 'peer review' process,[31] states reviewing states as equals. As an inter-governmental process, there is inevitably a degree of politicisation inherent in the process. However, the scope of the review – all UN member states reviewing all others – statistically minimises the impact of rogue politicised interventions.[32]

3.1 Extent of participation of African states in the review process

First it is worth noting that several African states did not actively participate in working group sessions as reviewers, thus electing not to avail themselves of the opportunity to comment on the performance of other states around the world. All African states were, however, subjected to the review process and thus were open to review by all other states. Sierra Leone, Seychelles, São Tomé and Principe, Malawi, Liberia, Kenya, Guinea Bissau, The Gambia, Eritrea and Comoros are amongst the states making little or no contribution

30 For African regional examples, see Report of the Working Group on Universal Periodic Review Nigeria, UN Doc A/HRC/11/26, 5 October 2009. Ten African states were time-barred; Report of the Working Group on Universal Periodic Review Djibouti, UN Doc A/HRC/11/16, 5 October 2009 with 12 African regional members time-barred; Report of the Working Group on Universal Periodic Review Angola, UN Doc A/HRC/14/11, 24 March 2010 with 14 African states time-barred; and Report of the Working Group on Universal Periodic Review Egypt UN Doc A/HRC/14/17, 26 March 2010 with 16 African states time-barred.

31 K Annan 'In larger freedom: Towards development, security and human rights for all' Report of the Secretary-General of the United Nations, Addendum Human Rights Council, (2005), UN Doc A.59/2005/Add.1 paras 6 *et seq*.

32 Thus, when some states attracted almost entirely negative comments, Israel and the United States of America being two examples, there are arguments of politicisation with polemical views expressed by allies and the rest; Working Group on the Universal Periodic Review Israel, UN Doc A/HRC/10/76, 8 January 2009; Working Group on the Universal Periodic Review United States of America, UN DocA/HRC/16/11, 4 January 2011.

to working groups during the first cycle. There are, of course, some obvious reasons which could explain this: Many of these states are small island states and/or very poor; some do not have permanent representation at the UN in Geneva, or other local diplomatic representation (for example, an embassy in Switzerland). For such states, sending representatives to Geneva would prove a costly and possibly not financially justifiable exercise.[33]

Second, several African states chose to intervene only, or primarily, in reviews of other African states. Burundi, Cape Verde, Central African Republic, Chad, Gabon, Guinea, Niger, Rwanda, Swaziland, Uganda and Tanzania are examples. This can indicate local interest – neighbouring states and those in the same region may be more aware of and interested in the human rights issues in those states. They can also share similar problems and/or be impacted on by infringements of human rights in adjacent states. Human trafficking is one obvious example, or refugees influxing from extreme poverty and civil conflict. However, it can also indicate that regional alliances are 'a major force influencing the review process',[34] opening the possibility that such allegiances may usurp neutral evaluation of human rights performance as a basis for review. Inevitably, most states trade with neighbouring states. Thus, this is not purely an issue pertinent to Africa. Indeed, this phenomenon is evident to a greater or lesser extent across the globe.[35]

Of all the African states, Algeria, itself reviewed in the first session of the first cycle of review, has proven to be one of the most active states. It has participated in virtually every working group and, in general, has been either neutral or positive and encouraging of the human rights performance of every state. South Africa,[36] Nigeria and Ghana[37] have also made broad contributions throughout the first cycle. These states have representatives in Geneva and thus can physically participate in the review process without additional expense. However, a number of other African states also have permanent representation in Geneva; thus, this cannot be the sole

33 On the 'burden of participation', see Abebe (n 1 above) 22-25. For a discussion of some problems with small island states and universal periodic review, see R Smith 'The Pacific island states: Themes emerging from the UN Human Rights Council's inaugural Universal Periodic Review?' (2011) 13 *Melbourne Journal of International Law* 569. Videoconferencing and similar technologies are now being considered to facilitate the involvement of small states distant from Geneva. See General Assembly Resolution 65/281 (n 4 above) Annex para 59.

34 Abebe (n 1 above) 19; see also R Freedman 'New mechanisms of the UN Human Rights Council' (2011) 29 *Netherlands Quarterly of Human Rights* 289 309, noting that '[r]egionalism was utilised by African and OIC members to protect allied states'.

35 Regional organisations which have objectives of single markets of free trade include the European Economic Area, the Association of South East Asian Nations, the African Free Trade Zone (SADC-COMESA-EAC) and MERCOSUR's Common Market of the South in the Americas.

36 Also considered during the first session.

37 Considered during the second session of the first cycle of review.

explanation. Algeria, Ghana, Nigeria and South Africa are, however, large and/or fairly powerful states within the region.

3.2 Evaluating state contributions to the working group reports: African states as reviewers

To evaluate the comments of each state, the contributions recorded in the report of each working group have been analysed with each comment graded according to whether it was overall positive, negative or neutral. Some common factors, such as ratification of additional treaties, were deemed neutral. Thus, for example, Guinea, noting South Africa's 'efforts in promoting human rights since the end of apartheid, its achievement in establishing the rule of law and its success in promoting socio-economic and cultural changes', was graded as positive.[38] Angola, appreciating 'the considerably increased school attendance rate and the rapid development of higher education' whilst noting 'a number of remaining difficulties and in the country such as the harmful traditional practices such as female genital mutilation, early marriages and abductions linked to forced marriages' in Ethiopia, was graded overall negative due to the number of problem issues identified.[39] In some instances, positive and negative comments balance each other out. Thus, commenting on Mozambique, Zambia 'commended the invitation extended to nine Special Rapporteurs in 2010 … commended the Plan of Action for Orphans and Vulnerable Children'. However, Zambia called on Mozambique to make operational all laws regarding to children's rights. It urged Mozambique to revisit the Five-Year Plan to reduce illiteracy. It noted that violence against women and girls should be addressed, *inter alia*, by criminalising it.[40] The positives and negatives, in effect, balanced each other out. Similarly, neutral was accorded to mere political statements with little focus on rights. Swaziland

> referred to the difficult economic times in Zimbabwe and challenges faced in providing essential services. [It] encouraged the GNU to continue rebuilding the economy and its institutions, including the Organ for National Healing, Reconciliation and Integration. [It] appealed to the international community to provide Zimbabwe with much needed assistance'

and recommended that Zimbabwe '[s]eek international assistance to fund programmes and capacity-building initiatives'.[41] As this

38 Guinea para 14, Report of the Working Group on the Universal Periodic Review South Africa, UN Doc A/HRC/8/32, 23 May 2008.

39 Angola para 77, Report of the Working Group on the Universal Periodic Review Ethiopia, UN Doc A/HRC/13/17, 4 January 2010.

40 Zambia para 60, recommendations in 89.12 and 89.90, Report of the Working Group in the Universal Periodic Review Mozambique, UN Doc A/HRC/17/16, 28 March 2011.

41 Swaziland para 35 and recommendation at para 93.74, Report of the Working Group on the Universal Periodic Review Zimbabwe, UN Doc A/HRC/19/14, 19 December 2011.

intervention is more neutral with comments and observations as well as neutral recommendations, it was recorded as overall neutral. Of course, the classifications are subjective but, as far as possible, they are based on the same quasi-objective criteria for each working group report; thus the same comments are regarded as positive, negative or neutral throughout. It should be borne in mind that some comments graded negative are in fact constructive, offering advice to a state deemed by the commenting state to be struggling with complying with its human rights obligations. No distinction is made between overt criticism and constructive criticism as, arguably, that would require a subjective view.[42]

Using the above outlined criteria, it is fair to say that there is evidence of differing approaches to Universal Periodic Review. So-called 'Western' states, taken as being from the Western European and Others regional group in particular, though also some members of the Eastern European group, particularly those who hold membership of the Council of Europe, are, overall, more likely to express criticism and make serial recommendations concerning perceived human rights infringements and problems within the state under review. This is true across the globe, rather than simply with respect to comments made on African states. Of all the African states, only Ghana, Algeria and South Africa made comments across the full range of negative to positive. The other African states tended to favour more positive and neutral comments, irrespective of which states they were commenting on. Zimbabwe made positive comments on all states whose review it participated in, as did Tanzania, Tunisia, Swaziland, Somalia, Rwanda, Mauritius, Mauritania, Mali, Madagascar, Lesotho, Côte d'Ivoire, Burundi and Botswana. There are a myriad of reasons for this, not least a general lack of engagement with the process as a mechanism for critiquing human rights performance, an emphasis on positive encouragement rather than criticism of other states and, of course, the 'glass house' argument, namely, that states with many human rights problems should not be unduly critical of others in a similar position. In the latter case, the whole system of peer review is predicated on all states commenting on all others. Accordingly, it should be feasible for any state to make an objective evaluation of the performance of any other state, on the basis of the prepared documentation rather than reciprocity. Moreover, it is always open to the state under review to respond to any comments, correcting errors and supplying additional information and clarification. Thus, for example, Mauritius clarified that its legislation already provided for equal rights of women and men and for the criminal offence of rape,

42 On additional issues pertinent to progressively realisable rights, see J Duggan-Larkin 'Can an intergovernmental mechanism increase the protection of human rights? The potential of universal review in relation to the realisation of economic, social and cultural rights' (2010) 28 *Netherlands Quarterly of Human Rights* 548.

when faced with recommendations to enact such by Germany and New Zealand.[43]

Sudan participated in over 55 reviews but was only negative, bordering on condemnatory, in respect of Israel, the United Kingdom of Great Britain and Northern Ireland and the United States of America. Such an approach, while valid within the terms of the process, inevitably adds weight to claims of politicisation. However, arguably it also adds balance, as Sudan is a country regularly receiving criticism, not least through the indictments issued by the International Criminal Court. During Sudan's review, few African states sought to participate, but those that did were positive and encouraging.[44] In some instances, the results are perhaps more random. Morocco participated widely in the review but was only critical of Israel,[45] Tajikistan[46] and the Solomon Islands.[47]

By way of comparison, a number of non-African states were generally critical during the review process, listing multiple recommendations for the state under review to consider. The USA, Sweden, Slovenia, Norway, Netherlands, Germany, France and Canada are among the more consistently critical states. Indeed, they were amongst the most critical of states when commenting across all regions, including states from the Western European and Others Group and Eastern European grouping. These states also generally made recommendations requiring positive action, for example in the form of new laws.[48] Fears that 'Western' states are more likely to use the process to criticise less developed states thus gain credence.

South Africa and Ghana are most critical of fellow African group states, identifying problems in seven[49] and six[50] countries, respectively. In many instances, the critique was mild and balanced with positives. A handful of other African states expressed slightly negative views of the human rights situations in other African states. In many instances, such comments were directed at neighbouring

43 Report of the Working Group on the Universal Periodic Review Mauritius, UN Doc A/HRC/11/28, 3 March 2009 paras 82(3) & (5).

44 Several African states were denied participation in the interactive due to the time limits and thus were restricted to comments on the extranet: Chad, Morocco, Senegal, Nigeria, Swaziland, Tanzania, Kenya and the Central African Republic; footnote 1 in para 16, Report of the Working Group on the Universal Periodic Review Sudan, UN Doc A/HRC/18/16, 11 July 2011.

45 Report of the Working Group on Universal Periodic Review Israel (n 30 above) para 46.

46 Report of the Working Group on Universal Periodic Review Tajikistan, UN Doc A/HRC/19/3, 12 December 2011 para 78.

47 Report of the Working Group on Universal Periodic Review Solomon Islands, UN Doc A/HRC/18/8, 11 July 2011 para 57.

48 For an analysis of this, see E McMahon *The Universal Periodic Review: A work in progress. An evaluation of the first cycle of the new UPR mechanism of the United Nations Human Rights Council* (2012).

49 Zimbabwe, Swaziland, Togo, Seychelles, Guinea-Bissau, Eritrea and Chad.

50 Swaziland, Liberia, Equatorial Guinea, Eritrea, Democratic Republic of Congo and Botswana.

states. Thus, Benin commented adversely on Nigeria,[51] Senegal on Guinea;[52] Central African Republic and Democratic Republic of the Congo on Congo;[53] and Burkina Faso on Benin.[54] In contrast, Algeria, Djibouti, Mauritius, Nigeria, Sudan, Egypt, Morocco, Tunisia and Burkina Faso were generally positive when reviewing other African states.

The working group reports also record examples of expressed solidarity. For example, Senegal 'reaffirmed its solidarity with the sister nation of Guinea-Bissau' and noted its pride in its participation in universal periodic review.[55] Similarly, Burkina Faso expressed a view that the 'constraints and difficulties faced by Benin in the implementation of its international human rights obligations were common to many developing countries'.[56] Successful, if incremental, emergence from conflict and colonialisation was commented upon favourably in respect of several states, including Liberia (particularly importance being placed on the election of its female president),[57] Burundi[58] and Namibia.[59] African states often took the opportunity to highlight examples of good practice in the states under review. This of course is one of the objectives of the review process.[60] However, African and, indeed, Asian states proved more likely than other regional groupings of states to identify positives. Thus, support within

51 Report of the Working Group on Universal Periodic Review Nigeria, UN Doc A/HRC/11/26, 5 October 2009 para 72, highlighting the issue of extra-judicial killings and the need for a national torture preventive mechanism whilst expressing gratitude for the progress made in protecting and promoting human rights.

52 Report of the Working Group on Universal Periodic Review Guinea, UN Doc A/HRC/15/4, 14 June 2010 para 65, recognising the 'fragile situation' of the country, whilst recommending increased human rights sensitisation, education and training (para 71.18) and a greater challenge to impunity of perpetrators of sexual violence (para 71.46), recommendations which Guinea accepted.

53 Report of the Working Group on Universal Periodic Review Congo, UN Doc A/HRC/12/6, 5 June 2009 paras 70 & 32 respectively, Central African Republic commenting on a range of minority and indigenous issues, sharing as they do many of the same indigenous peoples; Democratic Republic of the Congo commenting on judicial system weaknesses and problems with internally-displaced persons.

54 Report of the Working Group on Universal Periodic Review Benin, UN Doc A/HRC/8/39, 28 May 2008 para 44, noting sociological difficulties impeding the realisation of certain rights and freedoms.

55 Report of the Working Group on Universal Periodic Review Guinea-Bissau, UN Doc A/HRC/15/10, 16 June 2012 para 55.

56 Report of the Working Group on Universal Periodic Review Benin, UN Doc A/HRC/8/39, 28 May 2008 para 44.

57 Report of the Working Group on Universal Periodic Review Liberia, UN Doc A/HRC/16/3, 4 January 2011; Algeria para 24; Morocco para 26; Egypt para 64; Angola para 65; and the Congo para 72.

58 Report of the Working Group on Universal Periodic Review Burundi, UN Doc A/HRC/10/71, 8 January 2009; Algeria para 18; Cameroon para 36; and Benin para 66.

59 Report of the Working Group on Universal Periodic Review Namibia, UN Doc A/HRC/17/14, 24 March 2011. See comments of Angola para 70; Swaziland para 41; Algeria para 45; and Botswana para 37.

60 Human Rights Council Resolution 5/1 (n 13 above) para 4(d).

Swaziland for children in the form of feeding, schooling and even housing was highlighted,[61] as was its policies on the elderly,[62] and Ethiopia's temporary special provisions to address inequality of women.[63] Interestingly, there is no evidence of reciprocity of comments, whether graded negative or positive. Thus, African states appear no less or more likely to comment on a state which has commented on its performance in an earlier review. Neither are the reviews of African states statistically more critical or positive as the cycle progressed. Instead, the reviews are fairly consistent in that the few states in the latter sessions with more negative comments (Zimbabwe,[64] Sudan[65]) also attracted criticism from across the globe.

Critics[66] suggest that some states 'abused' the system, lining up their allies to comment favourably and be fulsome in their praise. Consequently, the number of review comments balances out and even surpasses the negative, more critical ones. However, within each geographical region, states have been more positive in their 'self-review' than their reviews of states in other regions, even if, in the case of Europe, those 'more positive' reviews were still negative (that is, self-critical). There is undoubtedly evidence to substantiate these claims. A number of states with well-publicised human rights problems received positive reviews, not least within the African regional group: Zimbabwe[67] and Sudan[68] are two examples. Other instances of perhaps excessively positive comments can be more easily deemed encouragement and constructive praise and comment when the recipient state has many development needs and lacks the capacity to guarantee many basic economic and social rights to those within its jurisdiction. As reviewers, African states have been proven to be generally positive and supportive of states under review. This is particularly evident when they are reviewing less developed countries. African states rate themselves most favourably, followed by their rating of Asian states. However, African states also rated every other region positively. In this regard, it is perhaps worth remembering that the African Peer Review Mechanism (APRM), the main peer review mechanism African states may have participated in, is itself non-

61 Report of the Working Group on Universal Periodic Review Swaziland, UN Doc A/HRC/19/6, 12 December 2011; Mauritius para 67; Tanzania para 72; and Mozambique para 32.

62 Report of the Working Group on Swaziland (n 61 above); Burkina Faso para 62; Democratic Republic of the Congo para 54; and Uganda para 60.

63 Report of the Working Group on the Universal Periodic Review Ethiopia, UN Doc A/HRC/13/17, 4 January 2010; Côte d'Ivoire para 88.

64 Report of the Working Group on Universal Periodic Review Zimbabwe, UN Doc A/HRC/19/14, 19 December 2011.

65 Report of the Working Group on Universal Periodic Review Sudan, UN Doc A/HRC/18/16, 11 July 2011.

66 Eg Abebe (n 1 above).

67 Report of the Working Group on Universal Periodic Review Zimbabwe, UN Doc A/HRC/19/14, 19 December 2011.

68 Report of the Working Group on Universal Periodic Review Sudan, UN Doc A/HRC/18/16, 11 July 2011.

adversarial, accompanied by neither sanctions nor mandatory recommendations.[69] Thus, for African states a more encouraging, nurturing process is perhaps more familiar and acceptable. This new Universal Periodic Review has been sculpted to fit that particular mould.

3.3 Performance of African states under review: African states as reviewees

As noted above, all African states underwent review during the first cycle of the process and all, with the addition of South Sudan, are being reviewed again during the second cycle (Tunisia, Morocco, Algeria and South Africa were considered in the first session of the second cycle, held late May to early June 2012). Looking across the cycle, it is possible to discern statistically the extent to which states' human rights performances were viewed as positive or negative across the entire working group report. Lesotho,[70] Tunisia,[71] South Africa[72] and Djibouti[73] received the greatest preponderance of positive comments of the African group. Tunisia had one of the highest number of states participating in the interactive dialogue – 65 – partly due to this being in the first session of the review. At the other end of the spectrum, Somalia[74] attracted most negative comments with a plethora of problem areas identified.

States such as Mali[75] and The Gambia[76] achieved virtually a neutral review, the negative and positive state interventions balancing each other out when the report of the working group on the interactive dialogue is considered in its entirety. Mali accepted most of the recommendations made, many of which related to accepting technical assistance to ensure the timely submission of UN treaty body reports,[77] strengthening the position of women and children in national law and society,[78] reinforcing measures against trafficking in

69 See Stulz (n 28 above).

70 Report of the Working Group on the Universal Periodic Review Lesotho, UN Doc A/HRC/15/7, 16 June 2010.

71 Report of the Working Group on the Universal Periodic Review Tunisia, UN Doc A/HRC/8/21, 22 May 2008.

72 Report of the Working Group on the Universal Periodic Review South Africa, UN Doc A/HRC/8/32, 23 May 2008.

73 Report of the Working Group on the Universal Periodic Review Djibouti, UN Doc A/HRC/11/16, 5 October 2009.

74 Report of the Working Group on the Universal Periodic Review Somalia, UN Doc A/HRC/18/6, 11 July 2011.

75 Report of the Working Group on the Universal Periodic Review Mali, UN Doc A/HRC/8/50, 13 June 2008.

76 Report of the Working Group on the Universal Periodic Review Gambia, UN Doc A/HRC/14/6, 24 March 2010.

77 Working Group Mali (n 75 above) Recommendation 2 by Algeria and Portugal.

78 Recommendation 7 by Netherlands; 8 by Czech Republic; 9 by Canada; 10 by Ireland, Working Group Report Mali (n 75 above).

children[79] and combating violence against children.[80] The Gambia, likewise, accepted a substantial number of the recommendations made by participating states. Obviously, it will only be during the second review process that the extent to which these recommendations have been realised should become apparent. It appears clear that African group states are also more likely to accept recommendations made by fellow African group members. McMahon and Ascherio corroborate this, noting that Africa (and indeed Asia) 'self-supplied over 40 per cent of the total recommendations to their region'.[81] Moreover, they classified all recommendations made in the first six sessions of Universal Periodic Review by action category and observed that African states were most inclined to accept recommendations coming from their own regions, a 'soft approach' to Universal Periodic Review, given the lesser action required to comply with recommendations by African states than by, for example, Western European and Others Group recommendations.[82]

It is also possible to go beyond the statistics and examine the substance of the interactive dialogue component of the review process. A number of common themes emerged from the review documentation of the African group states. Amongst these, access to technical assistance and resources to enhance capacity was almost ubiquitous. One of the declared objectives of review is '[t]he enhancement of the state's capacity and of technical assistance in consultation with, and with the consent of, the state concerned'.[83] Capacity issues were noted with respect to a host of issues, not least preparation for participation in the review process. Cape Verde[84] and Comoros,[85] for example, did not submit national reports, although they did send delegations to participate in the working group interactive dialogue. A range of other technical issues were identified concerning resources and capacity to fulfil UN treaty body reporting obligations and meeting the Millennium Development Goals. African states concurred with their need for technical assistance and capacity-building resources and welcomed support.[86] The real difficulties encountered by the governments of many African states were

79 Recommendation 11 by Democratic Republic of the Congo andBrazil, Working Group Report Mali (n 75 above).

80 Working Group Report Mali (n 75 above) Recommendations 12 by Italy and 18 by Switzerland.

81 E McMahon & M Ascherio 'A step ahead in promoting human rights? The Universal Periodic Review of the UN Human Rights Council' (2012) *Global Governance* 231 237.

82 McMahon & Ascherio (n 81 above) 242.

83 Human Rights Council Resolution 5/1 (n 14 above) para 4(c).

84 See Report of the Working Group on the Universal Periodic Review Cape Verde, UN Doc A/HRC/10/81, 12 January 2009.

85 See Report of the Working Group on the Universal Periodic Review Comoros, UN Doc A/HRC/12/16, 3 June 2009.

86 Egypt, eg, even called for support for other African states, eg Botswana. See also Report of the Working Group on the Universal Periodic Review Botswana, UN Doc A/HRC/10/69, 13 January 2009 para 79.

acknowledged within and beyond the region. It will be interesting to identify during the second review cycle whether additional technical assistance has been offered and accepted. In many cases, this will be directly from states through bilateral arrangements. Inevitably, the UN does not have the funding to support all initiatives it may wish. Nevertheless, some additional funding has been made available for implementing recommendations made during the review.[87]

As for specific topics of concern, stabilisation and security in post-conflict situations, the prevalence of HIV and AIDS, poverty, food insecurity, children's rights and violence against women and children as well as institutional protection of the rule of law were frequently noted as areas of concern, obviously not in every state but across the region as a whole. These are probably fairly non-contentious and even predictable, given the state of development of many African states and the instances of natural disasters and the pervasive impact of the HIV pandemic. More controversially, many European states repeatedly raised issues concerning the de-criminalisation and non-persecution of homosexuality,[88] Lesbian, gay, bisexual, transgender and intersex (LGBTI) rights and equality in law that are not accepted by all states as a requirement of human rights.[89] Maintenance of the death penalty also attracted widespread concern.[90] In particular, the number of moratoriums in place in Africa were noted with requests to transform the moratorium into a permanent abolition.

87 Human Rights Council Resolution 6/17, Voluntary trust fund for financial and technical assistance, UN Doc A/HRC/RES/6/17, 28 September 2007 para 19; annex of General Assembly Resolution 65/281 (n 4 above) calls on the fund to be 'strengthened and operationalised in order to provide a source of financial and technical assistance to help countries, in particular least developed countries and small island developing states, to implement the recommendations emanating from their review'.

88 See, eg, Report of the Working Group on the Universal Periodic Review Uganda, UN Doc A/HRC/19/16, 22 December 2011; Denmark para 54; Switzerland para 56; UK para 80; Sweden para 85, though Uganda argued in para 72 that any LGBTI persons feeling their rights are infringed are 'free to go to court for redress or initiate a process for the amendment of specific provisions of the law'. See also Report of the Working Group on the Universal Periodic Review Botswana, UN Doc A/HRC/10/69, 13 January 2009; Czech Republic para 50; France para 36; and the Netherlands para 37.

89 In response to comments made, *inter alia*, by the following states, see Report of the Working Group on the Universal Periodic Review Malawi, UN Doc A/HRC/16/4, 4 January 2011; Italy para 66; Austria para 67; Spain para 71; Switzerland para 71; Germany para 50; France para 45; Malawi noted that 'the wishes of the people of Malawi in this regard should be respected … there was no international consensus on gay rights or on the right of gay persons to marry. Malawi should not be singled out and unnecessarily pressured to legalise homosexuality' (para 39), citing the defeat in 2008 of the UN resolution on gay rights in support of this contention. Of course, the UN Human Rights Council subsequently adopted Resolution 17/19 (2011) on sexual orientation and gender identity.

90 See, eg, General Assembly Resolution 62/149, UN Doc A/RES/62/149, 18 December 2007 Moratorium on the use of the death penalty. See also the Second Optional Protocol to the International Covenant on Civil and Political Rights.

As is clear, a range of issues are covered by the reviews of African states. These are drawn from across all rights and freedoms. African states generally accepted comments and recommendations made by others within their region. However, such recommendations were normally easier to comply with than those made by other regional groupings (for example Western European and Others Group).[91] The fact that all states participated in their own reviews remains perhaps the biggest achievement of the first cycle. On the limited evidence to date, African states appear to be making efforts to meet obligations accepted during the review.

4 Conclusion

Having reviewed the completed first cycle of the Universal Periodic Review documentation, it is true to say that the African states have demonstrated considerable solidarity *intra se*, that is to say that African states comment repeatedly (and usually positively) on other African group states. Concerning solidarity *extra se*, excluding Nigeria, South Africa, Ghana and Algeria, there is little evidence of African states intervening extensively in respect of states beyond the region. Perhaps the issue may be that identified by commentators, including Abebe and Freedman, namely, that a north-south divide is emerging in international institutions, with the developing world, including most of Africa, proving reluctant to criticise states, preferring instead a more positive, supportive approach to human rights.[92] This non-confrontational approach is apparent from the working group reports on the interactive dialogues discussed above. Serious condemnations by African states were restricted to a few external states; otherwise comments were generally positive. Further support for this contention can be deduced from the comparative lack of involvement in the interactive dialogues of many African states, a phenomenon which finds echoes with the plight of small island states,[93] for example, those in the South Pacific. Based on the documentation alone, it is not possible to determine the reasoning behind any given state's participation or lack thereof in the process. However, there is established literature indicating that 'naming and shaming' were unpopular among developing states.[94] There is further support for this in the experience of and literature on the APRM.

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91 For an analysis based on the level of action required to implement recommendations, see McMahon (n 48 above).

92 See Abebe (n 1 above) 31; Freedman (n 34 above) 311: 'Developing nations seek to avoid condemnation, instead focusing on practical advice and assistance in implementing recommendations whilst Western countries focus on tailored, specific recommendations.'

93 Smith (n 33 above).

94 Abebe (n 1 above). See also E Dominguez Redondo 'The Universal Periodic Review of the UN Human Rights Council: An assessment of the first session' (2008) 7 *Chinese Journal of International Law* 722-724.

The idea of Universal Periodic Review as a 'voice' distinct from the pre-exiting conventional (treaty-based) mechanism was advanced by Gaer.[95] With African states no different from other states in demonstrating reticence and laxity in complying with treaty body reporting requirements, the fact that (with one exception)[96] every state submitted to Universal Periodic Review as scheduled is a remarkable achievement in itself. To an extent, equality of treatment emerged[97] with every UN member state treated alike, irrespective of its stage of development, economic or political power. African states thus clearly participated as and were accepted by all other regional groups as equals.

Although there was evidence of politicisation of the process, despite the exhortations of the General Assembly and the Council itself, it is feasible that this will be more muted in subsequent cycles if, and only if, states consider the process fair and equitable and thus continue to fully participate therein. This will in part depend on the membership of the Council and the direction taken with follow-up to the first cycle of reviews. After all, the Council stipulated at the outset that the review was to be 'conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicised manner'.[98] This is something African states have emphasised when politicisation was perceived to be an issue,[99] albeit that there were few (if any) claims of politicisation of the review process with respect to the reviews of the African states. Overall, the approach seemingly favoured across the African regional group, namely, co-operative, non-confrontational and non-politicised discussion of progress towards compliance with human rights, is in fact exactly what the process was intended to be.

In many respects, the positions adopted by African group states resonate with those of other regional groups. There is evidence of solidarity amongst many Asian states, but there is also some disparity, for example differences in actions of the Pacific island states, China and the Central Asian Republics. The degree of convergence of opinion in Africa is perhaps attributable to African states' broadly homogenous approach to the wider international community and to inter-state relations. Is this a problem? Arguably, no. However, an understanding of the politicisation of the process of Universal Periodic

95 F Gaer 'A voice not an echo: Universal periodic review and the UN treaty body system' (2007) 7 *Human Rights Law Review* 109.

96 Note that the Haitian review was moved, at the request of Haiti, to the last session given the aftermath of its earthquake. All other reviews occurred as originally scheduled.

97 See also R Smith 'Equality of "nations large and small": Testing the theory of the Universal Periodic Review in the Asia-Pacific' (2011) 11 *Asia-Pacific Journal on Human Rights and the Law* 36, comparing the experiences of China and Nauru.

98 Human Rights Council Resolution 5/1 (n 14 above) Annex para 3(g).

99 Eg, Algeria 'regretted the politicisation of the human rights situation in China during the review'; Working Group on Universal Periodic Review China UN Doc A/HRC/11/25, 5 October 2009 para 33.

Review supports a truer understanding of the outcome documentation. Asian and African states are particularly supportive during working group interactive dialogues; they are also notably less likely to make recommendations requiring substantial changes of law and policy in the states being commented upon. As the second review cycle is ongoing, it is too early to comment on the effectiveness of the African (and Asian) approaches. However, the level of engagement seen during the first cycle appears to be continuing.

A 'softly-softly' approach can reap dividends because supportive comments will be more acceptable to receiving states.[100] Moreover, any criticisms amidst the positive comments are possibly more likely to be accepted in the spirit of collegiality in which it is apparently given. As the AU grows in stature and increasingly exerts its influence across the region, so too African states gain confidence with their approach to international relations.

Overall, African states have engaged with the Universal Periodic Review process. It is to be hoped, moving forward, that African states will become more active throughout the African region. African states have rich experiences which hitherto are not extensively shared. There are many examples of good practice in human rights and, especially, development. Of course, there are also many instances of poor practice. Universal Periodic Review offers an opportunity to share the burden of building a stronger system which adequately discharges state responsibility to protect, promote and respect the human rights of those within their jurisdiction. Whilst many criticisms of the current system are undoubtedly fair, its achievements should not be underestimated. All states, not least African states, can and should have their voice heard in the international arena.

100 See McMahon (n 48 above).

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Observations on the Rules of the African Court on Human and Peoples' Rights

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Summary

The African Court on Human and Peoples' Rights was established by the 1998 Protocol to the African Charter on Human and Peoples' Rights. On 2 June 2010, its Rules of Court came into force. Rules of procedure are designed to supplement and fill in any gaps in the parent treaty. They are an essential part of the workings of many international bodies, including judicial organs.These Rules, which have a bearing on important aspects of the Court's functioning, are discussed in this article. The article does not undertake an exhaustive analysis of the whole set of Rules; it focuses on those Rules that may help to clarify or not, as the case may be, any obscurities or difficulties associated with the parent Protocol. The contribution covers the Rules pertaining to the composition of the African Human Rights Court; the Court's contentious procedure; and the Court's advisory opinions mandate. In the discussion, the Court's Rules are linked to those of the African Commission on Human and Peoples' Rights. The analysis concludes that the Rules of Court of the African Human Rights Court largely correspond to those of other regional courts. Although there are gaps and omissions, the Court has embarked on a process of addressing these issues through its jurisprudence, although at times raising questions of its own.

Key words: *African Court on Human and Peoples' Rights; African Commission on Human and Peoples' Rights; Rules of Court; Rules of Procedure; interpretation and application of Rules of Court*

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1 Introduction

The Protocol on the Establishment of an African Court on Human and Peoples' Rights (Protocol) was adopted by the Organisation of African Unity (OAU) in 1998[1] and entered into force on 25 January 2004.[2] As of 16 April 2014, the Protocol has been ratified by 27 member states.[3] The African Court on Human and Peoples' Rights (African Court), together with the African Commission on Human and Peoples' Rights (African Commission), established under article 30 of the African Charter on Human and Peoples' Rights (African Charter),[4] is meant to form a comprehensive continental supervisory mechanism with the mandate to examine whether contracting parties give effect to their obligations and to pronounce on claims of human rights violations perpetrated by states.[5] The African Court technically has been in existence for ten years at the time of writing, but became operational

1 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the Assembly of Heads of State and Government, 34th ordinary session, Ouagadougou, Burkina Faso, 8-10 June 1998, http://au.int, reproduced in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 41. Note that mention in the Protocol of the OAU should now be taken to refer to the African Union (AU).

2 Upon ratification by 15 states, see art 34(3) Protocol. For analysis, see F Viljoen *International human rights law in Africa* (2012) 410-466; GW Mugwanya *Human rights in Africa: Enhancing human rights through the African regional human rights system* (2003) 315-336; VO Nmehielle *The African human system: Its laws, practice and institutions* (2001) 259-308; J Harrington 'The African Court on Human and Peoples' Rights' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 305-334; N Krisch 'The establishment of an African Court on Human and Peoples' Rights' (1998) 58 *Heidelberg Journal of International Law* 713; GJ Naldi & KD Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court on Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly on Human Rights* 431; NJ Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45. The Court has its own website, http://www.african-court.org. Its judgments are available at http://www.african-court.org/en/cases/judgments_and_orders/. Basic facts on the Court can be found at the following website: http://www.aict-ctia.org/courts_conti/achpr/achpr_home.hmtl (accessed 31 July 2014).

3 Algeria, Burkina Faso, Burundi, Comoros, Congo, Côte d'Ivoire, Gabon, The Gambia, Ghana, Kenya, Libya, Lesotho, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Rwanda, Senegal, South Africa, Tanzania, Togo, Tunisia and Uganda.

4 Adopted in 1981, the African Charter entered into force in 1986, 1520 UNTS 217, reprinted in (1982) 21 *International Legal Materials* 58, and Heyns & Killander (n 1 above) 29. All AU member states, with the exception of South Sudan, are contracting parties to the African Charter.

5 Art 2 of the Protocol states that the Court shall complement the African Commission's protective mandate. The Commission is a quasi-judicial organ with powers akin to those of the UN Human Rights Committee. Rule 3 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (Rules) describes it as 'an autonomous treaty body working within the framework of the African Union to promote human and peoples' rights and ensure their protection in Africa', http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_ 2010_en.pdf, reproduced in Heyns & Killander (n 1 above) 182.

only relatively recently, and it is now dealing with a significant number of applications and has given its first judgments.[6] A number of commentators considered that the Protocol was deficient in certain regards, containing ambiguities of language and *lacunae*, but that any such difficulties would most probably be remedied by the Court's Rules of Procedure.[7] Rules of Procedure are designed to supplement the Protocol and may be said 'to provide such indications as are indispensable for litigant parties' and 'to inform those who are responsible for the conduct of a case before the Court what steps have to be taken, and when and how'.[8] Pursuant to the wide powers conferred upon it by article 33 of the Protocol, the African Court and the African Commission set to work on drafting a harmonised set of Rules and, on 2 June 2010, the Court's Rules of Procedure (Rules of Court) came into force.[9] The purpose of the present article is to consider those Rules of Court that invite attention; it is not intended as a full treatment of the whole set of Rules. Some are dealt with only cursorily or are not touched on at all; the discussion is limited to those salient Rules of Court that may help to clarify the problems associated with the parent Protocol or, indeed, any remaining difficulties.

2 Overview of the African Court's Rules of Procedure

The constitution of the Court is covered by Part I (Rules of Court 2-19), while Part II deals with the Registry (Rules of Court 20-25). Issues concerning the jurisdiction of the Court, including its contentious procedure and its advisory procedure, are governed by Parts III-V

The Rules were adopted in May 2010. In *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) paras 53-55, the African Commission dismissed Botswana's submission that the Commission had ceased to exist along with the OAU on the ground that only the termination of the African Charter could affect the Commission's existence. The continuing operation of the African Charter amounted to an acceptance of the Commission's jurisdiction. Furthermore, as a body working within the framework of the OAU, the Commission devolved to the AU. On the Commission's mandate, see Viljoen (n 2 above) 216-19 310-417; EA Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedure* (1996) 20-21; K Magliveras & G Naldi *The African Union* (2009) paras 318-33.

6 The Court handed down its first judgment on 15 December 2009 in the case of *Michelot Yogogombaye v Republic of Senegal* App 001/2008. Its first case on the merits was that of *Tankanyika Law Society and The Legal and Human Rights Law Centre and Reverend Christopher Mtikila v Tanzania* App 009 & 011/2011 (14 June 2013),

7 See, eg, Naldi & Magliveras (n 2 above).

8 Quoted in MO Hudson *The Permanent Court of International Justice 1920-1942* (1943) 271. According to one distinguished authority, the Rules of Court, as extensions of the parent statutes, are possessed of binding force; S Rosenne 'Some reflections on the 1978 Revised Rules of the International Court of Justice' (1981) 19 *Columbia Journal of Transnational Law* 235 236. Rule 44(B) of the European Court of Human Rights (European Court) http://www.echr.coe.int suggests that the Rules are considered binding.

9 Rule of Court 76. The Rules of Court are available at http://www.african-court.org (accessed 31 July 2014).

(Rules of Court 26, 27-67, 68-73) while final miscellaneous issues are dealt with by Part VI (Rules of Court 74-76). The official and working languages of the Court are those of the African Union (AU).[10] The Court meets four times a year, each session lasting a fortnight,[11] but extraordinary sessions may also be convened.[12] It is reiterated that its jurisdiction extends to cases and disputes concerning the interpretation and application of the African Charter; the Protocol[13] and any other relevant human rights instrument that a state party has ratified;[14] advisory opinions on any legal matter relating to the African Charter or other relevant human rights instrument, which must not relate to a pending application before the Commission;[15] the promotion of amicable settlements;[16] the interpretation of its own judgments;[17] and the revision of its own judgments.[18] The fact that the African Court is granted jurisdiction over other human rights instruments is worthy of comment. Its pioneering character sets it apart from its American and European counterparts which by contrast have a limited competence.[19] It is potentially sweeping in scope and has been described as bestowing upon the Court an 'almost unlimited substantive jurisdiction'.[20] In interpreting the applicable law, the Court has relied on article 60 of the African Charter to take account of 'instruments' which are not in fact treaties but which nevertheless play a central role in the corpus of human rights law, such as the Universal Declaration of Human Rights 1948 (Universal Declaration).[21] The Rules of Court reaffirm that it is for the Court to determine its own

10 Rule of Court 18(1)-(2). Compare *a*rt 25 of the Constitutive Act of the African Union 2000, 2158 UNTS 3, reprinted in Heyns & Killander (n 1 above) 4, and art 32 of the Statute.

11 Rule of Court 14(1).

12 Rule of Court 15(1).

13 Which extends to provisional measures, *In the Matter of the African Commission on Human and Peoples' Rights v Libyan Arab Jamahiriya (Provisional Measures)* Application 002/2013 (25 March 2013) para 11.

14 Rule of Court 26(1)(a). Compare *a*rt 3(1) of the Protocol. In *Emmanuel Joseph Uko & Others v Republic of South Africa* App 004/2012 (30 March 2012), eg, the applicant claimed violations of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR).

15 Rule of Court 26(1)(b). Compare *a*rt 4(1) of the Protocol.

16 Rule of Court 26(1)(c). Compare art 9 of the Protocol.

17 Rule of Court 26(1)(d). Compare *a*rt 28(4) of the Protocol.

18 Rule of Court 26(1)(e). Compare art 28(3) of the Protocol.

19 Art 32(1) European Convention on Human Rights 1950 (as amended), CETS 194, http://www.conventions.coe.int (accessed 31 July 2014) (European Convention). The Inter-American Court of Human Rights can give advisory or interpretative rulings on such treaties only, Art 64(1) American Convention on Human Rights 1969, 1144 UNTS 123, http://www.oas.org/juridico/english/treaties (American Convention), and art 60 of its Rules of Procedure, http://www.corteidh.or.cr (accessed 31 July 2014). Compare 'Other treaties' subject to the consultative jurisdiction of the Court (Art 64 of the American Convention on Human Rights), Advisory Opinion, [1982] (Ser A) No 1.

20 Harrington (n 2 above) 318.

21 *Frank David Omary & Others v Tanzania* App 001/2012 (28 March 2014) paras 71-77.

jurisdiction if its competence is challenged.[22] This power corresponds to a fundamental principle of international law, namely, 'the inherent power of a tribunal to interpret the text establishing its jurisdiction'.[23] The procedure in contentious cases consists primarily of written proceedings, and oral proceedings only if considered necessary.[24] Cases are heard in open court,[25] although it may decide, at its own initiative or at the request of the parties, that they be held *in camera* in the interests of public morality, public safety or public order.[26] A safeguard exists in that the Court must provide a reasoned explanation based on the listed grounds for its decision.[27] At any stage of the pleadings, the Court may order the joinder of interrelated cases and pleadings if considered appropriate.[28] The use of the phrase 'any stage of the pleadings' rather than 'proceedings' may suggest that the Court enjoys a narrower discretion in this field. Following the conclusion of the hearings, the Court deliberates in private[29] and then delivers its judgment, which must be taken by majority,[30] in open Court.[31] Moreover, judgments must be reasoned,[32] and separate and dissenting opinions may be attached.[33] The Court's judgments are final and not subject to appeal.[34] They are also binding on the parties.[35] It is interesting to note that in an innovative move the Court

22 Rule of Court 26(2); *Femi Falana v African Union* App 001/2011 (26 June 2012) para 57. Compare art 3(2) of the Protocol.

23 See the *Nottebohm* case *(Liechtenstein v Guatemala) (Preliminary Objection)* [1953] ICJ Rep 111, 119. Compare art 36(6) of the Statute of the International Court of Justice (ICJ), http://www.icj-cij.org (accessed 31 July 2014), art 32(2) European Convention. On the approach of the Inter-American Court, see, eg, *Constitutional Court v Peru (Competence)* [1999] (Ser A) No 55 and, further, JM Pasqualucci *The practice and procedure of the Inter-American Court of Human Rights* (2003) 33-36.

24 Rule of Court 27(1). The Court may put questions to the parties; Rule of Court 47(1).

25 Rule of Court 43(1). Compare *a*rt 10(1) of the Protocol.

26 Rule of Court 43(2). Both the Inter-American Court and the European Court indicate that this should happen only in 'exceptional circumstances'; art 24(1) Inter-American Court Statute, http://www.corteidh.or.cr; art 14(1) Inter-American Court Rules of Procedure, and European Court Rule 63(1) which, according to European Court Rule 63(2), includes grounds such as the interests of morals, public order or national security, the interests of juveniles or protection of the private life of the parties.

27 Rule of Court 43(3).

28 Rule of Court 54. This was so in *Tankanyika Law Society and The Legal and Human Rights Law Centre and Reverend Christopher Mtikila v Tanzania* App 009 & 011/ 2011 (22 September 2011), where the subject matter and the defendants were the same in both cases. Compare *a*rt 28(1) of the Inter-American Court Rules.

29 Rules of Court 59(1) & 60(1).

30 Rule of Court 60(3). Compare art 28(2) of the Protocol.

31 Rule of Court 61(3). *Compare a*rt 28(5) of the Protocol.

32 Rule of Court 61(1). Compare art 28(6) of the Protocol.

33 Rule of Court 60(5). Compare art 28(7) of the Protocol. Judge Ouguergouz has already made extensive use of this privilege; see, eg, *Michelot Yogogombaye v Senegal* (n 6 above).

34 Rule of Court 61(4). Compare art 28(2) of the Protocol.

35 Rule of Court 61(5). Compare art 30 of the Protocol, according to which state parties to a case 'undertake to comply with the judgment … and to guarantee its execution'.

is required to render its judgment within 90 days of having completed its deliberations.[36] This seems a sensible expectation in the context of the protection of human rights. It is common knowledge that the European system underwent reform because the original system found it ever more difficult to cope with the increasing workload and the length of time it was taking to deal with cases.[37] However, the snag that may emerge is that the deliberations may be inordinately lengthy. In *Mtikila v Tanzania*, a year elapsed between the hearings and the judgment.[38] It is incumbent on the President of the Court to set reasonable time limits for deliberations in its internal judicial practices.

It seems implicit in the Rules of Court that corrections may be made to insignificant errors or omissions in judgments or opinions.[39]

Rule of Court 30 states that each party will bear its own costs unless the Court decides otherwise.[40] However, article 10(2) of the Protocol and Rule of Court 31 make provision for the possibility of free legal representation in the interests of justice. Given the lack of means in many parts of Africa, this circumstance may ensure that justice is not denied but it will only prove effective if proper funding is forthcoming.

The Rules of Court contain a reaffirmation of the principle *pacta sunt servanda* in that state parties to a case are under an obligation to co-operate with the Court so that all notices, communications and summonses addressed to persons in their territory or under their jurisdiction are executed.[41] This is also true for any proceeding that the Court holds in the territory of a state party to a case.[42] This duty extends also to other states.[43] Given a real fear of retribution for challenging state authorities, the Court, in providing some protection for applicants, witnesses or legal representatives,[44] is seeking to preserve the integrity of the proceedings. A state that fails to protect such individuals could ultimately be found to be in breach of its treaty obligations.

The Protocol is silent on the publication of judgments, but the Rules make provision for the publication of the Court's judgments, advisory

36 Rule of Court 59(2). Compare art 28(1) of the Protocol.

37 See DJ Harris *et al Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights* (2009) 34-36.

38 *Mtikila v Tanzania* (n 6 above).

39 Rule of Court 25(2)(i).

40 See *Michelot Yogogombaye v Senegal* (n 6 above) paras 41-45.

41 Rule of Court 32(1). See art 24 of the Inter-American Court Rules; see Pasqualucci (n 23 above) 187-188. Art 34 of the European Convention may have a broader scope; Harris *et al* (n 37 above) 820-821.

42 Rule of Court 32(2).

43 Rule of Court 32(3).

44 See art 50 of the Inter-American Court Rules in relation to witnesses and expert witnesses.

opinions, orders, and so on.[45] These are available on the Court's website.

The Court has the sole power to effect revisions to its Rules.[46] However, in order to ensure a harmonious working association, the Court must consult the African Commission with regard to any changes to the Rules of Court and any issues of procedure governing their relationship.[47] It may be that only the Court or individual judges may initiate amendments, but the wording of Rule of Court 74(2) may not in fact be so limiting since it fails to specify from whom a proposal for amendment should emanate. It may therefore be open to member states[48] or the Commission to suggest proposals for change for the Court's consideration.

3 Composition of the African Court

The Court is composed of 11 judges[49] and cases are heard by the full Court. Neither the Protocol nor the Rules of Court make provision for the creation of chambers.[50] This is a situation that may need to be revisited should the Court attract a heavy workload.

The procedure set out in the Protocol for the election of judges raised an important issue in that article 14(3) thereof calls for 'adequate gender representation' on the bench. Even though this progressive formulation arguably constitutes an improvement on other comparable bodies,[51] it does not spell out how this 'adequate representation' is to be achieved, nor whether any minimum numbers are desirable. Disappointingly, the Rules of Court do not elucidate the matter. Rule 13 states, *inter alia*, that '[t]he members of the Court shall pursue, to the greatest extent possible, a policy aimed at securing a balanced representation of gender'. There is an element of

45 Rules of Court 25(2)(i) & 65.

46 Rule of Court 74(1). A proposed amendment requires the support of a minimum of seven judges to be adopted, Rules of Court 74(5) & 75.

47 Rule of Court 29(2); Rule of Commission 115(4).

48 State parties may submit proposals for amendments to the Protocol; art 35(1) Protocol.

49 Art 11(1) Protocol.

50 See arts 26-29 of the ICJ Statute. See JG Merrills *International dispute settlement* (1998) 140-145.

51 Note European Court Rule 14 which seeks to secure a 'balanced representation of the sexes', and see *Certain legal questions concerning the lists of candidates for the election of judges to the European Court of Human Rights,* Advisory Opinion of 2008, http://www.echr.coe.int/ENG/Judgments.htm (accessed 31 July 2014), where the European Court expressed the view that flexibility was necessary. However, art 5(2) of the Statute of the African Court of Justice and Human Rights specifies 'equitable gender representation', which arguably sets a more demanding requirement. The Statute is annexed to the as yet unratified Protocol on the Statute of the African Court of Justice and Human Rights 2008, http://au.int, which aims to replace the current Court. See GJ Naldi & KD Magliveras 'The African Court of Justice and Human Rights: A judicial curate's egg' (2012) 9 *International Organisations Law Review* 383.

discretion, therefore, and there does not appear to be any absolute guarantees that any of the judgeships will necessarily be filled by women.[52]

Similar considerations apply in relation to the direction to the Assembly contained in article 14(2) of the Protocol, that Africa's main regions and their principal legal traditions be represented on the Court. As has been seen, Rule of Court 13 simply requires a policy to this end.[53]

According to article 18 of the Protocol, the function of a judge is incompatible with any activity that might interfere with his or her independence or impartiality or the demands of the office. Exactly what activities come within the scope of a prohibited activity was left to the Rules of Court to determine. Rule of Court 5(2) specifically lists political, diplomatic or administrative positions or function as government legal advisers at the national level, but the use of the adverb 'in particular' indicates that other occupations are not excluded.[54]

Regarding suspension or removal from office under article 19 of the Protocol, Rule of Court 7 requires that the judge in question be informed in writing by the President of the Court. The impugned judge will be able to defend himself or herself at a specially-convened private session of the Court and a decision will be reached by the rest of the Court at a further special private session. The decision will be communicated to the Chairperson of the AU Commission.[55]

In order to avoid any semblance of partiality, article 22 of the Protocol does not allow a judge who is a national of a state that is a party to a case to hear it.[56] Additionally, a judge is also prohibited from hearing a case concerning the state that elected him or her.[57]

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52 Although two of the current judges are women, Justice Akuffo, President of the Court, and Justice Thompson, http://www.african-court.org/en/index.php/about-the-court-judges (accessed 31 July 2014).

53 Art 3(3) of the Statute is more specific, stating that, where possible, each geographical region of Africa is to be represented by three judges except for the Western Region which will have four judges. As at June 2014, the judges hail from Algeria, Burundi, Côte d'Ivoire, Ghana, Kenya, Malawi, Nigeria, Senegal, South Africa, Tanzania and Togo, http://www.african-court.org/en/index.php/about-the-court/judges/ (accessed 31 July 2014). See European Court Rule 25(2).

54 See art 16(1) of the ICJ Rules, http://www.icj-cij.org. The specification in art 15(4) Protocol that all judges, save for the President, are part-time could act as a deterrent to potential candidates.

55 A negative decision can be reversed by the Assembly; see art 19(2) of the Protocol.

56 See also Rule of Court 8(2). In consequence, Judge El Hadj Guissé, a national of Senegal, recused himself from hearing the case of *Michelot Yogogombaye v Senegal* (n 6 above). See also, eg, *Association Juriste d'Afrique pour la Bonne Gouvernance v Ivory Coast* App 006/2011 (16 June 2011). According to European Court Rule 13, judges are prevented from presiding in cases involving a contracting party of which they are nationals. Other jurisdictions do not have such concerns; see art 31(1) of the ICJ Statute and art 55(1) of the American Convention.

57 Rule of Court 8(3). Presumably this refers to a state party that nominated the judge.

The Rules seek to avoid conflicts of interest by requiring a judge who has had previous involvement or a personal interest with a case to recuse himself or herself.[58] However, the Rules do not stop there and proceed to set a higher threshold. Thus, a judge who has expressed public pronouncements, through the media or academic writings perhaps, or *for any other reason* that may undermine or lead his or her impartiality and independence to be questioned, is disqualified from the case.[59] Unlike some other jurisdictions, the President of the Court is not given the power to exclude a judge from a case.[60] No provision is made for replacing a judge in such circumstances with an interim or substitute judge.[61]

4 Contentious procedure

4.1 Overview

According to article 2 of the Protocol, the Court is to complement the protective mandate of the Commission in accordance with the terms of the African Charter.[62] The Rules seek to address some of the questions left unanswered by this provision. Thus, the two bodies are to meet at least once a year or whenever considered necessary in order to ensure a good working relationship between them.[63] This should help ensure that any duplication between the two bodies is minimised.

Article 5 of the Protocol and Rule of Court 33 define the Court's jurisdiction *ratione personae.* The initial observation to be made is that the category of persons entitled to submit cases to the Court is extensive, considerably broader than other regional systems, and includes, under article 5(1) of the Protocol, the African Commission, state parties, African intergovernmental organisations (IGOs), the regional economic communities (RECs), for instance. The jurisdiction of the Court to entertain applications from these entities is automatic. The Commission may initiate a case directly before the Court in accordance with article 5(1)(a) of the Protocol and Rule of Court 33(1)(a), and includes requests for provisional measures of protection.[64] Alternatively, it may refer a communication to the Court at any stage of the examination.[65] In addition, it may refer any decision on a communication that a state has not complied with or

58 Rule of Court 8(4)(a)-(b). Compare art 19(1) of the Inter-American Court Statute and European Court Rule 28(2).
59 Rule of Court 8(4)(c)-(d) (my emphasis).
60 Art 14(2) of the Statute. Compare art 19(3) of the Inter-American Court Statute.
61 See art 19(4) of the Inter-American Court Statute and European Court Rule 29(1)(a)-(b).
62 See also Rule of Commission 114(1).
63 Rule of Court 29(1)(a); Rule of Commission 115(1).
64 *African Commission on Human and Peoples' Rights v Libya* (n 13 above) para 13.
65 Rule of Commission 118(4).

will not comply with.[66] The Commission may similarly refer instances of non-compliance with provisional measures of protection.[67] However, Rule 29(6) of Court Rules provides that a communication before the Commission must be withdrawn if the case submitted to the Court relates to issues in that communication. This is an expression of the *lis pendens* principle. By the same token, the Commission cannot consider any communication that relates to a case pending before the Court unless it has been withdrawn from the Court's jurisdiction.[68] The application must be accompanied by the Commission's report and other documents.[69] The Court may hear the commissioners[70] or the individual or non-governmental organisation (NGO) that initiated the communication to the Commission in accordance with Rule 45.[71] In such a situation, the Court has considerable latitude in hearing from the latter persons in assisting it in its judicial functions. This is an important consideration because, as discussed below, the African system has adopted an optional scheme so that the right of an individual or NGO to seize the Court directly is limited, dependent on a state party explicitly recognising, by means of a declaration, individual applications.[72] Failing such an eventuality, individuals must rely on the Commission bringing an action at its discretion and they cannot compel it to do so.[73] Cases referred to the Court can include those of serious or massive violations of human rights under article 58 of the African Charter perpetrated by a state party to the Protocol.[74]

State parties which have lodged a complaint to the African Commission, and state parties against which a complaint has been lodged at the Commission, also have standing to submit cases to the Court.[75] So do state parties whose national is a victim, an expression of the diplomatic protection principle.[76]

66 Rule of Commission 118(1).
67 Rule of Commission 118(2).
68 Rule of Commission 123.
69 Rule of Court 29(3)(a). Compare also Rule of Commission 121.
70 Rule of Court 29(3)(b). Compare also Rule of Commission 120.
71 Rule of Court 29(3)(c).
72 Arts 5(3) & 34(6) Protocol.
73 For a comparison with the Inter-American system, see Pasqualucci (n 23 above) 19.
74 Rules of Commission 84(2) & 118(3). See *In the Matter of the African Commission on Human and Peoples' Rights v Libyan Arab People's Jamahiriya (Provisional Measures)* App 004/2011 (3 March 2011). Judge Ouguergouz has suggested that such cases are eminently suited for transfer by the Court to the Commission under Art 6(3) of the Protocol where the former lacks jurisdiction; see his dissenting opinion in *Ekollo Moundi Alexandre v Republic of Cameroon and Federal Republic of Nigeria* App 008/2011 (23 September 2011) paras 27-28.
75 Arts 5(1)(b) & (c) Protocol; Rule of Court 33(1)(b) & (c).
76 Art 5(1)(d) Protocol; Rule of Court 33(1)(d). Compare art 36(1) European Court, which allows a state party to intervene in a case where the applicant is a national of that party.

The Court must initially satisfy itself that it has jurisdiction and that the application is admissible. The Court therefore needs to ensure that it has jurisdiction *ratione personae,* in that the complaint impleads a contracting party, and only states may be respondents,[77] and that the applicants have *locus standi*, or that it possesses jurisdiction *ratione materiae,* in that it can only consider allegations of violations of rights protected by the African Charter, and jurisdiction *ratione temporis*.

These issues have been judicially considered in a number of cases. In *Youseff Ababou v Kingdom of Morocco*, the Court clearly lacked jurisdiction because not only was Morocco not a party to the Protocol, but not even a member of the AU.[78] In *Femi Falana v African Union*[79] and *Atabong Denis Atemnkeng v African Union*,[80] the applicants sought to implead the AU itself. The Court held that the AU could not be sued because it was not a party to the Protocol,[81] nor could it be; as only states had that capacity.[82] Neither could responsibility be attributed to the AU as it could not be considered a representative of the member states but a legal person in its own right.[83] The Court's conclusions are in keeping with relevant European jurisprudence,[84] but in principle international law does not preclude an international organisation from becoming a party to a human rights treaty.[85]

It is also essential that the state must in addition have made a declaration recognising the right of individual petition.[86] In its first case, *Michelot Yogogombaye v Senegal*,[87] it was necessary that for the Court to exercise jurisdiction, the state party, Senegal, must have deposited a separate optional declaration under article 34(6) of the Protocol, and Rule of Court 33(1)(f), accepting the competence of the Court to receive applications directly from individuals. However, given that Senegal had made no such declaration, the Court manifestly lacked jurisdiction and was unable to entertain the case.[88] Intriguingly, it has been argued that article 34(6) of the Protocol, in

77 Separate Opinion by Judge Mutsinzi, *Femi Falana v African Union* (n 22 above), a situation implicit in the Rules of Court.

78 App 007/2011 (2 September 2011) para 12.

79 n 22 above.

80 App 014/2011 (15 March 2013).

81 *Femi Falana v African Union* (n 22 above) para 70; *Atabong Denis Atemnkeng v African Union* (n 78 above) paras 38-40.

82 *Femi Falana v African Union* (n 22 above) paras 67 & 69-71.

83 *Femi Falana v African Union* (n 22 above) paras 68 & 71.

84 Harris *et al* (n 37 above) 789-790.

85 Consequently, art 17 of the Fourteenth Protocol European Convention CETS 194 allows the European Union to accede to the European Convention.

86 Six states have made this declaration: Burkina Faso, Ghana, Malawi, Mali, Rwanda and Tanzania. See *Tanganyika Law Society et al v Tanzania* (n 6 above) para 86,

87 *Michelot Yogogombaye v Senegal* (n 6 above) paras 35-37.

88 *Michelot Yogogombaye v Senegal* (n 6 above) paras 37-39. See also *Soufiane Ababou v Algeria* App 002/2011 (16 June 2011) paras 5-11; *Daniel Amare and Mulugeta Amare v Republic of Mozambique and Mozambique Airlines* App 005/2011 (16 June 2011) paras 6-8; and *Alexandre v Cameroon and Nigeria* (n 74 above) paras 5-9.

restricting access to the Court, is in breach of the right of access to justice and is therefore incompatible with the African Charter and should be declared null and void.[89] However, as Judge Ouguergouz has observed, the fundamental principle governing this question is that of consent.[90] If such radical proposals gained acceptance, it would in all likelihood be self-defeating as it would mean that the Court's jurisdiction became compulsory and the likely result would be that states would seek to disencumber themselves from their human rights obligations. This view is out of step with the sovereignty-based conception of international law prevailing in Africa. It needs to be recalled that the European system was initially of an optional nature and that the current African system is designed to encourage and facilitate the acceptance of declarations.

Judge Ouguergouz advanced a possible solution to this problem, the principle of *forum prorogatum*, or prorogated jurisdiction.[91] Unlike the other regional systems, the African system does not make specific provision for this step,[92] but this is not a material consideration given the universal acceptance of this general principle of law.[93]

Jurisdiction active legitimation was at issue in *Association Juriste d'Afrique pour la Bonne Gouvernance v Ivory Coast*, where the applicant NGO did not have observer status with the Commission as required by article 5(3) of the Protocol.[94]

In relation to substantive jurisdiction *ratione materiae,* in *Efoua Mbozo'o Samuel v Pan African Parliament* the Court found that it lacked jurisdiction on the ground that the application was based exclusively on a breach of employment contract.[95] Neither is the Court a court of appeal.[96] But it is important to note that no formal prescribed form of submission of a communication is required. This was a fact highlighted in *Frank David Omary and Others v Tanzania* where the Court held that, notwithstanding the requirement of Rule of Court 34(4) that the application must specify the alleged violations,

89 *Atabong Denis Atemnkeng v African Union* (n 78 above) joint dissenting opinions of President Akuffo, and Justices Ngoepe and Thompson. See also their joint dissenting opinions in *Femi Falana v African Union* (n 22 above).

90 *Michelot Yogogombaye v Senegal* (n 6 above), separate opinion of Judge Ouguergouz paras 21-23.

91 *Michelot Yogogombaye v Senegal* (n 6 above) paras 31-32.

92 See art 62(2) of the American Convention; art 48 of the original European Convention, ETS 5; see P van Dijk & GJH van Hoof *Theory and practice of the European Convention on Human Rights* (1990) 139 141.

93 RL Bledsoe & BA Boczek *International law dictionary* (1987) 289-290.

94 *Association Juriste d'Afrique pour la Bonne Gouvernance v Ivory Coast* (n 56 above) paras 7-9. See also *National Convention of Teachers Trade Union v Republic of Gabon* App 012/2011 (15 December 2011). See *Mtikila v Tanzania* (n 6 above) para 86, where the Court found it had jurisdiction because the state had made the required declaration.

95 App 010/2011 (30 September 2011) para 6, However, see Judge Ouguergouz's dissenting opinion, para 12.

96 *Ernest Francis Mtingwi v Malawi* App 001/2013 (15 March 2013). See Harris *et al* (n 37 above) 14-15.

it was not necessary that the exact articles of the African Charter be indicated. The application referred to the Universal Declaration and the Court held that it sufficed that the rights in question were also guaranteed by the African Charter.[97] This flexibility is important in the African context.[98]

The question of admissibility *ratione temporis* was considered in *Mtikila v Tanzania* where the respondent argued that the Court did not have jurisdiction because the alleged violation occurred before the Protocol had entered into force. Dismissing this challenge to its jurisdiction, the Court found that the rights in question were protected by the African Charter which had been in force in Tanzania at the material time. Moreover, the alleged violation was of a continuing nature which continued when the Protocol was ratified and the optional declaration made.[99] The continuing effects doctrine has been similarly applied in other jurisdictions.[100]

Article 6(2) of the Protocol states that the Court shall rule on the admissibility of cases taking account of article 56 of the African Charter, which govern the conditions of admissibility to be satisfied by communications submitted by individuals and NGOs to the Commission.[101] Rule of Court 39(1) further requires the Court to take into consideration article 50 of the African Charter which is a reference to the exhaustion of local remedies in the context of inter-state cases. Rule of Court 40 makes it clear that applications *must* satisfy the hurdles of admissibility, the conditions of which are materially identical to those listed in article 56 with the exception of sub-rule (6), which makes the necessary adjustment in that the case must be filed within a reasonable period from the time local remedies

97 *Omary v Tanzania* (n 21 above) paras 71-77. However, by way of contrast, the wording of art 2 of the Optional Protocol ICCPR 1966, 999 UNTS 171 limits the rights to those 'enumerated' in ICCPR.

98 And is also observed in the American system; Pasqualucci (n 23 above) 125. But European Court Rule 47(1)(e) requires a 'succinct statement of the alleged violation(s)' of the European Convention. In international law, matters of form do not have the same importance as in municipal law; *Mavrommatis Palestine Concessions (Greece v Great Britain)* (Jurisdiction) PCIJ Rep Ser A No 2.

99 *Mtikila v Tanzania* (n 6 above) para 84.

100 Harris *et al* (n 37 above) 802; A Conte & R Burchill *Defining civil and political rights: The jurisprudence of the United Nations Human Rights Committee* (2009) 28-29.

101 There are seven cumulative admissibility requirements, or 'conjunctive, meaning that, if any one of them is absent, the communication will be declared inadmissible', Commission Rule 106; *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) para 43; *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) AHRLR 235 (ACHPR 2009) para 81. All seven conditions must generally be fulfilled, *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 36. See generally Magliveras & Naldi (n 5 above) paras 334-348; F Viljoen 'Communications under the African Charter: Procedure and admissibility' in Evans & Murray (n 2 above) 76 92-128. Conditions, or hurdles, of admissibility are a feature common to all human rights systems. See generally Harris *et al* (n 37 above) 757-810; Pasqualucci (n 23 above) 123-35; Conte & Burchill (n 100 above) 19-34.

were exhausted,[102] or from the date set by the Court as being the commencement of the time limit within which it shall be seized of the matter. The Court has endorsed the Commission's jurisprudence on this issue.[103]

The Court will dismiss applications without merit (manifestly ill-founded), giving reasons for its decision.[104] It has been argued to the contrary that in such circumstances the application should not be 'considered judicially by the Court', but should be 'dismissed *de plano* by a simple letter from the Registry',[105] that is, in a summary judgment, although, as has been observed, the Court is obligated to give its reasons.

Judge Ouguergouz has accused the Court of confusing the questions of jurisdiction and admissibility. He claims that the Court has engaged in judicial consideration of cases even though it plainly lacks jurisdiction, for example, as a result of the states concerned not having made the required declarations.[106] Again, he has argued that such applications should be dismissed in a summary judgment.[107] It might be of little comfort to Judge Ouguergouz to know that such a distinction was not strictly observed under the European system either.[108]

A curious aspect of article 6(1) of the Protocol is the power conferred on the Court to request an opinion from the Commission while it decides on the admissibility of a case under article 5(3). The Commission is obliged to respond promptly and under Rule of Court 29(4) the Court will indicate the time limit within which it wishes to receive the Commission's opinion. For its part, the Commission will consider the matter in light of the conditions of admissibility.[109] Unfortunately, no guidance is given as to the sort of circumstances that might prompt the Court to invoke this provision.

Another unusual provision of the Protocol is article 6(3) according to which the Court has the discretion of referring a case to the Commission. The Rules of Court make a passing reference to this

102 In *Mtikila v Tanzania* (n 6 above) para 83, the Court found that one year was not an unreasonable period of time.

103 *Mtikila v Tanzania* (n 6 above) para 82.

104 Rule of Court 38. See *Amare v Mozambique and Mozambique Airlines* (n 88 above) para 8.

105 See, eg, Judge Ouguergouz, separate opinion in *Michelot Yogogombaye v Senegal* (n 6 above), and his dissenting opinion in *Alexandre v Cameroon and Nigeria* (n 74 above) para 7, which he justified on grounds of time and resources. This practice is applied by the European Court; Harris *et al* (n 37 above) 785.

106 See, eg, separate opinion of Judge Ouguergouz in *Uko v South Africa* (n 14 above). See, generally, M Shaw *International law* (2008) 1071-1072.

107 See, eg, his separate opinion in *Amir Adam Timan v Sudan* App No 005/2012 (30 March 2012); *Baghdadi Ali Mahmoudi v Tunisia* App No 007/2012 (30 March 2012).

108 Van Dijk & Van Hoof (n 92 above) 67-68 133,

109 Rule of Commission 119(1). According to Judge Ouguergouz, it is a condition precedent that the Court should determine that it has jurisdiction over the case, *Alexandre v Cameroon and Nigeria* (n 74 above), dissenting opinion, para 17.

procedure,[110] but again no indication is given as to what may motivate the Court to take such a step. However, the Court's case law is providing some insights as to the circumstances when such a course of action seems called for. In instances where the Court has found that it does not have jurisdiction because a complainant under article 5(3) of the Protocol lacks standing, either because a state party has not made a declaration under article 34(6) of the Protocol or an NGO does not have observer status with the Commission, in light of the claims made, it has transferred them to the Commission.[111] The Court appears to be guided by a desire to avoid a denial of justice.

This emergent practice has attracted strong disapproval from Judge Ouguergouz, who has argued that it 'is not founded in law' and that the Court has 'deviated from the original purpose of that provision'.[112] Implicit in his criticism is the opinion that the issues of jurisdiction and admissibility have not been determined correctly.[113] In his view, this procedure 'applies primarily to the consideration of the admissibility of a case over which the jurisdiction of the Court has already been established'.[114] Judge Ouguergouz additionally contends that the principle of legal certainty demands that clear reasoned objective criteria should guide the Court in its practice of referrals to the Commission, since the current policy was haphazard and unpredictable and was in danger of becoming 'systematic'.[115] He is of the opinion that the Court could play 'the role of an "early warning mechanism" for the Commission' and that this procedure should be reserved for cases displaying 'exceptional circumstances', such as those envisaged by article 58 of the African Charter.[116] He sees no reason why the Court could not use its discretion to transfer cases over which it has jurisdiction to the Commission to rule on the merits.[117] He advocates such a policy in order to lessen the workload on the Court.[118] His suggestions seem eminently sensible if the Court seeks to avoid the fate of the European Court where the backlog of cases runs into the thousands.

The Rules of Commission envisage a role for the Court in the implementation of the African Commission's decisions. Thus, where a state party to the Protocol has not complied with or will not comply with a Commission decision in an inter-state or individual communication, the Commission may refer the matter to the Court

110 Rule of Court 29(5)(a).

111 *Amare v Mozambique and Mozambique Airlines* (n 88 above) para 9; *Alexandre v Cameroon and Nigeria* (n 74 above) para 11; *Association Juriste d'Afrique pour la Bonne Gouvernance v Ivory Coast* (n 56 above) para 10.

112 *Alexandre v Cameroon and Nigeria* (n 74 above), dissenting opinion of Judge Ouguergouz, paras 12 & 20.

113 *Alexandre v Cameroon and Nigeria* (n 74 above) paras 14-19.

114 *Alexandre v Cameroon and Nigeria* para 13.

115 *Alexandre v Cameroon and Nigeria* paras 21-26.

116 *Alexandre v Cameroon and Nigeria* paras 22-29.

117 *Alexandre v Cameroon and Nigeria* paras 31-33.

118 *Alexandre v Cameroon and Nigeria* para 35.

for the adoption of appropriate measures for implementation of the decision.[119] This may encourage better compliance, but whether the Court can execute the Commission's decisions is open to debate. As is discussed later, the Court itself has no powers of enforcement; that is a role reserved for the Assembly.

4.2 Evidence and witnesses

Article 26(1) of the Protocol obliges the Court to hear submissions by all parties and, if necessary, to hold an enquiry. Rule of Court 45(3) gives the Court the discretion to conduct an enquiry at any time during the proceedings by one or more of the judges, to carry out visits to scenes or to gather evidence in any other manner.[120] Considering the often unco-operative and obstructive behaviour of impugned states in such circumstances, the Court's ability to visit scenes or to conduct enquiries is of considerable importance in marshalling the facts and attempting to ascertain the truth.

By virtue of article 26(2) of the Protocol, the Court may receive written and oral evidence, including expert testimony.[121] Rule of Court 45(1) establishes that evidence may be obtained by the Court *proprio motu*, at the request of a party or the Commission. No new evidence may be submitted by the parties after the closure of pleadings save with the leave of the Court.[122] That the Court has a wide discretion as to the evidence and witnesses it will admit is confirmed by the Rules of Court. Hence, Rule 45(1) states that the Court may 'obtain any evidence which in its opinion may provide clarification of the facts of a case'. To this end, it can 'decide to hear as a witness or expert or in any other capacity any person whose evidence, assertions or statements it deems likely to assist it'. Moreover, according to Rule 45(2), the Court 'may ask any person or institution of its choice to obtain information, express an opinion or submit a report to it on any specific point'. *Amici curiae* would therefore seem to be allowed and the effective protection of human rights in Africa could only be enhanced if the Court were to allow representations from a broad category of *amici curiae,* especially NGOs.[123] It is evident, although not set out in explicit terms, that parties may object to a witness or expert, given that Rule of Court 46(5) authorises the Court to rule on any such challenge. It would seem preferable to have followed the detailed guidance provided by the Rules of the Inter-American Court of Human Rights (Inter-American Court).[124]

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119 Rule of Commission 118(1).

120 Compare art 44(4) of the Inter-American Court Rules.

121 On the ICJ's powers relating to evidence, see K Highet 'Evidence the court, and the Nicaragua case' (1987) 81 *American Journal of International Law* 1.

122 Rule of Court 50.

123 See Pasqualucci (n 23 above) 214-215.

124 Arts 44-49 Inter-American Court Rules.

Questions may be put by the Court to witnesses, experts or other persons appearing before it.[125] They may be examined, cross-examined and re-examined by the parties and the Commission.[126] No provision is made either in the Protocol or the Rules for the failure of witnesses to appear, for contempt of court or for the possibility of perjury. It is interesting to note that in similar circumstances, the Inter-American Court can call upon states to impose sanctions against such persons.[127]

4.3 Interim measures of protection

Under article 27(2) of the Protocol, the Court can adopt interim, or provisional, measures of protection in cases of 'extreme gravity and urgency', and 'to avoid irreparable harm to persons'.[128] They are 'a consequence of the right to protection under the [African] Charter'.[129] They are also designed to preserve the *status quo ante* pending the determination of the case.[130] The Court found that 'circumstances … of great urgency', relating especially to the rights to life and physical integrity during unrest unleashed by the revolution in Libya in early 2011, compelled it to order such measures.[131] In *African Commission on Human and Peoples' Rights v Kenya*, the disturbing circumstances included the enjoyment of cultural rights, the right to property and the right to economic, social and cultural development.[132] This ability is supplemented by Rule of Court 51(1) which refers to 'the interest of the parties', no doubt corresponding to the preservation of their respective rights,[133] or 'of justice', thus conferring upon the Court a sweeping discretion. The Court has also taken notice of prejudice to the substantive matter before it.[134] In cases of extreme urgency, an extraordinary session of the Court may

125 Rule of Court 47(1).

126 Rule of Court 47(2).

127 Art 51 Inter-American Court Rules. The whole question of evidence was highly contentious in *Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua v USA*) [1986] ICJ Reports 14; see Highet (n 121 above) 33-46. This proved even more so when evidence subsequently emerged casting doubt on the veracity of some of Nicaragua's evidence before the ICJ. See S Rosenne *The World Court: What it is and how it works* (1995) 152-153.

128 *African Commission on Human and Peoples' Rights v Libya* (n 13 above) para 17. See art 63(2) of the Americn Convention; art 25 of the Inter-American Court Rules; and European Court Rule 39(1). See Pasqualucci (n 23 above) 298-308; Harris *et al* (n 37 above) 842-846. Note that under Rule of Commission 98(1), the Commission is authorised to indicate interim measures to 'prevent irreparable harm to the victim … as urgently as the situation demands'.

129 *African Commission on Human and Peoples' Rights v Libya* (n 13 above) para 13.

130 *In the Matter African Commission on Human and Peoples' Rights v Republic of Kenya (Provisional Measures)* App 006/2012 (15 March 2013) para 23.

131 *African Commission on Human and Peoples' Rights v Libya* (n 74 above) paras 22-23. See also *African Commission on Human and Peoples' Rights v Libya* (n 13 above).

132 *African Commission on Human and Peoples' Rights v Kenya* (n 130 above) para 20.

133 See art 43(1) of the ICJ Statute.

134 *African Commission on Human and Peoples' Rights v Kenya* (n 130 above) para 22.

be convened to decide on measures to be taken.[135] In its practice the Court has on occasion given the respondent states but a brief period of time, 15 days, to comply with its orders.[136]

According to Rule of Court 51(1), interim measures can be given at the request of a party to the case, the Commission[137] or the Court of its own accord.[138] The Court has taken the latter step on a couple of occasions.[139] The fact that the Court can order any measures 'it deems necessary' suggests that they could be 'in whole or in part other than those requested'.[140] In fact, the Court has ordered specific measures to be adopted.[141] The Court need not satisfy itself that it has jurisdiction on the merits, but simply that *prima facie* jurisdiction exists.[142] This it can do by establishing that the applicant is an entity entitled to submit a case to the Court and that the respondent has ratified the African Charter and the Protocol.[143] There is certainly no need to engage in prior consideration of the substantive issues in the case.[144] The Court has stated that a decision on interim measures does not prejudge the question of jurisdiction, the admissibility or merits of the case.[145] The Court's practice has established that a request for interim measures can be submitted to the Court at the same time as the institution of proceedings,[146] but can they also be

135 Rule of Court 51(2).

136 *African Commission on Human and Peoples' Rights v Libya* (n 13 above) para 20(5); *African Commission on Human and Peoples' Rights v Kenya* (n 130 above) para 25(2).

137 See also Rule of Commission 118(2) & (3). See *African Commission on Human and Peoples' Rights v Libya* (n 74 above) para 2; *African Commission on Human and Peoples' Rights v Kenya* (n 130 above) para 9.

138 It is interesting to note that in *African Commission on Human and Peoples' Rights v Libya* (n 13 above) paras 9-12, the Court ordered measures *proprio motu*. See also *African Commission on Human and Peoples' Rights v Libya (Provisional Measures)* (n 74 above) para 18.

139 As above.

140 Compare art 75(2) of the ICJ Rules. On a few limited occasions, the ICJ has indicated provisional measures against both parties; see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)(Provisional Measures)* [2008] ICJ Reports.

141 *African Commission on Human and Peoples' Rights v Libya* (n 13 above) para 20.

142 *African Commission on Human and Peoples' Rights v Kenya* (n 130 above) para. 16; *African Commission on Human and Peoples' Rights v Libya* (n 74 above) para 10. The ICJ's established practice is that, as long as *prima facie* jurisdiction is apparent, it will entertain the request for interim measures, even if it emerges subsequently that it lacks jurisdiction. See *Military and Paramilitary Activities in and against Nicaragua* (*Provisional Measures)* [1984] ICJ Reports 169; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)* (*Provisional Measures)* [1993] ICJ Reports 3; *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*), *Provisional Measures* [2000] ICJ Reports 182. It will decline to act if it manifestly lacks jurisdiction; *Fisheries Jurisdiction Cases (United Kingdom, Federal Republic of Germany v Iceland)* [1972] ICJ Reports 12.

143 *African Commission on Human and Peoples' Rights v Libya* (n 13 above) para 17.

144 *African Commission on Human and Peoples' Rights v Kenya* (n 130 above) para 19.

145 *African Commission on Human and Peoples' Rights v Kenya* (n 130 above) para 24; *African Commission on Human and Peoples' Rights v Libya* (n 74 above) para 19.

146 *African Commission on Human and Peoples' Rights v Libya* (n 74 above).

submitted at any time of the proceedings pending final decision?[147] However, a number of questions remain unaddressed. No mention is made of the duration of the measures, but this must be dependent on all the circumstances of the case. Can states request the Court to revoke interim measures adopted by the Commission? Furthermore, no explicit provision is made for the revocation or modification of interim measures.[148]

However, a surprising omission is any explicit guidance as to the question whether interim measures are legally binding, an issue that the drafters of the Rules must have been aware of in light of significant recent developments in other jurisdictions establishing that interim measures have binding effect.[149] The language of the relevant provisions of the Rules is unclear on this point;[150] the use of the verb 'prescribe' in Rule of Court 51(1) is capable of being interpreted as an order or a recommendation. Further favouring the sense of a legal duty is the fact that the Court itself has issued 'orders' to the respondents.[151] However, to the contrary is the Court's obligation to 'make all such recommendations as it deems appropriate' in instances of non-compliance by states in its Annual Report to the Assembly under article 31 of the Protocol and Rule of Court 51(4), which suggests that the final decision on such matters rests with the Assembly. The Court should follow the international trend and it could do worse than adopt the Commission's approach, declaring that a contracting party that has failed to abide by its indication of interim measures is in breach of the principle of *pacta sunt servanda* enshrined in article 1 of the African Charter.[152]

147 Compare art 73(1) of the ICJ Rules. Rule of Commission 98(1) specifies that a request for provisional measures can be made at any time after the receipt of a communication but before a determination on the merits.

148 Compare art 76 of the ICJ Rules.

149 *LaGrand* case (*Germany v United States of America*) [2001] ICJ Reports 466, paras 99-103; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Reports 1, paras 452 & 468 (ICJ); *Constitutional Court v Peru (Provisional Measures)* [2000] (Ser E) No 3 (Inter-American Court); *Piandiong, Morallos and Bulan v The Philippines* Communication 869/1999, UN Doc CCPR/C/70/D/869/1999 (19 October 2000) (UN Human Rights Committee); *Mamatkulov and Abdurasulovic v Turkey* 41 EHRR 494. See, generally, GJ Naldi 'Interim measures in the Human Rights Committee' (2004) 53 *International and Comparative Law Quarterly* 445. The practice of the Commission is inconclusive, refraining from a definitive answer. See generally GJ Naldi 'Interim measures of protection in the practice of the African Commission on Human and Peoples' Rights' (2002) 2 *African Journal of Human Rights* 1.

150 Rule 61(5) states that 'judgments' have a legally binding effect on the parties.

151 *African Commission on Human and Peoples' Rights v Libya* (n 13 above) para 25; *African Commission on Human and Peoples' Rights v Libya* (n 74 above) para 20.

152 *International Pen & Others (on behalf of Saro-Wiwa)* (2000) AHRLR 212 (ACHPR 1998). See further Naldi 'Interim measures in the practice of the African Commission' (n 149 above) 6-8.

4.4 Preliminary objections

The important subject of preliminary objections to the Court's jurisdiction, absent as such from the Protocol,[153] is governed by Rule of Court 52.[154] Preliminary objections may take many forms and it would be invidious to attempt a definition, which the Rule prudently avoids. A preliminary objection is admissible only when proceedings are begun through an application,[155] and must be raised by the objector before it files its first set of pleadings.[156] As a rule, objections will not operate so as to suspend the proceedings on the merits.[157] Objections may be decided upon separately by the Court in what would be a preliminary judgment, or the issue may be joined to the merits.[158] The Court's practice to date follows the latter route.[159] The Court's rulings on preliminary objections must be reasoned.[160] The fact that under Rule of Court 39(1), the Court must at the outset satisfy itself that it has jurisdiction and that the application is admissible, would suggest that the party entering an objection has to make a compelling case to convince the Court.

That preliminary objections to advisory proceedings are permissible is implied by virtue of the fact that Rule of Court 72 assimilates the advisory procedure to contentious procedure. Furthermore, it is an accepted practice for states to raise objections to the advisory jurisdiction of the ICJ in specific instances.[161]

4.5 Execution of judgments

According to article 30 of the Protocol, state parties to a case must not only comply with the judgment within the time stipulated by the Court, but must also guarantee its execution.[162] Rule of Court 61(5) makes it emphatically clear that the Court's judgments are binding on the parties, a fundamental point that was not expressly spelt out in the parent Protocol. As is true with other international judicial entities,

153 Although art 3(2) of the Protocol would appear to envisage this procedure by envisaging challenges to the Court's jurisdiction.

154 See *Michelot Yogogombaye v Senegal* (n 6 above) para 38. Compare art 79 of the ICJ Rules; art 36 of the Inter-American Court Rules.

155 Rule of Court 52(1).

156 Rule of Court 52(2).

157 Rule of Court 52(3). Compare art 36(3) of the Inter-American Court Rules.

158 Rule of Court 52(3). Compare art 36(6) of the Inter-American Court Rules.

159 See, eg, *Michelot Yogogombaye v Senegal* (n 6 above) para 12; *Mtikila v Tanzania* (n 6 above) paras 79-88.

160 Rule of Court 52(7); *Mtikila v Tanzania* (n 6 above) paras 79-88.

161 Eg, Spain in the *Western Sahara* case (Advisory Opinion) [1975] ICJ Reports 14; Israel in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case *(Advisory Opinion)* [2004] ICJ Reports 136. See European Court Rules 84(2) and 86 which give contracting parties the right to make written and oral submissions to the European Court. See also art 62(3) of the Inter-American Court Rules in accordance with which 'any interested party' may be authorised or invited to submit a written opinion.

162 Compare art 94(1) of the UN Charter, art 68(1) of the American Convention and art 46 of the European Convention.

the Court itself has no power to enforce its judgments. The wording of article 46(4) of the Protocol leaves no doubt that, should a party fail to comply with a judgment, the Court must refer it to the Assembly for a decision. The actual task of monitoring the execution of the judgments is delegated to the Executive Council.[163]

4.6 Intervention

Article 5(2) of the Protocol allows a state party which has an interest in a case to request the Court to join, effectively, to intervene. Worthy of note is that this provision simply requires third parties to demonstrate an *interest*, rather than the usual *legal* interest,[164] but it is not apparent whether this heralds a more relaxed requirement. However, Rule of Court 53(2)(a) reverts to the traditional position by inserting the adjective 'legal'. There is no guidance as to what the nature of the 'legal interest' might be and what degree of interest would be required, but the Court could choose to be guided by the practice of other tribunals.[165] For example, ICJ practice under article 62 of its Statute demonstrates that it has applied a very strict policy in this area,[166] and under article 63, in instances where the interpretation of a treaty is at issue, any other party to it may seek to claim such a right.[167] Whether such a situation would provide sufficient grounds remains to be seen. Third parties must additionally state the precise object of the intervention and the basis of jurisdiction that exist between them and the parties to the case.[168] This is contrary to the recent practice of the ICJ where a 'jurisdictional link' by the intervening party is not required.[169] The decision whether to grant a request for intervention naturally rests with the Court; in effect, the views of the applicant or the parties to the case cannot bind the Court in respect of this issue.[170]

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163 Rule of Court 64(2).

164 Compare art 62 of the ICJ Statute.

165 Under art 36(2) of the European Convention intervention is permissible in cases where a national of a contracting party is an applicant, or must be in the interest of the proper administration of justice. See further Harris *et al* (n 37 above) 853-856.

166 See C Chinkin 'Third party intervention before the International Court of Justice' (1986) 80 *American Journal of International Law* 495. Art 81(2)(a) of the ICJ Rules requires the intervening state to set out the interest of a legal nature that will be affected; and see *Indonesia/Malaysia (Philippines Intervening)* [2001] ICJ Reports 575, where the ICJ explained the meaning of an 'interest of a legal nature'. For the factors that will persuade the ICJ to accept a request for intervention, see *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Nicaragua Intervening)* [1990] ICJ Reports 92.

167 *SS Wimbledon (Poland intervener)* PCIJ Rep Ser A No 1 12.

168 Rule of Court 53(2)(b) & (c).

169 *Land and Maritime Boundary (Cameroon v Nigeria) (Equatorial Guinea Intervening)* [1999] ICJ Reports 1029. See Shaw (n 106 above) 1099-1100.

170 *Continental Shelf* (*Tunisia v Libya*) (*Malta Intervening)* [1981] ICJ Reports 3. The state seeking to intervene has the burden of proof; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Nicaragua Intervening)* [1990] ICJ Reports 92 117.

4.7 Non-appearance

The Protocol is silent on the problem of non-appearing parties, but this issue is addressed by Rule of Court 55. The Court is thereby authorised to proceed with the case and give its judgment at the request of the other party.[171] However, the Court must first satisfy itself that it has jurisdiction, that the claim is well founded in fact and in law, that the case is admissible and that due notice was given to the defaulting party. Since Rule 55 has similarities with article 53 of the ICJ Statute,[172] it remains to be seen whether the Court will follow the ICJ's practice in considering legal arguments that the absent party might have submitted in support of its case had it chosen to appear.[173]

4.8 Reparations

The Court is empowered by virtue of article 27(1) of the Protocol to make appropriate orders aimed at remedying a violation of human rights, including the payment of fair compensation or reparation to the victims.[174] Rule of Court 34(5) requires applicants to submit a request for reparation in the application commencing proceedings and allows them to submit a request for the amount of the reparation. The Court will rule on the request for reparation either in the judgment or in a separate decision.[175]

What exactly constitutes 'fair compensation' or 'reparation' remains undefined,[176] but this situation seems sensible in order to give the Court sufficient flexibility to order suitable remedies. Awards of a pecuniary nature are clearly envisaged because of the use of the noun 'amount' in Rule of Court 34(5) and by definition 'fair compensation' must include awards of a pecuniary nature,[177] but it should be emphasised that these are only options. The concept of 'reparation' seems broad enough to encompass restitution in kind, which could be covered by and implied in the general wording of the provisions and

171 In a human rights system, the American example might seem preferable. See art 27(1) of the Inter-American Court Rules whereby the Court shall, *proprio motu*, take whatever measures are necessary to complete consideration of the case.

172 See, generally, Rosenne (n 127 above) 95-96.

173 See, eg, *US Diplomatic and Consular Staff in Tehran* case (*United States of America v Iran*) [1980] ICJ Reports 3; *Fisheries Jurisdiction* cases [1974] ICJ Reports 3.

174 On how the African Commission has handled the issue of reparations, see G Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 681.

175 Rule of Court 63. See *Mtikila v Tanzania* (n 6 above) para 126(4).

176 However, see UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/147 (2005). The African Commission has often required the payment of 'adequate compensation'. See, eg, *Egyptian Initiative for Personal Rights and Interights v Egypt I* (2011) AHRLR 42 (ACHPR 2011).

177 Monetary compensation was awarded in *Egyptian Initiative for Personal Rights and Interights v Egypt II* (2000) AHRLR 72 (ACHPR 1995).

could even extend to ordering consequential measures requiring states to take certain positive steps.[178] The practice of the Inter-American Court on reparations, which provides ample examples of the extensive nature and forms that remedies could take, should guide the Court accordingly.[179]

4.9 Out-of-court and amicable settlement

Rule of Court 56 caters for the possibility of the parties settling their dispute amicably out of court.[180] The agreement to settle in this instance must be mutual.[181] A settlement may be reached at any time before the Court renders judgment. The Court will then deliver a judgment limited to a brief statement of the facts and the solution adopted.[182] Notwithstanding such an agreement, the Court may decide to proceed with the case.[183] Although the rationale for doing so is not explained, it is likely to be for reasons regarding the good administration of justice or for upholding human rights.[184]

Both article 9 of the Protocol and the Rules of Court envisage a proactive role, which is discretionary, for the Court in helping to reach amicable or friendly settlements.[185] It may therefore contact the parties and take suitable measures to facilitate an amicable settlement based on respect for human and peoples' rights.[186] Other procedural issues are identical in every material respect to those described in the previous paragraph.

The applicant can discontinue a case by informing the Registrar to that effect.[187] However, the respondent's consent to discontinue is

178 According to the UN Basic Principles on the Right to a Remedy, reparation includes restitution, rehabilitation and satisfaction. It is interesting to note that the African Commission has adopted a similar practice of issuing 'recommendations' to states in its communications. See, eg, *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

179 The Inter-American Court has interpreted its mandate under art 63(1) of the American Convention expansively. In a series of cases, the Inter-American Court has ordered a diverse range of measures. See Pasqualucci (n 23 above) 230-290. For a critical account, see D Shelton 'Reparations in the Inter-American system' in DJ Harris & S Livingstone *The Inter-American system of human rights* (1998) 151.

180 Compare art 88 of the ICJ Rules; art 53 Inter-American Court Rules; art 39 of the European Convention.

181 See art 88(1) of the ICJ Rules which allows for discontinuance either jointly or separately. See Rosenne (n 127 above) 150.

182 Rule of Court 56(2). Compare art 39(3) of the European Convention.

183 Rule of Court 56(3). Compare art 54 of the Inter-American Court Rules.

184 By analogy with Rule of Court 57(1). Compare also art 54 of the Inter-American Court Rules; art 37(1) of the European Convention.

185 Rules of Court 26(1)(c) & 57. It should be observed that the African Commission already performs this function pursuant to art 52 of the African Charter and Rule of Commission 97. Such a procedure can be found in the European system; art 38(1)(b) of the European Convention and European Court Rule 62, whereas art 48(1)(f) of the American Convention entrusts this role to the Inter-American Commission on Human Rights.

186 Rule of Court 57(1).

187 Rule of Court 58. Compare art 89(1) of the ICJ Rules; art 52 of the Inter-American Court Rules; art 37 of the European Convention.

required if it has already taken measures to proceed with the case.[188] Unlike the European Court, the African Court is not explicitly empowered to strike out cases from its list at any stage of the proceedings.[189] No provision is made for restoring a case to the Court's list, even if circumstances appear to so dictate.[190]

4.10 Interpretation

Article 28(4) of the Protocol states without further elaboration that the Court may interpret its own decisions. This simple instruction is supplemented by the Rules of Court. Under Rule 66(1), the Court is competent to interpret a judgment on application by any party.[191] Significantly, the Court's power in this regard is narrow, limited 'for the purpose of *executing a judgment*.[192] The rationale seems to be in order 'to prevent a new dispute being submitted to the Court in the guise of a request to interpret an earlier judgment'.[193] A deadline of 12 months from the date of judgment is set unless the interests of justice dictate otherwise.[194]

It is interesting to note that, while the Protocol refers to 'decisions', the corresponding Rule of Court employs the noun 'judgment'. It should not be assumed that the two terms are identical,[195] but it is not clear whether the use of the different nouns is supposed to make a substantive procedural distinction.

4.11 Revision of decisions

Pursuant to article 28(3) of the Protocol, the Court has the capacity to review its decisions at the request of a party in the light of new evidence.[196] According to Rule of Court 67(1), the new evidence must not have been known at the time to the party. Unlike the ICJ

188 Compare art 89(2) of the ICJ Rules. According to Rosenne (n 127 above) 150, the reason for obtaining the respondent's consent is in case it has submitted a counterclaim which it wishes to see decided by the Court.

189 Art 37(1) of the European Convention. See Harris *et al* (n 37 above) 833-835.

190 Compare art 37(2) of the European Convention.

191 See art 60 of the ICJ Statute; art 67 of the American Convention and European Court Rule 79. According to the Inter-American Court, the purpose of this procedure involves 'not only precisely defining the text of the operative parts of the judgment, but also specifying its scope, meaning and purpose, based on the considerations of the judgment'; *Velasquez Rodriguez v Honduras (Interpretation of the Compensatory Damages)* [1990] (Ser C) No 9 para 26.

192 An application for interpretation does not stay the execution of a judgment unless the Court decides otherwise; Rule of Court 66(5) (my emphasis).

193 Rosenne (n 127 above) 151. Rosenne was writing on the ICJ but his comment is equally valid with regard to the African Court.

194 European Court Rule 79(1) also sets a deadline of one year, but art 67 of the Inter-American Court Rules is stricter: only 90 days.

195 Hudson (n 8 above) 583-584. See also *Alexandre v Cameroon and Nigeria* (n 74 above) dissenting opinion of Judge Ouguergouz, paras 3-4.

196 See European Court Rule 80 which refers to 'a fact'. An application for revision does not stay the execution of a judgment unless the Court decides otherwise; Rule of Court 67(5).

Statute, there is no explicit requirement that the new facts should have played a decisive factor in the case.[197] A limitation period of no more than six months of the new facts' discovery is imposed.

It should be observed once more that the Protocol refers to 'decisions', while the corresponding Rule refers to 'judgment'.

5 Advisory opinions

The advisory procedure of the Court is governed by Part V of the Rules of Court and, with the necessary adjustments, corresponds to the contentious procedure.[198] According to article 4(1) of the Protocol and Rule of Court 68(1), advisory opinions can be sought by a member state,[199] the AU,[200] or any African organisation recognised by the AU. Whether 'organisation' extends to NGOs remains to be decided, although they have submitted applications to the Court which are pending.[201] They must concern any legal matter relating to the African Charter or other relevant human rights instruments,[202] but must not relate to an application pending before the African Commission.[203] The Court therefore declined a request for an opinion in Pan-African Lawyers' Union and Southern African Litigation Centre on this ground. In view of the fact that the advisory jurisdiction is discretionary, no indication is given as to what circumstances may induce the Court to decline to exercise this jurisdiction. The ICJ is of the view that it may do so for 'compelling reasons'.[204] The jurisprudence of the Inter-American Court suggests that a request for an advisory jurisdiction may be rejected in circumstances where the Court's contentious jurisdiction may be undermined, where the protective system would be impaired or where the question is wholly academic, amongst others.[205] It may be considered prudent to leave such matters to the discretion of the Court.

197 Compare art 61 of the ICJ Statute.

198 Rule of Court 72.

199 It is curious that a state need not be a party to the Protocol. In May 2012 Mali submitted a request for an opinion, subsequently withdrawn; Request 001/2011 by the Republic of Mali (3 March 2013).

200 Or any of its organs, This extends to the African Commission, Rule of Commission 117.

201 See, eg, Request 002/2012 by Pan-African Lawyers' Union and Southern African Litigation Centre (15 March 2013).

202 Rules of Court 68(1) & (2).

203 Rule of Court 68(3).

204 *Legality of the Threat or Use of Nuclear Weapons Case (Advisory Opinion)* [1996] ICJ Reports 226 235.

205 See, eg,*'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art 64 of the American Convention on Human Rights) (Advisory Opinion)* [1982] (Ser A) No 1; *Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights) (Advisory Opinion)* [1987] (Ser A) No 9.

The Rules of Court make it clear that advisory proceedings consist of written[206] and, if necessary, oral stages.[207] Rule of Court 70(2) allows any other state party to enter written submissions on any of the issues raised in the request for an opinion. The same holds true for any other 'interested entity' authorised by the Court. Such entities would appear to be entities such as AU organs and African organisations recognised by the AU, as mentioned in article 4(1) of the Protocol and Rule 68(1). However, it is interesting to observe that the Inter-American Court permits NGOs and individuals to submit briefs in advisory proceedings,[208] and it is submitted that in the interests of justice the Court should be prepared to accept such persons as 'interested entities'.

Opinions must be read in open court unless circumstances dictate otherwise, so that an opinion may be delivered in closed session.[209] It is to be hoped that in the latter situation the opinion is published and made public in due course in keeping with basic notions of justice, openness and transparency. On the other hand, on those occasions when secrecy may be considered necessary, it is to be hoped that this will be the case only for the most compelling reasons. Regrettably, the Rules are silent as to whether a 'secret opinion' could be made public at some future stage or whether it would remain 'secret' in perpetuity, or which body would be entitled ultimately to take a decision on if and whether the opinion is made public

6 Conclusion

On the whole, the Rules of Court complement the Protocol in a satisfactory manner. They cannot be said to have any radical features that distinguish them from those of other regional human rights systems. This is not to say that the Rules, including the Rules of the African Commission, are perfect. The wording sometimes lacks clarity, there are gaps and omissions, and they sometimes make ambiguous provisions of the Protocol no clearer, but these are minor criticisms that will no doubt be addressed by the Court in its practice directions or guidelines[210] or, indeed, its jurisprudence. In fact, the Court has already embarked on this route, stating that it has inherent powers in the interests of justice to fill *lacunae* in the Rules.[211] Of course, in light

206 Rule of Court 70.

207 Rule of Court 71.

208 Art 62(3) of the Inter-American Court Rules. See Pasqualucci (n 23 above) 74-75.

209 Rule of Court 73(1). This is a manifest difference with the ICJ and other regional human rights systems. Compare Art 67 of the ICJ Statute; art 24(3) of the Inter-American Court Statute.

210 Rule of Court 19.

211 *In the Matter of the African Commission on Human and Peoples' Rights v Libyan People's Arab Jamahiriya (Order)* App 004/2011 (16 June 2011) paras 8-9, relating to the extension of time limits for the submission of names and addresses of representatives, and *In the Matter of the African Commission on Human and Peoples'*

of experience, the Court may decide at some future stage that the Rules require amending.[212] At the same time, it should also be observed that the Court's jurisprudence is raising questions of its own.

Rights v Libyan People's Arab Jamahiriya (Order) App 004/2011 (2 September 2011) paras 12-13, relating to the setting and extending of time limits for the submission of pleadings.

212 See Rule of Court 74.

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The influence of Roman laws regarding same-sex acts on homophobia in Africa

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Summary

In recent years there has been a surge of homophobia across Africa. Among the arguments of this discourse against homosexuality is that homosexuality is a pattern of behaviour, not an orientation, that such behaviour is an import from the West and, as such, unAfrican. Paradoxically, this discourse also argues that homosexuality is against religion, where the religion referred to is Christianity, another Western import. However, one of the most dangerous manifestations of homophobia has been attempts not just to socially condemn, but to legally prosecute homosexual acts. Such legal persecution, especially in some of the former British colonies of sub-Saharan Africa, has been possible due to the presence within their penal codes of laws against 'unnatural' sexual acts. Many commentators have noted that these laws are themselves a remnant of colonial occupation and as such do not communicate African values. Nevertheless, they are being used to help justify homophobia in Africa. However, these commentators have not fully realised the implications of the origin of the laws on unnatural sexual acts. These laws can be traced back not just to Britain, but to the first codified laws regulating same-sex acts in the West, namely, the laws of the ancient Romans. This study examines Roman laws on same-sex acts and the consequent establishment of a legal concept of sexuality. It then illustrates

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how, due to the influence of these laws on the formulation of Victorian laws on unnatural acts, the Roman legal concept of sexuality underlies the laws which exist in many former British colonies. It also briefly outlines the effect of these laws on present-day sub-Saharan Africa. Perhaps understanding the ancient, alien socio-historical context of the legal concept of sexuality behind the Roman laws may assist in subverting the law argument of the African homophobic discourse.

Key words: *homophobia; homosexuality; sub-Saharan Africa; Roman laws; ancient Roman sexuality*

1 Introduction

In 2010, two Malawians, Steven Monjeza and Tiwonge Chimbalanga, classified as men by the Malawian legal system, were sentenced to 14 years in prison with hard labour for conducting a traditional engagement ceremony.[1] This example of homophobia[2] is just one from a growing trend in recent years, where the prospect of the law being used to persecute homosexuals in parts of sub-Saharan Africa is becoming an increasing threat.[3] The West's reaction to the judgment

1 M Epprecht 'The politics of gay-bashing' 28 June 2010 http://www.dandc.eu/articles/ 175882/index.en.shtml (accessed 16 February 2012). They were later pardoned by the President, Bingu wa Mutharika, but in doing so he also said that '[t]hese boys committed a crime against our culture, our religion and our laws'. M Gevisser 'Homosexuality and the battle for Africa's soul' 4 June 2010 http://www.mg.co.za/article/2010-06-04-homosexuality-and-the-battle-for-africas-soul (accessed 8 August 2013).

2 While Chimbalanga self-identifies as female and therefore this couple cannot technically be called homosexual, Chimbalanga was identified as male by Malawian society and the courts and so this can still be counted as a display of homophobia. Gevisser (n 1 above).

3 In 2009, a Ugandan MP, David Bahati, proposed a Bill that would allow for harsher punishments to be imposed on those successfully prosecuted for homosexual acts under the existing laws on 'unnatural acts'. These punishments included the death penalty for 'repeat offenders'. J Mmali 'Uganda fear over gay death penalty plans' 22 December 2009 http://news.bbc.co.uk/2/hi/africa/8412962.stm (accessed 22 March 2012). A watered-down version of this Bill was signed into law in 2014, but it still allowed for life imprisonment for 'aggravated homosexuality' and 'promotion' of homosexuality. A Cowell 'Uganda's President signs antigay Bill' 24 February 2014 http://www.nytimes.com/2014/02/25/world/africa/ugandan-president-to-sign-antigay-law.html?_r=0 (accessed 17 June 2014). The law has since been invalidated by the Ugandan Constitutional Court. However, this was on technical grounds and the law may yet be reintroduced in parliament. D Smith 'Uganda anti-gay law declared "null and void" by constitutional court' 1 August 2014 http://www.theguardian.com/world/2014/aug/01/uganda-anti-gay-law-null-and-void (accessed 21 September 2014). In 2009, the Rwandan government was forced to put out a statement saying that they would not be interfering in the private lives of citizens, after fears arose that they too were planning anti-gay legislation. Gevisser (n 1 above). However, other former British colonies in Africa, Nigeria and The Gambia, have followed Uganda's lead and imposed similar, harsher laws against homosexuality. A Nossiter 'Nigeria

and similar legal manoeuvres in Africa has been outrage.[4] The legal persecution of homosexuals conjures images of racism and gender discrimination.[5] European countries and the United States (US) have threatened to withhold aid to African countries not supporting gay rights.[6] However, this stance could be considered to be hypocritical.[7] Homosexuality and most of the main justifications for homophobia in sub-Saharan Africa, namely, Christian morality[8] and the laws, are actually imports brought in centuries before by the colonial Western powers.[9] The most systematic, pervasive and firmly-established colonial laws against same-sex acts were imposed by the British and can be found as remnants in the penal codes of many of their former

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tries to "sanitize" Itself of gays' 8 February 2014 http://www.nytimes.com/2014/02/09/world/africa/nigeria-uses-law-and-whip-to-sanitize-gays.html (accessed 17 June 2014); E Margolin 'Another African nation to enact anti-gay law' 10 September 2014 http://www.msnbc.com/msnbc/gambia-anti-gay-law (accessed 19 September 2014).

4 In response to Uganda's proposed Bill against homosexual acts, Sweden threatened to withhold aid in 2009; Mmali (n 3 above). Barack Obama criticised the Bill in 2010. P Fihlani 'Religion, politics and Africa's homophobia' 23 February 2010 http://news.bbc.co.uk/2/hi/8528409.stm (accessed 16 February 2012). In 2011, David Cameron also threatened to withhold aid to Uganda similarly to the US policy announced by Hilary Clinton that they would 'tie US foreign aid to a country's record on gay rights'. N Abraham 'Religious leaders battle African homophobia' 22 December 2011 http://www.salon.com/2011/12/22/religious_leaders_battle_african_ homophobia/ (accessed 16 February 2012). UN Secretary-General Ban Ki-Moon also spoke against legalised homophobia in Africa in 2012. N Broverman 'UN Secretary-General calls out African homophobia' 29 January 2012 http://www.advocate.com/news/daily-news/2012/01/29/un-secretary-general-calls-out-african-homophobia (accessed 2 August 2013). When the Ugandan anti-gay Bill was signed into law, several European countries threatened to review, withhold or divert aid. The US suggested that the Bill would complicate their relationship with Uganda and decided to review their aid policy, and the UK questioned the Bill's compatibility with Uganda's own Constitution. E Biryabarema 'Ugandan President signs anti-gay Bill, defying the West' 24 February 2014 http://www.reuters.com/article/2014/02/24/us-uganda-gaybill-idUSBREA1N05S201402 24 (accessed 17 June 2014). In 2014, after the signing of the Nigerian anti-gay Bill into law, the then UN High Commissioner for Human Rights, Navi Pillay, said in a statement that the new laws directly violated 'basic, universal human rights'. Nossiter (n 3 above).

5 See M Epprecht *Hungochani. The history of a dissident sexuality in Southern Africa* (2004) 6.

6 See n 4 above. See also Epprecht (n 1 above).

7 It is also causing concern with LGBTI and other human rights groups in Africa who, while condemning the strengthening of laws against homosexuality, feel that the reaction of the West is aggravating the anti-colonial stance of African leaders. See Abraham (n 4 above). See also T Msibi 'The lies we have been told. On (homo) sexuality in Africa' (2011) 58 *Africa Today* 72.

8 Islam, the other prominent religion in Africa (also an import), especially in North and parts of West and East Africa, also condemns homosexuality. See Nossiter (n 3 above) on the effect of the interaction between Nigeria's harsher new laws against homosexuality and Islamic law on homosexuality.

9 Epprecht (n 5 above) 152-183 suggests that the third common justification for homophobia in Africa, namely that homosexuality is unAfrican, also seems to come from the West. He argues that the concept is the result of the internalisation of Western, colonial ideas about Africans, gender identity and sexual practices.

colonies.[10] Even though commentators have noted the colonial nature of these laws,[11] many Africans now call these conservative, Victorian forms of morality their own, and resent what they perceive as Western interference.[12] But this is not the end of the story. The origin of the laws used against same-sex acts is actually far older than British colonialism. They can be traced all the way to ancient Rome. Thus, the ancient, non-religious concept of sexuality, which lay beneath the Roman laws, is being used to justify homophobia and persecute homosexuals in a modern, African, Christian context. Perhaps creating an awareness of the older, alien underpinnings to the colonial laws will undermine the legal justification for homophobia in Africa, where other arguments have not, without being an imposition from the West.

10 Human Rights Watch *This alien legacy. The origins of 'sodomy' laws in British colonialism* (2008) 10. Dutch settlers brought Roman-Dutch law to the Cape settlement in South Africa, which also included provisions against same-sex acts. Human Rights Watch and the International Gay and Lesbian Human Rights Commission *More than a name. State-sponsored homophobia and its consequences in Southern Africa* (2003) 257 262-265. The British South Africa Company, operating out of South Africa, came to settle and occupy several colonies, such as Zimbabwe, Zambia and Botswana, and brought the Roman-Dutch law with them. (Namibia came under the purview of Roman-Dutch law when the colony was passed from German to South African control in 1920.) However, all of these colonies, including South Africa, eventually came under British rule. In some cases, the colonial British penal code was introduced, and in others Roman-Dutch laws were interpreted according to the concepts underlying the colonial British penal code. Human Rights Watch and the International Gay and Lesbian Human Rights Commission (above) 265-274. See Human Rights Watch (above) for a full discussion of the history of sodomy laws in British colonies. For a history of the Roman-Dutch sodomy laws and their interaction with the colonial British penal code, see Human Rights Watch and the International Gay and Lesbian Human Rights Commission (above) 258-274. (The influence of French, German and Portuguese laws against same-sex acts on their former colonies is minimal, with the possible exception of Francophone states Cameroon and Senegal. Human Rights Watch (above) 6-7; F Viljoen 'Equal rights in a time of homophobia. An argument for equal legal protection of "sexual minorities" in Africa' 12 June 2013 11th University of Pretoria Expert Lecture http://www1.chr.up.ac.za/ images/files/ research/researchers/Frans%20expert%20lecture-HomosexualityWeb%20ver sion.pdf (accessed 26 September 2014) 22-23.

11 Eg Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 7 256; Epprecht (n 5 above) 7; Human Rights Watch (n 10 above) 10; AS Leonard 'A spurious defence of sodomy laws in the former British colonies' 15 March 2009 http://newyorklawschool.typepad.com/leonard link/2009/03/a-spurious-defense-of-sodomy-laws-in-the-former-british-colonies. html (accessed 8 March 2012); F Cowell 'Colonial sodomy. Homophobic threat within common law' 14 July 2010 http://www.consultancyafrica.com/ index.php? option=com_content&view=article&id=472:colonial-sodomy-homophobic-threat-within-common-law&catid=91:rights-in-focus&Itemid=296 (accessed 16 February 2012); Msibi (n 7 above) 69.

12 See Epprecht (n 5 above) 180-181 184-185; Human Rights Watch (n 10 above) 10.

2 Perception of 'homosexuality' in Africa

In order to understand how and why the law is being deployed by the homophobic discourse in parts of sub-Saharan Africa, it is necessary to know the nature, and to be aware of the context, of this discourse. First, it is important to realise that homosexuality does not have a uniform or concrete meaning. Homosexuality is a fairly modern term. It was coined in the nineteenth century as part of the growing European field of medical and psychological studies to identify people, mostly men, whose erotic attraction to others of the same sex[13] was believed to constitute an innate perversion, or pathology.[14] This was a radical change from the previous conceptualisation of sex between men as sodomy, which was seen as a 'temporary aberration',[15] not a life-long orientation. As Foucault points out, once provided with an identity and a terminology, 'homosexuality began to speak in its own behalf'.[16] Certain men, and later women, used the discourse of homosexuality to justify a valid identity and existence for themselves. The term 'gay', and the language surrounding it, began to be used in the US as part of the counterculture movements of the 1960s and rights struggles of the 1970s, such as those against racism and sexism, as a means of claiming the identity of homosexuality and recasting it in an affirming light.[17] Consequently, for many in the Western world homosexuality, or the more popular adjective 'gay', has come to refer to an intrinsic sexual orientation in a person towards one of their own sex.[18]

The idea of homosexuality as an inborn, life-long orientation is very much a product of the West,[19] and it has been transported to Africa mainly through the Western media and aid organisations.[20] While several African communities do have identities for men who do not conform to the Western hetero-normative model, no African culture has ever had a concept of sexual orientation.[21] The response to such a concept has been multifaceted. Some have accepted it and, where

13 E Cameron 'Sexual orientation and the Constitution. A test case for human rights' (1993) 110 *South African Law Journal* 452.

14 M Foucault *The history of sexuality, vol 1. The will to knowledge* trans R Hurley (1978) 43.

15 As above.

16 Foucault (n 14 above) 101.

17 CF Stychin 'Being gay' (2005) 40 *Government and Opposition* 92-93.

18 The terms 'homosexuality' and 'gay' are usually used to refer to males.

19 Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 7-8.

20 Gevisser (n 1 above). See N Hoad *African intimacies. Race, homosexuality, and globalisation* (2007) 69, who notes that the threat of homosexuality in the eyes of the African homophobic discourse is embedded in Western non-governmental organisations.

21 Msibi (n 7 above) 64-65 points out that traditional sexual identities in Africa were predominately based on reproduction and gender roles, with men who played the passive part in same-sex acts sometimes identified as women. He highlights studies that show the gender and sexual identities of some traditional cultures

appropriate, taken on homosexuality as an identity.[22] However, many Africans cannot, or choose not to, comprehend the concept of a biological sexual orientation.[23] Some have seen same-sex acts and those who commit them as simply being re-identified with new, foreign-language terms. A homosexual is therefore a person who commits same-sex acts, not a person with an orientation.[24] Others understand the concept of an orientation but refuse to believe it, just as the conservative sexual discourse still does in Western countries. David Bahati, the anti-gay Ugandan Member of Parliament (MP), said that '[i]t's not an inborn orientation, it's a behaviour learnt - and it can be unlearnt'.[25] This refusal to accept a homosexual identity and instead to place emphasis on the behaviour of people means that many Africans believe that same-sex acts are a matter of conscious choice:[26] Human beings are considered able to choose what behaviour to enact, therefore either those who commit same-sex acts are misguided and can be stopped through counselling,[27] or they are wilfully committing the acts and must be stopped through punishment.[28]

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21 from Nigeria, Uganda, Malawi, Senegal and the Zande people of South-Western Sudan, the Central African Republic, and the North-Eastern Congo which included, or accepted, same-sex desire; Msibi (n 7 above) 65-68. Epprecht (n 5 above) 35 69-71 257 n 39 notes acceptance of same-sex practices among the Shona, Shangaan, Zulu and Ndebele of Southern Africa.

22 Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 8. However, Human Rights Watch and the International Gay and Lesbian Human Rights Commission also point out that Africans who take on the identity of homosexual do so in an African context and imbue the term with their own cultural understandings of difference, often based on gender.

23 Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 7. See also K Cheney 'Locating neocolonialism, "tradition", and human rights in Uganda's "gay death penalty"' (2012) 55 *African Studies Review* 81.

24 In fact, the men and women who practise same-sex acts themselves often do not self-identify as homosexual. Scholars, rights groups and journalists have appropriated the identity-free terms MSM ('men who have sex with men') and WSW ('women who have sex with women') from HIV literature to try and identify, research, aid and discuss those who do not identify as homosexual. RM Young & IH Meyer 'The trouble with "MSM" and "WSW". Erasure of the sexual-minority person in public health discourse' (2005) 95 *American Journal of Public Health* 1144. See Young & Meyer (above) for the complexities of the issue.

25 Mmali (n 3 above).

26 Sec 1 of the Anti-Homosexuality Act, 2014 from Uganda specifically defines homosexual as 'a person who engages or attempts to engage in same-gender sexual activity'.

27 David Bahati has encouraged churches and mosques to undertake such counselling. Mmali (n 3 above).

28 Although a Ministry of Health report Scientific Evidence on Homosexuality of 23 February 2014 11, commissioned by Ugandan President Yoweri Museveni on whether or not homosexuality is inborn, came to equivocal conclusions, such as '[n]ature (genes) and nurture (environment) interact to yield homosexuality. However, nurture appears to play a greater role ...'; '[h]omosexuality is not an anomaly or abnormality' and '[n]o single gene for homosexuality is known to date'. The President took the statement '[n]o single gene for homosexuality is known' to be unequivocal evidence that homosexuality is a learnt behaviour and

3 Factors contributing to homophobia in Africa

Considering that there is no evidence to suggest that, before colonialism, African cultures systematically condemned and prosecuted same-sex acts or those with an alternative gender identity,[29] the recent surge of homophobia across sub-Saharan Africa[30] could be seen as surprising. Homophobia, a term coined from the word 'homosexual', refers generally to prejudice against same-sex acts and the people who practise them. This prejudice manifests itself in Africa as 'exclusions, taunting, name-calling and discrimination' as well as 'murder',[31] perpetrated not just by individuals but, in some countries, by the media, the state, religious leaders, and group demonstrations and violence.[32] Scholars have suggested several factors that they believe are the main driving forces behind this phenomenon. Both Human Rights Watch with the International Gay and Lesbian Human Rights Commission and Epprecht attribute growing homophobia in Southern Africa to polarising rhetoric by some African leaders who are attempting to provide a bulwark to their regimes in the face of the seemingly insurmountable HIV epidemic, economic decline and socio-political inequalities brought about by incomplete democratisation in former European colonies. Condemnation and vilification of homosexuality provides these African leaders with a scapegoat for all society's problems.[33] This rhetoric resonates with people experiencing poverty, and a

used this as his argument for deciding to sign the anti-gay Bill into law. Department of Press and Public Relations, Republic of Uganda, Press Release 'President to sign anti-gay Bill after experts prove there is no connection between biology and being gay' 15 February 2014.

29 See n 21 above.

30 Almost every region of Africa has been affected by homophobia. The start of a recent wave was signalled by an incident at the International Book Fair in Zimbabwe in 1995 and has been followed over the years by homophobic rhetoric by African political and religious leaders, vitriolic anti-gay media reports, arrests, harassment or anti-gay protests in, amongst others, countries in Southern Africa (Zambia, Namibia, Swaziland, South Africa, Malawi), East Africa (Uganda, Kenya), West Africa (Nigeria, Senegal) and North Africa (Egypt). V Reddy 'Homophobia, human rights and gay and lesbian equality in Africa' (2001) 50 *Agenda* 83-85; Gevisser (n 1 above); Fihlani (n 4 above); Abraham (n 4 above); C Mdletshe 'Gays are rotten, says Zulu king' 23 January 2012 http://www.timeslive.co.za/local/2012/01/23/gays-are-rotten-says-zulu-king (accessed 23 September 2014); Nossiter (n 3 above).

31 K Naidoo & M Karels 'Hate crimes against black lesbian South Africans. Where race, sexual orientation and gender collide, part 1' (2012) 33 *Obiter* 254. They are specifically referring to South Africa and therefore include 'corrective rape' in this list. Corrective rape is a peculiarly South African phenomenon where lesbians are raped and sometimes murdered in order to change their sexual behaviour, or to frighten other lesbians into changing theirs.

32 See n 30 above.

33 Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 3-9; Epprecht (n 5 above) 177-178. See also V Reddy 'Institutionalising sexuality. Theorising queer in post-apartheid South Africa' in D Constantine-Simms (ed) *The greatest taboo. Homosexuality in black communities*

breakdown in health and education systems.[34] Nigerian leaders have also used this rhetoric to unite Christians and Muslims in a common hatred, especially prior to elections.[35] Concomitantly, Tamale notes that, in Uganda, by tightly controlling same-sex acts and silencing the individuals and groups who practise them, the state sustains its power by preventing these individuals and groups from organising and fighting for their rights.[36]

Msibi suggests that homophobia is the result of attempts by Africans to try and redefine their identities in a modern world fuelled by Western culture.[37] African cultures, which are predominantly patriarchal, create an identity for men which expects them to be dominant in society and fulfil certain gender roles.[38] However, men, especially in urban centres, are finding themselves exposed to a contradictory world view based on gender equality. In addition, to prevent the spread of HIV, new modes of sexual and social interaction between people, mainly men and women, are being prioritised, both by African activists and Western aid agencies.[39] Women are being encouraged to take control of their sexual well-being and men are expected to respect a woman's physical integrity. The traditional means for males to self-identify are thus being threatened. Many men are responding by privileging 'traditional' gender roles. However, as Epprecht points out, 'traditional' gender roles are actually an internalisation of Western gender roles.[40] Nevertheless, these men are reacting with violence to any perceived deviations from the supposed norm. Gay men undermine the traditional dominant male role by choosing another means of self-identification, and lesbians seem to avoid male influence in their lives altogether.[41] This privileging of traditional, cultural gender roles means that many Africans, especially African leaders, are suggesting that same-sex desire is unAfrican,[42] and did not exist here until it was imported from the West.[43] This allows these African leaders to blame the West for their societies' ills,

(2000) 170 on Southern and East Africa. For a more detailed discussion, see Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 12-116; Epprecht (n 5 above) 152-183.

34 Epprecht (n 5 above) 183.

35 Viljoen (n 10 above) 15; personal commentary of B Wainaina 'We must free our imaginations, part 6. China will own us' 21 January 2014 http://www.youtube.com/watch?v=8FkDm6H6fS0 (accessed 26 September 2014).

36 S Tamale 'Out of the closet. Unveiling sexuality discourses in Uganda' (2003) 2 *Feminist Africa* http://agi.ac.za/sites/agi.ac.za/files/fa_2_standpoint_3.pdf (accessed 16 September 2014).

37 Msibi (n 7 above) 70. See also Gevisser (n 1 above); Epprecht (n 1 above).

38 Msibi (n 7 above) 64.

39 Hoad (n 20 above) 69; Epprecht (n 1 above).

40 Epprecht (n 5 above) 158-159. See also Tamale (n 36 above).

41 Reddy (n 33 above) 170; Msibi (n 7 above) 70. See Epprecht (n 5 above) 153-169 on causes of gender-based violence.

42 Paradoxically, Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 7 suggest that African leaders who are vilifying homosexuals are, by using the term, creating meaning for it as an African identity.

43 Epprecht (n 5 above) 180-181; Msibi (n 7 above) 62-63.

and makes their people hostile to Western calls for their leaders to support gay rights, as they believe the West is trying to encourage homosexuality, and thereby perverting and endangering African children.[44]

Paradoxically, Epprecht and Msibi point out that, while vilifying the West for introducing and encouraging same-sex desire on the continent, many Africans are also claiming that same-sex desire is against their religion.[45] Despite being a colonial import, the most popular religion in sub-Saharan Africa is Christianity. It is currently one of the main groups supporting homophobia. Evangelical church leaders from the US are visiting parts of Africa, such as Rwanda, Uganda and Kenya, and working together with local evangelists and, in some cases, African leaders themselves, are preaching an anti-gay message and conservative sexual values.[46] These US church leaders are followed by related church groups which are entering African countries as aid organisations and are using their platform of trying to prevent the spread of HIV through changing patterns of behaviour, to further advocate conservative Christian beliefs in respect of sex and relationships.[47] Evangelical Christians tend to hold the belief that there are no such people as homosexuals, only heterosexual people with a homosexual problem. In a radically-changing world, people tend to gravitate to fundamentalist religious movements that claim to have all the answers.[48] These movements also promise salvation to a select few and therefore create an 'us and them' mentality. Certain African leaders have incorporated this mind-set into their rhetoric about the protection of African culture and children from Western interference. 'Us' therefore often becomes independent, righteous, heterosexual Africans against an interfering, perverted, neo-colonialist, Western 'them',[49] even when 'them' is referring to fellow Africans and countrymen.[50] These sentiments all promote intolerance and as such they help to justify and intensify homophobic reactions in Africa.

Politics, adverse social circumstances, culture and religion are probably all contributing factors to homophobia in Africa to different

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44 Hoad (n 20 above) 69-71 on Southern Africa; Mmali (n 3 above) on Uganda. For further discussions of this issue, see both Epprecht (n 5 above) 180-181 184-185 and Hoad (n 20 above) 68-75 on Southern Africa; Cheney (n 23 above) 86-89 on Uganda.

45 Epprecht (n 1 above); Msibi (n 7 above) 68-69. See also Hoad (n 20 above) 76. Eg see Fihlani (n 4 above); Gevisser (n 1 above).

46 K Kaoma *Globalising the culture wars. US conservatives, African churches, and homophobia* (2009) 3-4 13 15; J Anderson 'Conservative Christianity, the global South and the battle over sexual orientation' (2011) 32 *Third World Quarterly* 1593-1597 1601-1602; Cheney (n 23 above) 82 84-85.

47 Kaoma (n 46 above) 9; Epprecht (n 1 above); Cheney (n 23 above) 82 85.

48 See Epprecht (n 1 above); personal commentary of B Wainaina 'We must free our imaginations, part 2. This ecstasy of madness' 21 January 2014 http://www.youtube.com/ watch?v=SQrln8pogNw (accessed 26 September 2014).

49 See Kaoma (n 46 above) 8; Anderson (n 46 above); Cheney (n 23 above) 82.

50 See Tamale (n 36 above) on her own experience; Kaoma (n 46 above) 14.

degrees, depending on the circumstances of individual countries,[51] but the main reason the judgment in Malawi occurred was because there were laws which made the prosecution of same-sex acts possible.[52] Britain imposed legislation on its African colonies to regulate what was considered to be immoral sexual behaviour. Although it changed its own laws concerning same-sex acts, most colonies had already achieved independence by this time and, as such, their systems of law either petrified or moved in a different direction without any influence from later reforms in Britain.[53] The laws Britain left behind are contributing to homophobia due to the concept of sexuality which underlies them. However, while the laws may be a remnant of colonial occupation, their origin and the concept of sexuality which underpins them can be traced back to ancient Rome.

4 Roman origins of the laws on same-sex acts

The first Roman law regulating sexuality that in any way impacted on same-sex relations seems to be the *Lex Scantinia*,[54] which was probably passed in the second or first century BC.[55] No text of this law survives, so evidence of its existence has come from other non-legal, literary sources.[56] Needless to say, the purpose of the authors who mentioned the law was not to define or explain its provisions. With such scanty evidence, the interpretations of modern scholars as to the exact provisions of the law have been widely divergent.[57] Earlier scholars have suggested in passing that the law banned all

51 In fact, Viljoen (n 10 above) 2 suggests that in light of the differing interactions between the many individual and societal factors which influence homophobia, it may be more appropriate to refer to 'homophobias'.

52 Until this incident, Malawi had never made use of its provisions against same-sex acts. Gevisser (n 1 above).

53 Human Rights Watch (n 10 above) 5-7. See also Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 258-261.

54 CA Williams *Roman homosexuality 2nd ed* (2010) 140.

55 E Cantarella *Bisexuality in the ancient world 2nd ed* trans C ÓCuilleanáin (2002) 110-111.

56 Politician and lawyer Cicero *Letters to friends* 8.12 14 seems to have been first to mention the law in a letter dating from 50 BC. Others include historian Suetonius *Life of Domitian* 8.3, satirist Juvenal 2.36-44, both writing in the late 1st to early 2nd century AD, the late 2nd to early 3rd century Christian writer, Tertullian *On monogamy* 12, and from the 4th century, poet Ausonius *Epigrams* 91 and Christian writer Prudentius *Crowns of martyrdom* 10.201-5. Other contemporary references to legislation in relation to male same-sex relations do not specifically mention the law. See J Boswell *Christianity, social tolerance, and homosexuality. Gay people in Western Europe from the beginning of the Christian era to the fourteenth century* (1980) 65-66; Cantarella (n 55 above) 107; Williams (n 54 above) 132-133.

57 For discussions of what contemporary sources may have been referring to the *Lex Scantinia* and how they may be interpreted, see Boswell (n 56 above) 65-69; S Lilja *Homosexuality in Republican and Augustan Rome* (1983) 112-121; D Dalla *Ubi Venus mutatur. Omosessualità e diritto nel mondo romano* (1987) 71-99; E Fantham '*Stuprum.* Public attitudes and penalties for sexual offences in Republican Rome' (1991) 35 *Echos du Monde Classique/Classical Views* 285-287; A Richlin 'Not

male same-sex activity.[58] However, according to the extensive evidence on male same-sex desire and relations, both romantic and physical, this interpretation is simply not feasible.[59] In ancient Roman society gender, the socially-constructed notion of behaviours, expectations, roles, representations and values that are applied to people by any given society based on whether they are male or female,[60] was dependent, not on biological sex, but mainly on social status.[61] The normative gender for males was that of the *vir*, the high-class male whose social position allowed him to penetrate others,[62] namely, women, children and slaves, both male and female. There was no prejudice about what the object of penetration and pleasure should be. However, as those who were acceptable objects were considered to be in a subordinate position to the *vir*, a high-class male who chose, or was seduced into allowing, penetration was automatically perceived as belonging to the subordinate class, and there was strong social prejudice against the actions of such a man.[63]

More recent scholars, therefore, argue that the law punished men taking the passive role, and/or that it was put in place to protect high-born youths from pederasty,[64] and the loss of social status associated with being perceived as a potentially passive adult man. Williams gives the latest and most comprehensive interpretation which incorporates these other interpretations. He bases this on the legal definition of *stuprum* and on the provisions of the *Lex Julia* on adultery, passed in 18 BC. Williams postulates that the *Lex Scantinia* did not make a

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before homosexuality. The materiality of the *cinaedus* and the Roman law against love between men' (1993) 3 *Journal of the History of Sexuality* 569-571; FX Ryan 'The *Lex Scantinia* and the prosecution of censors and aediles' (1994) 89 *Classical Philology*; E Meyer-Zwiffelhoffer *Im Zeichen des Phallus. Die Ordnung des Geschlechtslebens im antiken Rom* (1995) 109-133; Cantarella (n 55 above) 106-119; Williams (n 54 above) 131-136.

58 WT MacCary 'The Bacchae in Plautus' *Casina*' (1975) 103 *Hermes* 463 n 11; LP Wilkinson *Classical attitudes to modern issues* (1978) 136.

59 See J Walters 'Invading the Roman body. Manliness and impenetrability in Roman thought' in JP Hallett & MB Skinner (eds) *Roman sexualities* (1997) 29-43; Williams (n 54 above) 137-245 on the complexities of the construction of male sexualities and related gender identities in Rome. See HN Parker 'The teratogenic grid' in Hallett & Skinner (above) 47-65; MB Skinner *Sexuality in Greek and Roman culture* (2005) 195-197 on the socio-sexual hierarchy in Rome.

60 D Glover & C Kaplan *Genders* (2000) xxiii xxvi.

61 Walters (n 59 above) 32; Parker (n 59 above) 47. Parker mentions that other factors that might have influenced the construction of gender included age, ritual category or power relations.

62 Walters (n 59 above) 32; Parker (n 59 above) 48-49.

63 Those who were perceived as voluntarily taking the passive role were the subject of scorn, crude humour and rhetorical invective. A Corbeill 'Dining deviants in Roman political invective' in Hallett & Skinner (n 59 above) 99-128. Allowing himself to be sexually penetrated was one of several ways in which a man might be perceived as effeminate. Parker (n 59 above) 48-49 51-54.

64 Dalla (n 57 above) 71-99; Richlin (n 57 above) 569-571; Cantarella (n 55 above) 106-119.

distinction between crimes committed against men or women.[65] Instead, it was a formalisation of the 'traditional Roman [social] sanctions'[66] against *stuprum*, a crime in which a man committed sexual acts with any free-born woman outside marriage or free-born child, male or female.[67] In addition, from examining the *Lex Julia* on adultery, a law which attempted to regulate this one specific form of *stuprum*, he believes that, just as the *Lex Julia* punished both partners in adultery,[68] the *Lex Scantinia* could also have punished both the perpetrator of the act and the man who acted inappropriately by allowing himself to be penetrated.[69]

All these interpretations suggest that the *Lex Scantinia* and, indeed, all laws on *stuprum*, established a legal concept of sexuality based on the belief that some sexual acts were appropriate or inappropriate depending on the person who performed them. Appropriate or inappropriate was usually determined by status and gender roles. Free, male citizens should not take on sexual roles that placed them in the position of a woman or subordinate. Women of high status should not move outside their gender roles of chaste, child-producer, by taking a lover. The concern of the laws, therefore, was the interplay between status, roles in the sex act, gender roles and the sex act itself. However, at this time, there was no crime consisting specifically and exclusively of male same-sex acts, nor was there a legal identity based on sexual orientation.

The *Lex Julia* on adultery itself later came to have an effect on the regulating of male same-sex acts. The original wording seems to have provided not only for the crime of adultery in particular, but also *stuprum* in general. Although adultery was considered to apply to married women, while *stuprum* could also be committed with a

65 Williams (n 54 above) 131-132. Richlin (n 57 above) 561-569, too, uses an argument based on the concept of *stuprum* to argue that passive men were the intended target of the law, but she believes the law applied exclusively to men.

66 Williams (n 54 above) 132. Before the advent of the *Lex Julia*, the regulation of sexual behaviour was under the control and discretion of the head of the family.

67 Williams (n 54 above) 132. 'Whoever shall persuade a boy wearing the *toga praetexta* (ie a prepubescent boy) to commit *stuprum* or any other offence, after abducting or bribing his attendant; or shall solicit a woman or girl or do anything for the purpose of corrupting her *pudicitia* ('chastity'); or shall proffer a gift or give money in order to persuade her to do it: If the offence is actually perpetrated he is punished capitally; if not, he is deported to an island. Attendants who have been bribed are subjected to the ultimate punishment.' *Digest* 47.11.1.2, translation by Williams (n 54 above) 131-132 (brackets added). This version of the edict on *stuprum* was only recorded in the *Digest* in the 4th century AD and the wording may have changed slightly over time. Williams (n 54 above) 131.

68 'It has been held that women convicted of adultery shall be punished with the loss of half of their dowry and a third of their goods, and by relegation to an island. The adulterer, however, shall be deprived of half his property, and shall also be punished by relegation to an island; provided the parties are exiled to different islands.' Paul *Opinions* 2.26.14, translation by MR Lefkowitz & MB Fant *Women's life in Greece and Rome. A source book in translation* (1992) 104.

69 Williams (n 54 above) 133. See also K Ormand *Controlling desires. Sexuality in ancient Greece and Rome* (2009) 176-178 who agrees with Williams's interpretation.

widow, unmarried girl or a male youth, the sources suggest that the general thrust of this law was towards protecting females as commodities. However, in the third century AD the conversion of the Emperor Constantine to Christianity led to a transformation of the Roman Empire towards a Christian ideology. An interrelationship developed between the leadership of church and state. Religious beliefs and state policy became one, guided to a great extent by the emperors themselves,[70] under the influence of the Bible, early church fathers and canons passed at church councils.[71] This led towards a more conservative stance to sexual acts, especially those outside marriage and which were not for the purposes of procreation,[72] such as sexual intercourse between two males. The existence of the word *stuprum* in the *Lex Julia* allowed much later jurists to broaden its interpretation to include acts against free-born males.[73] Nevertheless, the concept of sexuality behind the laws on *stuprum* did not change.[74] The added interpretation specified a crime which consisted of a male of high status being forced or coerced into an act in which he played the passive sexual role, and consequently moved outside of his gender roles.

Despite this growing conservatism, only a handful of edicts and laws were passed in the next three centuries in the Roman and later Byzantine Empires that in any way regulated male same-sex acts. The Theodosian Code 9.7.3 records a constitution published by Constantius and Constans in 342 AD which seems to be legislating on matters of same-sex marriage, as it refers to a crime 'when a man is married in the manner of a woman'.[75] However, both Bailey and

70 H de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19 *Fundamina* 223.

71 The condemnation of same-sex acts in the account of the destruction of Sodom and Gomorrah in Genesis 13-19 is one of the main Biblical texts used to justify the church's position, as well as Leviticus 18.22, Romans 1.24-6 and 1 Corinthians 9-11. M Goodich 'Sodomy in ecclesiastical law and theory' (1976) 1 *Journal of Homosexuality* 432. The council of Elvira in 305 or 306 AD passed canon 71 forbidding the 'committers of illicit sexual acts with boys' to take Communion (own translation). Further canons were passed at the Council of Ancyra in 314 AD: canon 16 'Concerning those who have committed fornication with animals'; canon 17 'Concerning those who either have been defiled or commit defilement with animals or with males'. Translation by DS Bailey *Homosexuality and the Western Christian tradition* (1955) 86-87. Late 2nd to early 3rd century AD Christian writer Tertullian *On modesty* 4.5 writes of passions which are 'beyond the laws of nature' and 'unnatural acts' (*monstra*), and which must be repelled from the church (own translation). See Bailey (above) 82-83 86-89.

72 De Ru (n 70 above) 223.

73 Williams (n 54 above) 134-135. 'Anyone who has sexual relations with a free male without his consent shall be punished with death.' Paul *Opinions* 2.26.12. Translation by Lefkowitz & Fant (n 68 above) 104.

74 As Christian writings also centred on the societal understanding of sexuality as acts, rather than identity, the understanding of sexuality underpinning imperial legislation was not affected. See n 71 above.

75 'When a man marries in the manner of a woman, a woman about to renounce men, what does he wish, when sex has lost all its significance; when the crime is one which it is not profitable to know; when Venus is changed to another form;

Cantarella argue that the word *nubere* ('to marry') is not intended to refer to one man actually marrying another, but instead to a male who takes the passive role in sex.[76] *Nubere* was most often used of women as it referred to the custom of women veiling themselves to indicate marriage. The word was also sometimes used to describe non-marital sexual relations with implausible marriage objects, such as prostitutes or passive males.[77] A similar law to this was published in 438 and is recorded in the Theodosian Code 9.7.6.[78] This law refers to the 'disgraceful' custom some men have of acting in a passive role, like a woman, during sexual intercourse. In both cases a man taking the passive role, that of the woman, in sexual intercourse is the object of this law, rather than all men engaging in same-sex acts. Although these men are referred to as seeming to be no different from women; they are not identified as women, but are noted as taking on the role of women. Lastly, these laws seem to be directed at men who take the passive role on a regular basis. While this would suggest the recognition of a legal identity of some men according to their sexual orientation, this is not in fact the case. Code 9.7.3 states that men who 'marry' in such a way are *infames* ('shameful' or 'disreputable'). Although being *infamis* identified a person, this identification was based on any act which rendered them shameful, including committing crimes or taking part in shameful activities such as acting or prostitution.[79] Code 9.7.6 recognises a sexual preference, but this is not necessarily for sexual intercourse with other males, but simply for playing the passive part. In both these laws, then, men who play the passive role are given a specific identification but in each case it is based on the act in which they take on sexual roles that lead to them flouting gender roles.

The last of the Roman laws on male same-sex acts can be found in the works sponsored by Justinian. In 533 Justinian claimed that the *Lex Julia* punished 'even those who dared to exercise their shameful lust with men'.[80] *Novel* 77 from 538 includes same-sex acts as one of many blasphemous acts. Justinian enjoins men to refrain from such

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when love is sought and not found? We order the statutes to arise, the laws to be armed with an avenging sword, that those infamous persons who are now, or who hereafter may be, guilty may be subjected to exquisite punishment.' Theodosian Code 9.7.3. Translation by C Pharr *et al The Theodosian Code and Novels and the Sirmondian Constitutions. A translation with commentary, glossary and bibliography* (1952) 231-232.

76 Bailey (n 71 above) 71; Cantarella (n 55 above) 175-176.

77 See also PGW Glare (ed) *Oxford Latin dictionary* (1982) sv *nubo*.

78 'All of those who are accustomed to the disgrace of condemning a masculine body, arranged in female manner, by means of the passivity of the other sex, and who are seen to have nothing different than women, will pay for this sort of crime through the vengeance of flames, with the people watching.' Theodosian Code 9.7.6. Translation by Ormand (n 69 above) 266.

79 Richlin (n 57 above) 558-559; Ormand (n 69 above) 178-181.

80 'Likewise the Julian law on adultery, which not only punished with the sword those who violated other men's wives, but even those who dared to exercise their shameful lust with men.' *Institutions* 4.18.4. Translation by Ormand (n 69 above) 266.

acts as they have brought down natural disasters.[81] *Novel* 141 from 544, in a similar vein, also speaks of acts and includes the belief that such acts are a matter of choice and men can stop them if they so choose.[82] There seems to be a move away from an underlying concept of sexuality in the law based on status, sex and gender roles, although there is still an understanding of sexuality as a series of acts, not an identity. However, in *Novel* 77 Justinian introduces into law a term from the New Testament, Romans 1.26, possibly influenced by its reiteration in the early church fathers. He writes of men acting *contra naturam* ('contrary to nature').[83] What are we supposed to understand by 'nature' in this context? Considering that these edicts do not institute a new crime, but instead encourage the enforcement of the existing laws on same-sex acts, I believe the use of the word 'nature' is imbuing sex roles and gender roles, as understood by Justinian, with an essentialist force.

Throughout the legislation from ancient Rome and the Byzantine Empire, a definite legal concept of sexuality emerges. Sexuality is conceived of mainly as roles and acts, and the law legislates against those roles and acts which are believed to be wrong, even if the exact definition of these changes over time. Importantly, there is no concept in Roman law of anyone having an identity based on sexual orientation. The closest the laws seem to come is acknowledging habitual offenders.

5 Roman laws in Africa

Once the laws on same-sex acts as laid down by the Roman/Byzantine Empires were established, very few changes appear to have occurred. These laws entered England through church, or canon, law. Canon law was an amalgam of 'the Bible, the writings of the church fathers,

81 '… since certain men, seized by diabolical incitement practise among themselves the most disgraceful lusts, and act contrary to nature: We enjoin them to take to heart the fear of God and the judgment to come, and to abstain from suchlike diabolical and unlawful lusts, so that they may not be visited by the just wrath of God on account of these impious acts, with the result that cities perish with all their inhabitants. For we are taught by the Holy Scriptures that because of like impious conduct cities have indeed perished, together with all the men in them.' *Novel* 77. Translation by Bailey (n 71 above) 73.

82 'Preamble … Wherefore it is not right that we should all despise God's abundant goodness, forbearance, and long-suffering kindness and, hardening our hearts and turning away from penitence, should heap upon ourselves wrath in the day of wrath. Rather, we ought to abstain from all base concerns and acts-and especially does this apply to such as have gone to decay through that abominable and impious conduct deservedly hated by God. We speak of the defilement of males which some men sacrilegiously and impiously dare to attempt, perpetrating vile acts with other men.' *Novel* 141. Translation by Bailey (n 71 above) 74.

83 In Romans 1.26-27, Paul writes of women and men acting against nature by lusting after those of the same sex. Late 4th to early 5th century AD Christian writer John Chrysostom highlights this phrase in his *Homilies on Paul's epistle to the Romans* 4. See also Bailey (n 71 above) 83 n 2.

Justinian's codification, the *Corpus Iuris Civilis*, the canons of church councils and the papal decretals',[84] and was, according to De Ru, 'basically Roman law as modified to meet the needs of the medieval church'.[85] It held sway in England over moral and religious matters such as marriage, sex, heresy and sorcery.[86] However, there was some separation of church and state. In the case of same-sex acts, ecclesiastical courts could judge people, but if the court wanted them to be punished with the applicable penalty, death, they had to hand them over to the state. The state could hold its own tribunal to assess the guilt of the party and could act independently of the church in bringing such men to trial, judging and sentencing them.[87] The degree to which the laws were implemented by church and state in the medieval period fluctuated and over the centuries Christian writers and law makers felt it necessary to reiterate and refine them.[88] However, the attitude of the church did not change substantially.[89] In the sixteenth century, the English king, Henry VIII, split from the Roman Catholic Church which led to many laws, including those against same-sex acts, being recodified as secular laws.[90] The penalties and the implementation of these laws also fluctuated over time.[91] Nonetheless, the basic laws, and the concept behind them, survived until the nineteenth century.

In the mid-nineteenth century Britain updated and, where necessary, changed their laws for implementation in the colonies. The resulting penal code was later implemented across Asia and Africa.[92] The sections on same-sex acts can still be found in the Penal Codes of Malawi, Uganda, The Gambia, Nigeria, Kenya and many other former British colonies in Africa.[93] The laws used to prosecute Monjeza and Chimbalanga in Malawi provide an excellent example:

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84 De Ru (n 70 above) 223.

85 De Ru 222.

86 CP Sherman 'A brief history of medieval Roman canon law in England' (1920) 68 *University of Pennsylvania Law Review and American Law Register* 234-235; Bailey (n 71 above) 146. In fact, M Goodich 'Sodomy in medieval secular law' (1976) 1 *Journal of Homosexuality* 297 points out that '[i]n English law, it would appear that sexual morality fell early under church authority, and crimes against nature were identified with heresy'.

87 Bailey (n 71 above) 146.

88 Bailey 110-120; M Goodich *The unmentionable vice. Homosexuality in the later medieval period* (1979) 71.

89 Bailey (n 71 above) 98; Goodich (n 71 above).

90 Human Rights Watch (n 10 above) 14. See also Bailey (n 71 above) 147.

91 Bailey (n 71 above) 148-152.

92 See Human Rights Watch (n 10 above) 15-25 for a full discussion of the process.

93 See Human Rights Watch (n 10 above) 5-6 for countries affected by the colonial laws of Britain. See Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 262-274 for countries affected by the interaction between Roman-Dutch and colonial British laws. The Constitutional Court of South Africa, in reaction to the South African Constitution Act 108 of 1996 secs 9(3)-(4), which prohibits discrimination on the grounds of sexual orientation, struck down their law against same-sex acts in 1998. Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 265.

> Penal Code Cap 7:01 Laws of Malawi 24
> Section 153 - Unnatural offences
> Anyone who –
> (a) has carnal knowledge of any person against the order of nature; or
> (b) has carnal knowledge of any animal; or
> (c) permits a male person to have carnal knowledge of him or her against the order of nature
> shall be guilty of a felony and shall be liable to imprisonment for fourteen years, with or without corporal punishment.
> Section 156 - Indecent practices between males
> Any male who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, shall be guilty of a felony and shall be liable to imprisonment for five years, with or without corporal punishment.

The concept of sexuality underlying section 153 and, indeed, some of the wording, are the direct result of the Roman laws on same-sex acts. Firstly, similar to the Roman laws on *stuprum*, the law is interested in any and all sexual acts considered to be against the moral interest of the law makers, regardless of gender, but it also places a special emphasis on *acts* between males. Section 156 specifically legislates against, not just acts involving carnal knowledge, but any 'act of gross indecency'[94] between two men. Notably, neither Roman nor British colonial law overtly acknowledges female same-sex acts. Secondly, these laws are also legislating against the acts people commit, not the people themselves.[95] 'Permits' in section 153(c) suggests that once again these acts are considered to be a matter of choice, not an intrinsic part of a certain type of man. Lastly, the wording 'against the order of nature' is Justinian's *contra naturam* ('contrary to nature').[96]

'Against the order of nature' and 'act of gross indecency' are not defined by the law. This means that the judge was left to interpret

94 The Roman-Dutch law on 'sodomy' also legislated against acts, not people. See Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 260.

95 The new laws promulgated in Nigeria specifically use the term gay. Eg Same Sex Marriage (Prohibition) Act sec 4(1) against the 'registration of gay clubs, societies and organisations, their sustenance, processions and meetings'. This has led commentators like Viljoen (n 10 above) 11 to suggest that the law 'for the first time criminalises homosexual identity, that is, being gay, as opposed to punishing acts or conduct'. However, I feel it is more accurate to say that the laws recognise that people who engage in same-sex acts have an attendant life-style which consists of acts that are related to same-sex acts, such as congregating with those who also engage in same-sex acts. I do not believe the law is recognising an intrinsic, biological identity. This is in line with the belief that 'homosexual' for many Africans describes a person who practises same-sex acts. See earlier comment under section 2 'The perception of "homosexuality" in Africa'.

96 *Novel* 77. This concept can also be found in the Roman-Dutch laws. See Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 259-260; De Ru (n 70 above) 223.

whatever act he disapproved of as 'against the order of nature' or amounting to 'gross indecency'.[97] Consequently, it can be seen that both concepts are based on the acts of the people to be punished and the assumption that those acts contravene the judge's understanding of sexual and gender roles. The essentialist word 'nature' is once again being used to refer to socially-defined gender and sex roles. Although status is not an issue, the legal concept of sexuality in former British colonies in Africa is still based on the Roman belief in the importance of the interaction between sexual acts, sexual roles and gender roles. This perfectly coincides with current homophobic mentalities in Africa.

6 Consequences of the Roman sexuality in Africa

The result of this set of circumstances is that these African states have a tool which allows them not only to prosecute homosexuals, namely, those who engage in same-sex acts, but to legally justify denying rights and services to them. On the grounds that it would encourage criminal activity, states with a homophobic agenda are not sponsoring counselling for homosexuals on how to prevent the spread of HIV.[98] The men themselves are often uneducated as to the means of HIV transmission with many believing that anal sex is safe. The stigma against homosexuality means that many men are also in sexual relationships with women and are therefore spreading the disease through having multiple partners. Homosexuals also find it difficult to access condoms and condom-safe, water-based lubricants. Some clinics have even turned away homosexuals who wished to receive treatment.[99] Needless to say, homosexuals are also denied protection under the law from religious and societal persecution. Violence against homosexuals, openly fuelled by the media and prominent political and religious figures, is rife.[100] Many homosexuals are being driven into hiding, further alienating them from education and

97 See Human Rights Watch and the International Gay and Lesbian Human Rights Commission (n 10 above) 256-257.

98 Epprecht (n 1 above).

99 'Africa. Homophobia fuelling the spread of HIV' 23 July 2008 http://www.irinnews.org/report.aspx?reportid=79397 (accessed 16 February 2012); AD Smith *et al* 'Men who have sex with men and HIV/AIDS in sub-Saharan Africa' (2009) 374 *Lancet* 419.

100 See n 30 above. This is in marked contrast to South Africa. Although homosexuals still suffer societal persecution, especially in the form of corrective rape, they do, technically at least, have recourse to the law. The South Africa Constitution Act 108 of 1996 secs 9(3)-(4) prohibit discrimination on the grounds of sexual orientation and thereby ensure that the perpetrators of such rapes, when they are caught, can be prosecuted. See Reddy (n 33 above) 174-175.

treatment.[101] The Roman concept of sexuality which underpins their laws is therefore perpetuating, and being used to justify, a state-sponsored homophobic agenda in parts of sub-Saharan Africa.

7 Conclusion

The concept of sexuality which governs the laws of most former British colonies in sub-Saharan Africa is derived from a culture that was the basis for much Western thought, a culture that did not consider male same-sex acts, as such, to be worth regulating and which was only interested in protecting the bodily integrity of males of a certain status. The concept also had no basis in religion, and is therefore no more Christian than a concept of sexuality based on identity and sexual orientation. Yet, this is the state tool being used to persecute homosexuality and perpetuate homophobia in sub-Saharan Africa. Understanding this may bring success in undermining the laws where other arguments, based solely on the Western origin of the laws, have failed. The British may have been invaders, but their morals coincide with the current moral conservatism of their former colonies in Africa. Africans may resent colonialism, but they have always taken what they believed to be useful from Western culture and found ways to integrate it with African concepts. Perhaps if the basis for these laws as non-Christian, alien and accepting of same-sex acts is elucidated, the entrenched colonial legal framework may be destabilised, and the African homophobic discourse may not be so accepting of the absolute natural rightness of these laws and be a little more reluctant to make use of them. But even if this is unlikely, knowing the issues behind the origin of these laws adds an important dimension to understanding the origins of homophobia in parts of sub-Saharan Africa.

101 Men cite fear of rejection by their families, public humiliation, ridicule by healthcare workers, pressure to have children and blackmail as factors that contribute to their decision to conceal their behaviour or orientation. K Lauer 'Men who have sex with men and the global HIV/AIDS epidemic' December 2009 http://www.thebody.com/content/art56243.html (accessed 7 August 2013). See also Smith *et al* (n 99 above) 419.

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Strengthening constitutional order and upholding the rule of law in Central Africa: Reversing the descent towards symbolic constitutionalism

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Summary

This article examines some of the challenges that have arisen as part of attempts during the past two decades to entrench a culture of constitutionalism and respect for law in Central Africa. It shows how, from a background of constitutions that did not promote any constitutionalism, the countries in this region generally adopted constitutions which contained most of the core elements of constitutionalism and the rule of law. It is shown that in the last few years there has been a steady slide towards what can be referred to as tokenistic and symbolic constitutionalism in the region. The objective of the article is to see how this decline could be arrested to ensure a return to substantive and effective constitutionalism. The approach adopted is essentially comparative. The contribution starts with an overview of the state of constitutionalism and the rule of law in the 11 countries located in the region. This is preceded by a brief explanation of the three critical concepts: constitution, constitutionalism and the rule of law. It then uses a number of key indicators of good governance and the rule of law to assess the governance situation in the region. This is followed by an overarching analysis of the constitutions of these countries to identify trends and tendencies and to show the nature and extent of the widening gap between the constitutional texts and actual practice. A number of measures are suggested which, it is argued, need to be taken to make constitutionalism in the region meaningful and effective.

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1 Introduction

The last two decades have seen significant efforts to entrench constitutionalism and the rule of law in Africa. After several years of military dictatorships and authoritarian rule that triggered political instability and economic decline, African governments under internal and external pressure started from the 1990s to adopt new or revised constitutions which began to entrench democratic principles, values and practices rooted in constitutionalism and the rule of law. For the first time, African rulers and the ruling elites have come under pressure to submit themselves to the dictates of the rule of law.

However, in the last few years, efforts to entrench an ethos of constitutionalism and the rule of law have come under serious threat as the forces of authoritarianism appear to have regrouped and are staging a comeback. The challenges have come in diverse forms. The article attempts to assess, using several well-established and generally-accepted indicators of good governance, how a process of constitutional transformation that started very promisingly in the 1990s, with constitutional reforms that provided some elements of formal and pragmatic constitutionalism, is now being undermined by changes that will result in nothing more than tokenistic and symbolic constitutionalism.

The focus of the article is on the countries in Central Africa that have seldom been discussed in the English literature on this topic. The analysis is comparative in nature and the scope of the countries discussed as falling within the Central African region are Angola, Burundi, Cameroon, Central African Republic, Chad, Democratic Republic of the Congo (DRC), Congo, Equatorial Guinea, Gabon, Rwanda and São Tomé and Principe. On account of the number of countries covered, the article can do no more than provide a general indication of trends and emerging tendencies.

The discussion that follows is divided into three parts. It starts with an overview of the state of constitutionalism in the 11 countries studied in the article. This part will be preceded by a brief explanation of the terms 'constitution', 'constitutionalism' and 'rule of law' as used in this context. Since the assumption is that the constitutional developments of the last two decades were designed to establish a solid basis for the promotion of constitutionalism and the rule of law, the second part of this section will review the progress that has been made. The strides made towards good governance in the region will be assessed based on a number of widely-accepted governance indicators. It is shown that since the 1990s, the Central African region has been the region that has made the least progress compared to other regions in entrenching constitutionalism and the rule of law in Africa. The next part of the article provides an overview of the actual

constitutional developments that have taken place since 1990, to see whether or not this is a reflection of the conclusions suggested by the indicators of good governance and, if so, what corrective measures need to be undertaken. The last part contains concluding remarks. It is argued that the early signs of progress towards constitutional democracy in Africa, generally, and the Central African region, in particular, are now being systematically undermined by authoritarian tendencies that combine intransigence with strategic and symbolic adaptability to the modern paraphernalia of constitutionalism and respect for the rule of law. There is a need to reverse the trend in which several elements and aspects of democracy, good governance, constitutionalism and the rule of law are used merely as a cloak by leaders and their cronies to gain international respect and acceptance amongst Western donors and international institutions.

2 Overview of the state of constitutionalism and the rule of law

2.1 Some preliminary thoughts on the concepts of constitution, constitutionalism and the rule of law

The credibility, viability and effectiveness of any modern constitutional order depend fundamentally on the nature of the polity's constitution and whether this provides a solid basis for the promotion of constitutionalism and other things such as the rule of law. The terms constitution, constitutionalism and rule of law have been discussed widely in the literature. There is no need to revisit these debates beyond simply explaining the sense in which these terms are used in this context.

The definitions and conceptualisations of the term 'constitution' are so diverse that Tushnet considers that it is one of those words which 'are more used than defined', but rightly adds that 'understanding them means knowing how they are used'.[1] From the variety of definitions, one can say that a constitution could be used in at least four senses: the minimalist or material sense; the formal sense; the modern sense; and the functionalist sense.[2] The most frequent use refers to the document, written or unwritten, which governs, regulates and allocates powers, functions and duties amongst the different agencies within the state and between the governed and the government. The main purpose of a constitution is to limit the use of governmental powers in a manner that will prevent the twin dangers of anarchy and authoritarianism. Although the constitution is universally accepted as the best method of legitimation and

1 M Tushnet 'Constitution' in M Rosenfeld & A Sajó (eds) *The Oxford handbook of comparative constitutional law* (2012) 218.

2 See A Dyèvre 'The constitutionalisation of the European Union: Discourse, present, future and facts' (2005) 30 *European Law Review* 165-169.

organisation of powers that prevents these twin evils, it is often clear that some constitutions fail to achieve this balance effectively, either in the text or in practice or even in both instances. It is therefore no surprise that scholars sometimes distinguish between certain constitutional types to reflect the extent of their effectiveness or ineffectiveness. For example, some constitutions can be described as symbolic or sham when they are not worth the paper on which they are written. They merely serve as window-dressing and are routinely ignored or arbitrarily changed and only implemented at the convenience of the government. Some normal constitutions occasionally contain sham or symbolic elements, such as directive principles of state policy, which are expressly stated not to be legally enforceable. Lowenstein has distinguished between normative, nominal and semantic constitutions based on the degree to which the political reality conforms to the norms of the constitution.[3] He describes normative constitutions as effective constitutions in the sense that the political actors and the processes that they follow are within the framework of the constitution. A nominal constitution, according to him, exists where the existing socio-economic conditions prevailing in the country, regardless of the interests of the power-holders, prevent the constitutional norms from being faithfully complied with. The third category, semantic constitutions, refers to constitutions which, although reflecting the prevailing political reality, do not impose any binding rules. The constitutions of dictatorial or totalitarian regimes usually fall within this category. Grimm notes that others characterise semantic constitutions as instrumentalistic or ritualistic.[4] These constitutions are instrumentalistic to indicate that they are used exclusively in the interest of the government or power-holders and ritualistic because the rules of the constitution are often applied while the substantive processes take place elsewhere and are complete when the 'ritual' starts.[5]

The word 'constitution', in its diverse senses, is clearly distinguishable from the concept of constitutionalism. The latter, however, defies any easy and simple definition and has often been defined differently by jurists and other writers in the social sciences, especially political scientists.[6] Generally speaking, constitutionalism is a much broader concept than the notion of a constitution. In essence, a constitution focuses on the attempts to limit governmental arbitrariness, which attempt may fail, as has happened several times in Africa. Modern constitutionalism, for its part, encompasses the idea that a government should not only be sufficiently limited in a way

3 K Lowenstein *Political power and the governmental process* (1957) 147-170.

4 D Grimm 'Types of constitutions' in Rosenfeld & Sajó (n 1 above) 107.

5 Grimm (n 4 above) 39.

6 See the discussion of this in CM Fombad 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa' (2007) 55 *American Journal of Comparative Law* 6-8.

that protects its citizens from arbitrary rule, but also that it should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations. Constitutionalism thus combines the idea of a government limited in its actions and accountable to its citizens for its actions. It rests on two main pillars: first, the existence of certain limitations imposed on the state, particularly in its relations with citizens, based on a certain clearly-defined set of core values; second, the existence of a clearly-defined mechanism for ensuring that the limitations on the government are legally enforceable. In this broad sense, constitutionalism has certain core, irreducible and possibly minimum content of values with a well-defined process and procedural mechanisms to hold government accountable. The core elements of constitutionalism can be listed as follows: [7]

(i) the recognition and protection of fundamental rights and freedoms;
(ii) the separation of powers;
(iii) an independent judiciary;
(iv) the review of the constitutionality of laws;
(v) the control of the amendment of the constitution; and
(vi) institutions supporting constitutional democracy and accountability.

What is clearly emerging from recent constitutions as the central theme of constitutionalism, especially in Africa, such as the Kenyan Constitution of 2010 and the Zimbabwean Constitution of 2013, is the emphasis on principles and values that recognise and protect human worth and dignity. Constitutionalism is therefore not a fixed and static principle and the core elements identified are bound to change as better ways are devised to limit government and protect citizens.[8] It is the institutionalisation of these core elements that matters. The philosophy behind constitutionalism is the need to design constitutions that are not merely programmatic shams or ornamental documents that could be easily manipulated by politicians, but rather documents that can promote respect for the rule of law and democracy. Nevertheless, constitutionalism can be distinguished from the rule of law.

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7 See L Henkin 'Elements of constitutionalism' (1998) 60 *The Review* 11-22, who identifies nine 'essential elements'; S Giovanni *The theory of democracy revisited* (1987), who lists five elements of what he terms liberal constitutionalism, although he lays emphasis on the rule of law; B Li 'What is constitutionalism' http://www.oycf.org/Perspectives/6_063000/what_is_constitutionalism.htm (accessed 31 August 2014); B Li 'Constitutionalism and the rule of law' http://www.oycf.org/Perspectives/7_083100/constitutionalism_and_the_rule_o.htm (accessed 31 August 2014); WF Murphy 'Constitutions, constitutionalism and democracy' in D Greenberg *et al* (eds) *Constitutionalism and democracy. Transitions in the contemporary world* (1993) 3-25.

8 In this regard, one is bound to agree with Klug who, in H Klug 'Constitutional law' (1995) *Annual Survey of South African Law* 1-11, states that ch 9 of the South African Constitution, which covers the 'state institutions supporting democracy', is probably South Africa's most 'important contribution to the history of constitutionalism'.

The much-revered doctrine of the rule of law has an ancient lineage and was popularised by Dicey, the most eminent British constitutional scholar of the nineteenth century, who viewed it as one of the crucial elements of English constitutionalism.[9] According to him, the rule of law in the context of the British Constitution had 'three meanings'[10] or included 'at least three distinct kindred conceptions':[11] first, the principle of legality, according to which nobody may be deprived of their rights and freedoms through the arbitrary exercise of wide discretionary powers by the executive. This could only be done by the ordinary courts of law. Second, the principle of equality states that nobody, regardless of their status, is above the law and everybody is subject to the jurisdiction of the ordinary courts. Third, the general principle is that in Britain the rights of individuals are effectively protected by the action and decisions of ordinary courts rather than by guarantees contained in a constitution. Although Dicey's formulation of the doctrine, especially his third point, proved to be acutely controversial and has been regularly criticised, the underlying concepts of this doctrine as formulated by him still constitute the root of most of the modern conception of the doctrine.

The modern conception of the rule of law has drawn from its rich history and diverse understandings of it at both national and international levels. What is now widely accepted as a modern conceptualisation of the rule of law was formulated by the UN Secretary-General in 2004. He defines the rule of law as[12]

> a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.

He also points out that, as a principle,[13]

> [i]t requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

9 See AV Dicey *Introduction to the study of the law of the constitution* (1968).

10 Dicey (n 9 above) 202.

11 Dicey 187-188.

12 See Report of the Secretary-General 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' para 6 http://www.google.com/url?sa =t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.ipu.org%2Fsplz-e%2Funga07%2Flaw.pdf&ei=IHODUri_NM-QhQfv04HoBQ&usg=AFQjCNH4tfk4EZdh3JZfJaIOMTyIL777RA&sig2=_51SuV7GbBdRzWVgX16iNg&bvm=bv.56343320,d.ZG4 (accessed 31 August 2014).

13 As above.

The possible scope of the rule of law thus defined is accurately captured in the four universal principles of the rule of law formulated by the World Justice Project. These state as follows:[14]

(i) The government and its officials and agents as well as individuals and private entities are accountable under the law.
(ii) The laws are clear, publicised, stable, and just, are applied evenly, and protect fundamental rights, including the security of persons and property.
(iii) The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
(iv) Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

These principles have the merit of incorporating and emphasising both the procedural or formal (sometimes also referred to as thin or minimalist) conception as well as the substantive (thick or maximalist) conception of the rule of law. They also incorporate most of the cluster of ideas which over the centuries have traditionally been associated with the rule. From this perspective, it is clear that many of the core elements of constitutionalism listed above are also necessary for the rule of law to exist, but the latter concept is slightly narrower in scope. Respect for the rule of law on its own may not necessarily lead to the existence of constitutionalism. Nevertheless, constitutionalism is safeguarded by the rule of law and without the rule of law there can be no constitutionalism.

With this brief understanding of these concepts, it is now necessary to see how far the countries in the Central African region have gone in establishing governance systems that promote constitutionalism and the rule of law.

2.2 Assessment of the efforts towards entrenching constitutionalism and the rule of law

Every year a number of organisations have carried out surveys and other investigations to see how countries perform with regard to some of the crucial indicators of constitutionalism and good governance. These surveys have covered governance issues as broad as respect for civil and political rights, respect for freedom of the press, corruption and, perhaps more pertinently, respect for the rule of law. In order to have a general overview of the state of constitutional governance and respect for the rule of law in the countries covered in this article, their performances was briefly reviewed using the annual reports, particularly for 2012/2013, from some of these organisations. Although there are numerous reports by different international organisations, this analysis was limited to five

14 See M Agrast *et al* 'The world justice/Rule of law index 2012-2013' 3 http://worldjusticeproject.org/publication/rule-law-index-reports/rule-law-index-2012-2013-report (accessed 31 August 2014).

reports, two from Africa and three from global international non-governmental organisations (NGOs).[15]

The first two are based on the African Development Bank's Governance Rating and the 2013 Ibrahim Index of African Governance. Table 1 below is based on the African Development Bank Country Governance Rating for 2012 and extracts information dealing with the 11 Central African countries covered in the study.

Table 1: African Development Bank Country Governance Rating for 2012[16]

Country	Rating for property and rule based governance	Transparency, accountability and corruption in public sector	Governance rating**	Country performance assessment rating***
Angola	N/A	N/A*	N/A	N/A
Burundi	3.1	2.7	3.18	3.54
Cameroon	3.1	3.5	3.63	3.75
Central African Republic	2.6	3.3	2.89	3.19
Chad	2.8	2.8	2.97	3.39
DRC	2.4	3.3	2.89	3.14
Congo	3.1	3.5	3.43	3.59
Equatorial Guinea	N/A	N/A	N/A	
Gabon	N/A	N/A	N/A	N/A
Rwanda	4.8	4.0	4.44	4.54
São Tomé and Principe	3.4	4.0	3.48	3.56
Average for Africa**	3.1	3.2	3.31	3.54

* N/A indicates that no information was provided.

** The figures range from 1, being the poorest performance, and 10, being the highest performance. The governance average is obtained from five governance indicators, three of which (quality of budgetary and financial management; efficiency of revenue mobilisation and quality of public administration) have not

15 The study is based mainly on the 2013 reports but where these were not available, the 2012 reports were used. In certain cases where this was considered useful and informative, reports for the last five years were reviewed.

16 This information is obtained from the African Development Bank country governance rating at http://www.afdb.org/en/documents/project-operations/country-performance-assessment-cpa/country-governance-rating/ and country performance assessment at http://www.afdb.org/en/documents/project-operations/country-performance-assessment-cpa/ (accessed 31 August 2014).

been included in this table.

*** This provides an overall performance that is based on several other indicators besides those provided in the preceding columns.

**** This is the general average for each sector for all the countries surveyed.

From the table, it can be seen that half of the eight countries surveyed (Burundi, Central African Republic, Chad and DRC) have governance ratings below the general average for all the African countries surveyed. The general country performance assessment is slightly better, where only three of these eight countries (Central African Republic, Chad and DRC) perform below the general African average.

Table 2 is based on the 2013 Ibrahim Index of African Governance. The focus is on the regional performances in just two of the five sectors that were surveyed, namely, safety and the rule of law and participation and human rights. The overall average shown in the last column includes the other sectors that are not included here.[17] It should, however, be noted that the Ibrahim Index also groups Africa into eight rather than the traditional five regions.

Table 2: 2013 Ibrahim Index of African Governance (regional averages)[18]

Region	**Safety and rule of law**				**Participation and human rights**			**Overall average**
	Rule of law	Accoun-tability	Personal safety	National security	Partici-pation	Rights	Gender	
Central Africa	34.4	26.4	31.8	66.3	31.0	30.9	43.1	40.1
East Africa	40.5	38.4	44.4	67.9	37.4	34.2	58.6	47.9
North Africa	43.3	42.6	37.3	76.8	32.2	42.2	50.0	54.0
Southern Africa	63.4	51.4	47.3	89.8	55.1	52.8	64.9	59.2
West Africa	48.0	42.4	46.0	83.0	57.2	54.6	48.4	52.5

17 The excluded sectors are sustainable economic opportunity and human development.

18 See generally '2013 Ibrahim index of African governance' http://www.moibrahimfoundation.org/ interact/ (accessed 31 August 2014).

Island countries	59.1	58.6	61.1	94.1	68.9	62.0	62.0	64.7
Landlocked countries	51.9	43.4	43.6	72.3	47.2	44.6	56.3	51.1
Coastal countries	43.3	37.3	39.3	78.4	41.2	42.4	51.1	49.3
Average score over 100	47.6	41.5	43.1	78.4	46.1	45.3	53.8	51.6

In understanding this table, it is necessary to point out that the number of countries listed as falling under Central Africa only includes seven countries covered by our classification of countries in this region. It excludes Angola, Burundi, Rwanda and São Tomé and Principe. From a purely regional perspective, what is remarkable about the Ibrahim Index of African Governance for 2013 is that it shows that the Central African region was the lowest performer. This is so, not only on the overall regional average, where it obtained 47,6 per cent compared to the regional average of 51,6 per cent, but also on all the sub-categories in each of the two main performance areas. Even if the performances of the other four countries not included in arriving at these averages are taken into account, this position is unlikely to change.[19] It is also noteworthy that the performances in the areas of the rule of law and accountability are significantly low in the region.

We now turn to the reports compiled by three highly-respected international organisations. The first of these is the Freedom House annual reports on the state of freedom in the world. Table 3 below is extracted from Freedom House's Freedom in the World reports for the period 2009-2013.[20]

19 The overall performances of these countries are as follows: Angola 44,5%; Burundi 43,8%; Rwanda 57,8%; and São Tomé and Principe 59,9%.

20 See 'Freedom in the world 2013' http://www.freedomhouse.org/report/freedom-world/freedom-world-2013?gclid=CJ3hvKbp47oCFfSWtAodFAwA2g (accessed 31 August 2014).

Table 3: Freedom status of countries in Central Africa 2009-2013

	2009			2010			2011			2012			2013		
	PR	**CL**	**FR**	**PR**	**CL**	**FR**	**PR**	**CL**	**FR**	**PR**	**CL**	**FR**	**PR**	**CL**	**FR**
Angola	6	5	NF	6	5	NF	6	5	NF	6	5	NF	6	5	NF
Burundi	5	4	PF	5	5	PF	5	5	PF	5	5	PF	5	5	PF
Cameroon	6	6	NF	6	6	NF	6	6	NF	6	6	NF	6	6	NF
Central African Republic	5	5	PF	5	5	PF	5	5	PF	5	5	PF	5	5	PF
Chad	7	6	NF	7	6	NF	7	6	NF	7	6	NF	7	6	NF
DRC	6	5	NF	6	6	NF	6	6	NF	6	6	NF	6	6	NF
Congo	6	5	NF	6	5	NF	6	5	NF	6	5	NF	6	5	NF
Equatorial Guinea	7	7	NF	7	7	NF	7	7	NF	7	7	NF	7	7	NF
Gabon	6	4	PF	6	5	NF	6	5	NF	6	5	NF	6	5	NF
Rwanda	6	5	NF	6	5	NF	6	5	NF	6	5	NF	6	6	NF
São Tomé and Principe	2	2	F	2	2	F	2	2	F	2	2	F	2	2	F

PR and CL stand for political rights and civil rights, respectively, whilst 1 represents the most free and 7 the least free rating. NF stands for not free, PF for partly free and F for free.

In their 2013 report, Freedom House points out that 'sub-Saharan Africa has ranked as the world's most politically volatile region' and identifies Equatorial Guinea, which it describes as a 'highly corrupt regime with one of the worst human rights records in Africa', as one of the worst rated countries in the world. The report shows that in 2013, 22 per cent of African countries were rated as free, 37 per cent as partly free and 41 per cent as not free. It is again significant that of all the 11 countries covered in this article, only one (São Tomé and Principe) is rated as free, two (Burundi and Central African Republic) as partly free and the rest as not free. For the other eight countries, their status as 'not free' does not only go back to the last five years; in fact most of these have never attained the 'free' rating since this survey was started in 1972, in spite of the wave of liberalisation in the 1990s. The Freedom House rule of law survey also shows that, apart from São Tomé and Principe rated as free and Burundi as partly free, all seven of the other countries in the region (excluding DRC and

Congo that are not covered in the report) were again rated as not free.[21]

Finally, in its latest report, Corruption Perceptions Index 2012, Transparency International points out that 'corruption is a major threat facing humanity', not only because it destroys lives and undermines countries and institutions, but also because it operates as a dirty tax with the poor and most vulnerable as its primary victims. The position of the countries in Central Africa has been extracted and is presented in Table 4 below.

Table 4: Corruption perception ranking for Central African countries in 2012

Country	CPI score	Ranking in the world
Angola	22	157
Burundi	19	165
Cameroon	26	144
Central African Republic	26	144
Chad	19	165
DRC	21	160
Congo	26	144
Equatorial Guinea	20	163
Gabon	35	102
Rwanda	53	50
São Tomé and Principe	42	72

21 See Freedom House 'Rule of law' http://www.freedomhouse.org/issues/rule-law (accessed 31 August 2014).

The corruption perception index (CPI) score indicates the perceived level of public sector corruption on a scale of 0-100, where 0 indicates a country that is highly corrupt and 100 indicates one that is perceived to be very clean.

Although out of the 176 countries surveyed, Somalia with a score of 8 is ranked as the most corrupt country in the world, and as it has been like this for most of this decade, the Central African region is not only the most corrupt region in Africa, but also possibly in the world. In fact, five of the 11 countries covered in this study (Angola, DRC, Equatorial Guinea, Burundi and Chad) are ranked amongst the ten most corrupt countries in the world.

Mention should be made of the World Justice Project/Rule of Law Index 2012-2013.[22] The report is potentially very useful because of the elaborate index that it uses to investigate adherence to the rule of law and identifies each country's strengths and weaknesses in comparison to similarly-situated countries. However, its major limitation is that the number of countries covered in Africa is too few. In fact, in the Central African region, it only covers Cameroon. Nevertheless, some of its conclusions are quite useful. For example, in discussing sub-Saharan Africa, it states:[23]

> When examined holistically as a region, sub-Saharan Africa (AFR) lags behind other regions around the world in nearly all dimensions of the rule of law. Despite ongoing reforms, many countries lack adequate checks on executive authority, and government accountability is also weak. Many public institutions and courts throughout the region are inefficient and vulnerable to undue influence.

Some of its conclusions on the situation in Cameroon are worth quoting:[24]

> Cameroon lags behind its regional and income peers in most categories. The country faces challenges in terms of accountability and the functioning of public institutions. Checks and balances are poor (ranking ninety-fourth overall and second to last within the region), and corruption is pervasive (ranking last in the world [for the 97 countries that were surveyed]). The civil court system is slow and subject to political influence. The country scores poorly on respect for fundamental rights (ranking ninetieth), including freedom of assembly, opinion, and expression, as well as labour rights.

The overall picture that emerges from this brief overview of some of the important governance indicators that can enable one to gauge the level of constitutional governance, constitutionalism and respect for the rule of law in the region is therefore not positive. Having examined some of the indicators that could determine the degree of progress towards constitutionalism and the rule of law, it is now

22 See 'The world justice project/Rule of law index 2012-2013' http://worldjusticeproject.org/publication/rule-law-index-reports/rule-law-index-2012-2013-report (accessed 31 August 2014).

23 n 22 above, 49.

24 n 22 above, 49-50.

necessary to see to what extent these conclusions are a reflection of the actual constitutional developments that have taken place within these countries since the 1990s.

3 Reconciling textual constitutionalism and the rule of law with practical reality

In the preceding discussion, we saw that most of the countries in Central Africa, if not actually all, face huge challenges of constitutional governance, not only generally, but even when compared with other African countries. The question that this poses is whether or not these weaknesses are a reflection of or can be attributable to the failure of the revised or new constitutions to fully incorporate the basic principles of constitutionalism and the rule of law discussed above.

This brief overview will show that, in spite of the fact that all these countries have in diverse ways followed the wave of post-1990 constitutionalism, good governance and respect for the rule of law, there are many parts of these constitutions which make a lot of these changes symbolic and tokenistic rather than substantive and effective. The first part of this section will show that one of the main problems today has been caused by a sort of contagious and never-ending fever of frequent making, unmaking and remaking of constitutions. Apart from the dramatic changes in the 1990s which were designed to pave the way for a return to multiparty democracy, most subsequent changes have been made by what could be termed 'born-again' democrats who survived the removal of some of the old guards caught off guard in the 1990s. They have now conspired with the new generation of post-1990 democrats to tame the beast of democracy and use it as a cloak to perpetuate the pre-1990 authoritarian practices. It is clear from this that the changes that were introduced do not seem to have gone far enough to exorcise the ghost of dictatorship.

3.1 Instability caused by making, unmaking and remaking constitutions

Constitutional stability and the certainty and predictability that go with this are important elements of constitutionalism and respect for the rule of law. In fact, a constitution will lose its value as the supreme law if it is frequently and arbitrarily changed to suit the political convenience of the ruling elites. However, from the point of view of form and content, there is no ideal or perfect constitutional design that is irreproachable and unimpeachable such that it can solve any country's problems permanently. Nor are constitutions designed to endure unchanged forever, although their durability is crucial to ensure peace and stability within the polity. In other words, a constitution is not a contract struck once and for all, but rather an important part of a continuous process of careful maintenance and

step-by-step incremental accommodation to take account of changing needs, aspirations and challenges that a polity faces.

As Table 5 below shows, one of the major challenges that countries in the Central African region have faced is the problem of frequent and arbitrary changes of constitutions.

Table 5: Frequency of changing and amending constitutions[25]

Country	Year of adoption of new Constitution	Year of amendment of Constitution	Other changes
Angola	New Const 1975 New Const 2010	Amendment of Const 1978 Amendment of Const 1980 Amendment of Const 1991 Amendment of Const 1992	
Burundi	New Const 1962 New Const 1974 New Const 1981 New Const 1992 New Const 2005	Amendment of Const 1970 Amendment of Const 1996	Suspension of Const 1968 Suspension of Const 1976 Suspension of Const 1987 Interim Const 1998 Interim Const 2004
Cameroon	New Const 1960 New Const 1961 New Const 1972 New Const 1996[a]	Amendment of Const 1969 Amendment of Const 1975 Amendment of Const 1984 Amendment of Const 2008	

25 This information is compiled from data made available at 'Comparative constitutions project: Chronology' http://comparativeconstitutionsproject.org/chronology/ (accessed 31 August 2014). It has, however, been corrected and updated with information from other sources.

Chad	New Const 1960 New Const 1962 New Const 1978 New Const 1989 New Const 1996	Amendment of Const 1965 Amendment of Const 1967 Amendment of Const 1991 Amendment of Const 1995 Amendment of Const 2005	Suspension of Const 1975 Interim Const 1982 Suspension of Const 1990 Interim Const 1993
Central African Republic	New Const 1959 New Const 1964 New Const 1976 New Const 1981 New Const 1986 New Const 1994 New Const 2004	Amendment of Const 1960 Amendment of Const 1961 Amendment of Const 1962 Amendment of Const 1966 Amendment of Const 2010	Interim Const 1979 Suspension of Const 2003
DRC	New Const 1960 New Const 1964 New Const 1967 New Const 1978 New Const 1997 New Const 2003 New Const 2005	Amendment of Const 1970 Amendment of Const 1971 Amendment of Const 1974 Amendment of Const 1980 Amendment of Const 1982 Amendment of Const 1988 Amendment of Const 2011	Interim Const 1961
Congo	New Const 1961 New Const 1963 New Const 1969 New Const 1973 New Const 1979 New Const 1992 New Const 2002	Amendment of Const 1984 Amendment of Const 1989 Amendment of Const 1990	Suspension of Const 1977 Interim Const 1991
Equatorial Guinea	New Const 1968 New Const 1973 New Const 1982 New Const 1991	Amendment of Const 1995 Amendment of Const 1998	

Gabon	New Const 1960 New Const 1961 New Const 1975 New Const 1991	Amendment of Const 1967 Amendment of Const 1968 Amendment of Const 1981 Amendment of Const 1994 Amendment of Const 1995 Amendment of Const 1997 Amendment of Const 2000 Amendment of Const 2003	
Rwanda	New Const 1962 New Const 1978 New Const 1991[b] New Const 1995 New Const 2003	Amendment of Const 1973 Amendment of Const 2003 Amendment of Const 2005 Amendment of Const 2008 Amendment of Const 2010	
São Tomé and Principe	New Const 1975	Amendment of Const 1980 Amendment of Const 1982 Amendment of Const 1987 Amendment of Const 1990 Amendment of Const 2003	

a. Although what we refer to here as the Cameroon Constitution of 1996 is officially referred to as 'an amendment to the 1972 Constitution', the reality is that the extensive nature and scope of the changes (replacement of the earlier Constitution which had 39 articles with one that has 69 articles) goes well beyond anything that can be referred to merely as an amendment or revision of the previous Constitution.

b. It is necessary to note here that between 1994 and 2003, Rwanda was governed by a set of documents that included President Habyarimanana's 1991 Constitution, the Arusha Peace Accords and some additional Protocols.

Apart from the two Lusophone countries, Angola and São Tomé and Principe, which gained their independence in the 1970s, all the others that gained their independence in the 1960s have adopted new constitutions on several occasions. The rest of the countries have rewritten and adopted new constitutions on average every ten and a half years during the last 52 years, with Chad, Central African Republic and Congo doing this almost every seven years.

It is necessary to contextualise this. The US statesman Thomas Jefferson once proposed a constitutional lifespan of 19 years.[26] In a recent study, Ginsburg, Melton and Elkins have confirmed this as the average lifespan of modern constitutions.[27] Whilst it is clear in principle, there is nothing wrong with amending or completely rewriting a constitution. Where this is done so frequently and so arbitrarily as has been the case in the Central African region, it creates uncertainty and diminishes the prospects for entrenching the rule of law.[28] A number of observations can be made concerning the changes that have taken place since the 1990s and their impact on constitutional development and the rule of law.

As part of the measures to enhance constitutionalism, and unlike in most pre-1990 constitutions, provisions were crafted to regulate, control and check against arbitrary changes of constitutional provisions and thus ensure that any changes made are done with such deliberation and consultation that will prevent the will of the people from being subverted by the self-seeking interests of opportunistic majorities.[29] Table 5 suggests that, in spite of these constraints on the ability of political elites to easily and casually amend constitutions, the problem of changing and remaking constitutions remains. For example, Congo and Rwanda have adopted three new constitutions since 1990, although the record for frequent constitutional changes belongs to Niger which has had five new constitutions (the Constitutions of 1993, 1996, 1999, 2009 and 2010).

It is quite clear that the objective of preventing the abusive use of the powers to amend constitutions has not been attained in the Central African region. The effect has been that some of the progressive constitutional changes introduced under domestic and external pressure in the early 1990s have often been repealed with the frequent amendments or the introduction of new constitutions. One of the main reforms adopted to end the notorious practice of life presidencies in Africa in the 1990s was the introduction of two-term presidential limits. In the 1992 Constitution of Congo, article 178(5) expressly stated that the provision limiting the mandates of the

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26 Cited in T Ginsburg *et al* 'The endurance of national constitutions' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536925 1 (accessed 31 August 2014).

27 Ginsburg (n 26 above) 2.

28 One cannot help but see the close analogy between this and the man who planted a treasured flower. Each day, before watering it, he dug into the soil to see how well the roots were doing. Because of the frequent tampering with the roots, the flower withered and died.

29 For the provisions controlling and regulating the revision of the constitutions, see arts 233-237 of the Constitution of Angola; arts 297-300 of the Constitution of Burundi; arts 63-64 of the Constitution of Cameroon; arts 222-224 of the Constitution of Chad; arts 106-108 of the Constitution of the Central African Republic; arts 218-220 of the Constitution of DRC; arts 185-187 of the Constitution of Congo; arts 103-104 of the Constitution of Equatorial Guinea; arts 116-117 of the Constitution of Gabon; art 193 of the Constitution of Rwanda; and arts 122-123 of the Constitution of São Tomé and Principe.

President of the Republic shall not be the object of any amendment. In spite of this, and arguably because of this provision, a new Constitution was adopted in 2002 in which the two-term limit was removed. In Cameroon, Chad and Gabon, the Constitutions were all amended to remove the term limits, and in the case of Cameroon, over 200 people who were demonstrating against the changes were killed by security forces. It is therefore no surprise that most of Africa's longest-serving leaders come from the Central African region.[30] Although some of the constitutional amendments tried to enhance good governance, in most cases the impression given is that the dictators who were caught off guard in the 1990s have sufficiently recovered and are gradually recovering the grounds they lost. For example, in the 2008 constitutional amendments in Cameroon, article 53(3) grants the President absolute immunity for any acts committed whilst in office as well as after he leaves office. Since a new Gabonese Constitution with 120 articles was adopted in 1991, 125 of these articles have been amended, some more than once. It is therefore clear from this that if constitutions that are supposed to contain provisions protecting them from frequent and arbitrary amendments have nevertheless been revised with such frequency, then all the provisions designed to guard against dictatorship and other abuses of power are in jeopardy. We will now briefly consider some of these provisions and their practical effect.

3.2 Textual promises and practical realities

A casual examination of all the constitutions of the countries in Central Africa will clearly show that all of them, unlike the pre-1990 constitutions, now contain provisions which incorporate almost all the core elements of constitutionalism. One glaring omission in most of them, however, are provisions that are supposed to help support, strengthen and sustain the fledgling transition towards constitutional democracy. Be that as it may, the tentative strides to entrench a culture of constitutionalism and respect for the rule of law in the countries covered in this study have been progressively undermined by several factors. The main one is the fact that the sometimes lofty ideals expressed in the constitutions do not reflect or correspond with actual practice and there remains a wide gap between the constitutional text and practice.

This analysis will focus on five main issues: the recognition and protection of human rights; the attempts to prevent dictatorship through a separation of powers; the strengthening of the rule of law through independent judiciaries; and judicial review and the problem

30 Eg, the longest-serving leaders on the continent are Teodoro Obiang Nguema of Equatorial Guinea and José Eduardo dos Santos of Angola who have been in power since 1979. They are closely followed by Paul Biya of Cameroon, in power since 1982; Idriss Deby of Chad, in power since 1990; Denis Sassou Nguesso of Congo, in power since 1997; Paul Kagame of Rwanda, in power since 2000; and Joseph Kabila of DRC, in power since 2001.

of accountability, especially corruption. It is necessary to preface this by pointing out that, unlike other regions in Africa, most of the countries in this region are francophone, with the exception of Angola, Equatorial Guinea and São Tomé and Principe, which are lusophone. Their constitutional systems have therefore been largely influenced in many respects by the civil legal system within which they operate and therefore have many distinctive characteristics that distinguish them from other African countries, especially those influenced by the Anglo-American constitutional tradition. We will now examine how the constitutions deal with the five issues mentioned above and see what actually happens in practice. Besides the indicators summarised above, a useful indication of actual practice that is used in this analysis is the US Department of State Country Reports on Human Rights Practices in the past two decades, particularly the latest 2012 report.[31]

3.2.1 Nature and scope of human rights protection

All the constitutions, except that of Cameroon, have extensive provisions recognising and protecting the fundamental human rights of citizens.[32] In the case of Cameroon, many of the rights which normally appear in the Bill of Rights or provisions protecting fundamental rights only appear in the Preamble to the Constitution. Although article 65 of this Constitution states that 'the Preamble shall be part and parcel' of the Constitution, the loose, hortatory and obscure language in which these 'rights' are couched does not appear to create or impose any sense of legal obligation. This is reinforced by the fact that individual citizens have no powers to challenge any governmental actions or legislation which violate the Constitution.[33]

Perhaps one of the most significant constitutional developments in the 1990s was the re-introduction in all constitutions in the region of provisions recognising multipartyism. Some, in fact, have detailed provisions which attempt to regulate political parties. Article 7 of the Constitution of the DRC expressly prohibits the formation of a one-party system. Probably because of the conflicts between the two main ethnic groups, the Hutu and Tutsi that led to the 1994 genocide, the constitutional provisions dealing with political parties and elections in Burundi and Rwanda are fairly detailed. Nevertheless, in Burundi there

31 See generally http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed 31 August 2014).

32 See arts 22-88 of the Constitution of Angola; arts 19-74 of the Constitution of Burundi; arts 1-17 of the Constitution of the Central African Republic; arts 12-58 of the Constitution of Chad; arts 11-67 of the Constitution of DRC, arts 7-55 of the Constitution of Congo, arts 5-19 of the Constitution of Equatorial Guinea; art 1 (secs 1-23) of the Constitution of Gabon; arts 9-59 of the Constitution of Rwanda; and arts 14-64 of the Constitution of São Tomé and Principe.

33 For a discussion of the constraints with respect to the control of constitutionality in Cameroon, see CM Fombad 'The new Cameroonian Constitutional Council in comparative perspective: Progress or retrogression?' (1998) 42 *Journal of African Law* 172-186.

is regular harassment of members belonging to certain political parties, and membership of a registered political party is often needed in order to obtain or retain employment in the civil service or to get other benefits such as free housing, electricity and water and interest-free loans.[34] The provisions in the Rwandan Constitution are even more elaborate. They expressly state that no person 'shall be subjected to discrimination by reason of membership of a given political organisation'.[35] This Constitution establishes a National Forum of Political Organisations for purposes of national political dialogue, consensus building and national cohesion.[36] The most significant provision is article 58, which provides for power sharing and states that '[t]he President of the Republic and the Speaker of the Chamber of Deputies shall belong to different political organisations'.[37] In spite of this, some opposition parties were not allowed to operate freely.[38] As Table 6 below shows, the majority of parties in the parliaments in the region are controlled by dominant parties.[39]

Table 6: State of party dominance in parliaments in the Central African region[40]

Country	Ruling party	Seats held in legislature	
		Date of last elections	No of seats held over total number of parliamentary seats
Angola	Popular Movement for the Liberation of Angola, and Labour Party	31 August 2012	175 of a possible 220 seats

34 See US Department of State, Country Report on Human Rights Practices in Burundi (2012) http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed 31 August 2014) 1-2 11.

35 See art 53 of the Constitution of Rwanda.

36 Art 56 Constitution of Rwanda.

37 Art 58 Constitution of Rwanda.

38 See US Department of State, Country Report on Human Rights Practices in Rwanda (2012) 27-30 http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed 31 August 2014).

39 The concept of dominant party is fairly complex. It will suffice to point out that in this context, it simply refers to a situation where the ruling party, either alone or with its allies, controls 66% and above of the seats in parliament. See generally H Brooks 'Realising effective and sustainable democratic governance in Southern Africa and beyond' *EISA Occasional Paper 25* 1-24 (October 2004); J van Eid 'Dominance and fluidity: Conceptualising and explaining party system characteristics in sub-Saharan Africa' http://jonathanvaneerd.files.wordpress.com/2011/01/mpsa_vaneerd2010.pdf (accessed 31 August 2014); M Bogaards 'Counting parties and identifying dominant party systems in Africa' (2004) 43 *European Journal of Political Research* 173-197.

40 It should be noted that this table only covers the lower houses of parliaments, which usually have more powers and influence over the legislative process than the upper houses, for those countries that have both.

Burundi	National Council for the Defence of Democracy and Forces for the Defence of Democracy	28 July 2010	81 of a possible 106 seats
Cameroon	Cameroon Peoples' Democratic Party	30 September 2013[a]	148 of a possible 180 seats
Central African Republic	Kwa Na Kwa and allies	23 February and 27 March 2011	61 of a possible 105 seats
Chad	Patriotic Salvation Movement	13 February 2013	118 of a possible 188 seats
DRC	Party for Reconstruction and Development and its allies	28 November 2011	260 of a possible 500 seats
Congo	Congolese Labour Party and allies	29 July 2012	117 of a possible 139 seats.
Gabon	Gabonese Democratic Party and allies	17 December 2011	114 of a possible 120 seats
Equatorial Guinea	Democratic Party of Equatorial Guinea and allies[b]	26 May 2013	99 of a possible 100 seats
Rwanda	Rwandan Patriotic Front and its allies	16 September 2013	41 of a possible 80 seats.
São Tomé and Principe	Independent Democratic Action Party	1 August 2010	26 of a possible 55 seats

a. Parliamentary elections were originally scheduled for July 2012, and were postponed twice to February 2013 and July 2013 before being held on 30 September 2013.

b. It is doubtful whether the ruling party really needed any allies. On its own, it won 89 seats and its so-called allies only brought in 10.

Apart from São Tomé and Principe, the foundation for a fully-fledged and effective multiparty system in which the opposition parties can play a role in checking governmental excesses and presenting an alternative view on the issues of the day is very weak in the region. The proliferation of parties, for example, 282 in Cameroon and 132 in Chad, most of which (100 in the case of Chad) have been created by or are directly affiliated to the ruling party, makes nonsense of potentially progressive constitutional provisions, such as those in Burundi and Rwanda which are designed to help the opposition parties.[41] In DRC, in the last elections, the ruling Party for Reconstruction and Democracy and its allies captured 260 of the 500 seats in the National Assembly and the main opposition 110 seats, whilst about 100 different parties got in with just one or two seats.

The absence of effective and credible opposition parties in these countries has been compounded by a history, since the 1990s, of routinised blatant electoral malpractices which ensure that the ruling parties always win. There is thus no surprise when Table 3 shows that insofar as civil and political rights are concerned, the only free country in the region is São Tomé and Principe. Political opposition is barely tolerated. As a result of electoral malpractices, opposition party representation is artificially kept to the plus-minus 20 per cent threshold. Grand coalitions, unity governments or so-called 'presidential majority' parties, have become the *modus operandi* for establishing and entrenching dominant parties. Through strategic alliances and manipulation of the election processes, ruling parties have ensured that their positions are never seriously threatened.

It is argued that the only way to improve the situation is to recognise a right to free and fair elections and a number of ancillary rights. First, the basic rights and duties of political parties should be constitutionalised by provisions included to ensure that there is internal democracy within these parties. Second, the constitution should guarantee a right to free and fair elections and a right to equal treatment of all political parties. This should ensure that no political party abuses its incumbency to secure an unfair advantage over its rivals or uses government resources to further its aims. The goal should be to provide a level playing field for all political parties.

3.2.2 Dispersal of powers through separation of powers

There seems to have been an attempt to address one of the problems that made dictatorship and abuses of power after independence inevitable – the excessive concentration and centralisation of powers in the President and in the capital. All the constitutions examined in this study expressly provide for a separation of powers. A number of measures were introduced to disperse powers. For example, most of the constitutions in the region provide for the position of prime minister, who will act as head of government and is answerable to both the President and parliament. Members of the executive are prohibited from holding other positions, especially elective positions in parliament. The decisions of the President, and sometimes even those of the prime minister, need to be countersigned by the minister with responsibility to implement them. Both the Constitutions of Chad and Congo provide, rather oddly, it must be said, that the functions of head of state are incompatible with the discharge of any functions within a political party.[42] It is difficult to see why a person who is elected as President on the basis of his leadership of a political party should, on assuming office, cease to hold any position in the

41 For information on political parties in Cameroon and Chad, see US Department of State, Country Report on Human Rights Practices of 2012 for both countries http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed 31 August 2014).

42 See arts 71 & 72 of the Chad and Congo Constitutions respectively.

party and pretend to be apolitical. The Constitutions of Burundi and Rwanda also provide many other interesting attempts to deconcentrate and disperse powers.

In the case of Burundi, article 108 requires that the President, in appointing his cabinet, must consult his two Vice-Presidents. These Vice-Presidents, according to article 124, must be chosen from different ethnic groups and political parties. The powers of the President are further constrained by the requirement in article 129 that the cabinet must be made up of 60 per cent Hutu and 40 per cent Tutsi and that at least 30 per cent of cabinet positions should be occupied by women. This same ethnic representation is required to be reflected in the public service. As regards Rwanda, article 116 specifies that members of cabinet must be appointed from political parties which have seats in parliament in a manner that will ensure that no party will have more than 50 per cent of the positions in cabinet.

In spite of the elaborate provisions which purport to disperse powers between the three arms of government, the reality is that in all the countries in the region, the President not only continues to exercise exorbitant powers, but dominates and controls all the other two branches of government. This is manifested in several ways. Most of these constitutions still confer excessive powers to the President, especially in making appointments. It is only under the Burundian Constitution where the appointment of senior officials is subject to senate approval.[43] The requirement that the President's orders should be countersigned by the prime minister or minister responsible for implementing them is more symbolic than real because this requirement only applies to certain obscure powers, not the very important ones, especially those concerning appointments of the top officials in government, the judiciary, the military and in other government departments.[44] In all cases, the prime minister is only a nominal head of government because in almost all cases, it is expressly stated that he merely implements the policies decided upon by government.[45]

When the relationship between the executive and the other two branches of government is reviewed critically, even just on the basis of what the constitutional texts provide for, it becomes clear that these constitutions have done nothing more than pay lip service to the concept of separation of powers. As regards the legislature, these constitutions have in accordance with the civilian constitutional tradition usually shared the law-making powers in specified domains between the executive and the legislature. In addition, they usually provide that the executive could make laws by way of ordinances or

43 See arts 111 & 123 of the Constitution.

44 See, eg, art 22 of the Constitution of the Central African Republic; arts 91 & 103 of the Constitution of Chad; and art 27 of the Constitution of Gabon.

45 The only exception is São Tomé and Principe where the choice of Prime Minister is determined by the legislative elections and where the President has recently been forced to appoint a Prime Minister from the opposition party.

decrees in matters reserved for the legislative when so authorised and within the limits of such authorisation.[46] The loose manner in which the law-making powers are couched and the phenomenon of dominant ruling parties have effectively coalesced to leave the executive branch firmly in control of the legislative agenda as well as its content. Besides this, the President usually has the power, sometimes under obscurely specified circumstances, to dissolve parliament.[47] The various controls that have been provided to act as checks and balances, such as motion of censure on the government, oral and written questions, commissions of inquiry and committee hearings, have hardly been effective checks against abuses of power.[48] With a weak and ineffective legislature and, as we shall soon see, a judiciary that is compromised by political interference and corruption, it is clear that the attempts to limit the scope for arbitrary and dictatorial rule were bound to fail.

Leaving aside the position of the judiciary, which will be addressed in the next section, it is argued that some of the post-1990 reforms that have been reversed need to be restored. The most important of these is the restoration of strict term limits to ensure alternation of power. The wide-ranging presidential powers of appointment, which have regularly been used as a source of patronage and rewarding supporters, need to be reduced substantially. First, the criteria and qualifications for appointments and promotions should be clearly laid down. Second, independent commissions should be established to study all applications and make recommendations to the President. Finally, the constitutional right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair must now be entrenched in all constitutions to ensure that ordinary citizens can challenge perverse and arbitrary governmental action.[49] However, any measures designed to promote good governance and the rule of law will hardly yield any dividends in the absence of an efficient judiciary that has the independence and expertise to interpret and apply the law objectively, impartially and without fear or favour.

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46 See generally arts 163-165 of the Constitution of Angola; art 187 of the Constitution of Burundi; arts 25-28 & arts 61-66 of the Constitution of the Central African Republic; arts 121-125 of the Constitution of Chad; arts 122-130 of the Constitution of DRC; arts 111-113 & 132 of the Constitution of Congo; art 64 of the Constitution of Equatorial Guinea; arts 47-53 of the Constitution of Gabon; arts 62-64 of the Constitution of Rwanda; and arts 86-89 of the Constitution of Equatorial Guinea.

47 See eg art 8(12) of the Constitution of Cameroon; art 83 of the Constitution of Chad; art 148 of the Constitution of DRC; and art 19 of the Constitution of Gabon.

48 One rare instance of the legislature occurred in São Tomé and Principe in December 2012 when the Prime Minister, an ally to the President, lost a vote of no confidence in the legislature and had to be replaced by the President. See 'São Tomé and Principe: Government defeated in censure motion' http://www.semipresidentialism.com/?p=2714 (accessed 31 August 2014).

49 Examples of this are found in sec 33 of the South African Constitution of 1996 and art 47 of the Kenyan Constitution of 2010.

3.2.3 Overcoming challenges to judicial independence

As pointed out above, one of the ways in which the separation of powers and the checks and balances that go with it has been weakened is the excessive powers of interference that the executive, especially the Presidents, have been given over the judiciary. The attempt to separate the judiciary from the other two branches and make it independent in these constitutions is couched in fairly contradictory terms. They contain provisions which usually start by reiterating the independence of the judiciary from the other two branches, but then proceed to state that the President shall guarantee the independence of the judiciary. If the intention was to ensure the independence and, one will assume, equality of the three branches of government, why should it be deemed necessary to entrust one with guaranteeing the independence of the other? These constitutions go further to provide that judicial appointments must be made by the President with the 'assistance' or after the 'opinion' of the Supreme Council of Magistracy (SCM). It needs to be noted here that most of the members of the SCM are appointed by the President. He is the Chairperson and is assisted by his Minister of Justice and convenes its meetings as well as determines its agenda.[50] It is manifestly clear from this that in most of these countries, the President has a free hand to decide not only on judicial appointments, but also on disciplinary issues such as suspensions and dismissals, as well as transfers and promotion, since this body often has exclusive powers to deal with these matters. It is little wonder that the various US State Department Reports point out that the judiciary in these countries is often subject to political interference.[51] However, there have been some countries, like Rwanda, where the judiciary has operated without too much government interference and where in 2012 some judges were dismissed for corruption.[52] By way of contrast, in Equatorial Guinea, judges serve at the pleasure of the President.[53]

The overall picture that emerges on the state of the judiciary in Central Africa is that it is subject to much political influence, and is corrupt and inefficient. Amongst the several corrective measures that need to be undertaken, three are imperative. First, the so-called

50 See arts 209, 214 & 218-219 of the Constitution of Burundi; art 37(3) of the Constitution of Cameroon; arts 78-80 of the Constitution of the Central African Republic; arts 145-148 of the Constitution of Chad; arts 82 & 149-152 of the Constitution of DRC; arts 79 & 136-141 of the Constitution of Congo; arts 83-93 & 98 of the Constitution of Equatorial Guinea (in fact, art 86 describes the head of state as the 'first magistrate of the nation'); arts 68-72 of the Constitution of Gabon; and arts 140 & 157-158 of the Constitution of Rwanda.

51 See generally US Department of State, Country Report on Human Rights Practices of 2012.

52 See US Department of State, Country Report on Human Rights Practices in Rwanda, 2012 (n 38 above) 14-15.

53 See US Department of State, Country Report on Human Rights Practices in Equatorial Guinea 2012 5-6 http://www.state.gov/j/drl/rls/hrrpt/humanrights report/#wrapper (accessed 31 August 2014).

powers given to presidents to guarantee the independence of the judiciary must be repealed. Second, there is a need to entrench what are now accepted as the core principles of judicial independence rather than leaving this to be regulated by ordinary legislation which is vulnerable to opportunistic majoritarian manipulation.[54] Finally, the SCM should indeed be required to make recommendations for judicial appointments as well as to deal with other issues of promotion, discipline and transfers. However, it should be constituted in such a manner that at least 50 per cent of its membership is made up of persons who have no links, direct or indirect, with any of the three branches of government and only persons with no such links should be elected to act as Chairperson and Deputy Chairperson. The fundamental importance of an independent judiciary to establishing and entrenching constitutionalism and the rule of law cannot be gainsaid. However, an independent judiciary will only be effective if there is a credible system of judicial review.

3.2.4 Enhancing judicial review

A critical bulwark of constitutionalism and respect for the rule of law is a credible and efficient system that ensures that all violations of the constitution can be sanctioned promptly and competently. With two exceptions, the Constitutions of Cameroon and São Tomé and Principe, all the constitutions examined here have tried to provide a system for controlling and sanctioning violations of the constitutions.

Cameroon took the retrograde step in 1996 of adopting the inefficient system of control of the constitutionality of law that was introduced in the 1958 French Fifth Republic Constitution.[55] It was flawed because it did not allow citizens the right to challenge any violations of the Constitution.[56] Only those who are responsible for introducing laws that may violate the Constitution, namely, the President of the Republic, the President of the National Assembly, the President of the Senate and one-third of the members of either the National Assembly or the Senate may challenge the constitutionality of any law and, even then, only before its promulgation. The centralised body with responsibility for dealing with these matters, the Constitutional Council, is a quasi-administrative and quasi-judicial

54 The core elements of judicial independence that seem to be internationally recognised can be summarised as follows: (i) institutional arrangements for judicial autonomy; (ii) financial arrangements for judicial autonomy; (iii) arrangements for the security of the judicial office; (iv) adequate remuneration of judicial officers; (v) transparent mechanisms for judicial appointments; and (vi) judicial accountability. These are fully discussed by L Dung 'Judicial Independence in Transitional Countries', http://www.undp.org/oslocentre/dvcsjuly03/DungTien Luu-v2.pdf (accessed 31 August 2014).

55 See further Fombad (n 33 above) 172-186.

56 This was corrected during the revision of the French Constitution in 2008. See further MA Rogoff 'Fifty years of constitutional evolution in France: The 2008 amendments and beyond' http://mainelaw.maine.edu/academics/pdf/2010_franco_amer_1.pdf (accessed 31 August 2014).

body whose composition is essentially determined by the President. The effect of this is that there is practically no means for challenging any law that violates the rather weak and outdated Cameroonian Constitution.[57] An equally unsatisfactory approach is adopted by the Constitution of São Tomé and Principe which provides in article 111 that all questions dealing with the infringement of the Constitution must be submitted to and dealt with exclusively by the National Assembly and that its decisions on the matter have binding force. There is scarcely any merit in reserving an issue of constitutional interpretation to a political body that is apt to pay more attention to political – rather than legal – considerations.

All the other countries in the region, with the exception of Rwanda, have improved on the ineffective French Constitutional Council model that was adopted in one form or another after independence.[58] Two main changes have been introduced. First, the new Constitutional Courts have the power of both abstract and concrete review – unlike in the past where this was limited to abstract review. For a constitutional system in which the executive has very extensive law-making powers, which previously were not reviewable for conformity to the Constitution, the power of concrete review which Constitutional Courts now have is a tremendous expansion in the scope for promotion of respect for the rule of law. Abusive executive orders, decisions and other executive rules can now be invalidated for non-conformity with the Constitution. Second, these Constitutional Courts are constituted in such a manner that they will be composed of legal experts (judges, legal practitioners or legal academics).[59] Although the *locus standi* in some matters is reserved, rather illogically, one should say, to the very politicians who are apt to make some of the bad laws, the most important development is that for the first time ordinary citizens can bring matters before these courts where an act or a law violates their constitutional rights.[60]

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57 See generally arts 46-52 of the Constitution. With its 65 articles, with the exception of the Eritrean Constitution, it is one of the shortest and most illiberal of the post-1990 constitutions that have done more to perpetuate the pre-1990 dictatorial system in the country. It is no surprise that Cameroon is one of the very few African countries that, since the Freedom House survey of the state of freedom in the world started in 1972, has never gone outside the category of 'not free'. It is difficult to see how it could happen otherwise under such a regressive constitutional framework.

58 The Rwandan approach is, however, unique in two ways. First, the court that deals with constitutional matters, the Supreme Court, operates within and is the highest court in the hierarchy of ordinary courts. Second, the system of constitutional justice is not necessarily centralised and dealt with exclusively by the Supreme Court. This is because, according to art 149 of the Constitution, cases dealing with violations of arts 52, 53 and 54 of the Constitution as well as those involving political organisations and elections may be initiated at the level of the High Court.

59 Previously, it was not necessarily a requirement that the members of the Constitutional Council should have any legal training or expertise.

60 See generally arts 226-230 of the Constitution of Angola (but note the restrictions in arts 228(2) and 232(2)); arts 226-230 of the Constitution of Burundi; arts 72-77

In spite of the commendable expansion of access to constitutional justice in the past two decades in most countries in the region, it remains too remote and inaccessible. The constitutional courts are usually located in the national capitals, far removed from potential litigants, thus making access expensive and, because they usually have a huge backlog of cases, they do not deal with matters expeditiously. They often have exclusive jurisdiction to deal with electoral disputes but are usually required to render their decisions within very short and unreasonable deadlines. The absence of appeals, because these courts operate as courts of first and final instance, means that errors can never be corrected. It would certainly be desirable to decentralise the system of constitutional justice to bring it as close to the ordinary citizen as possible. This will make it cheaper, faster and probably more just because of the possibility of errors being corrected on appeal. One other problem which needs to be addressed is that of judicial corruption but, as we will now see, it is part of a more general societal problem of lack of accountability.

3.2.5 Corruption and strengthening mechanisms of accountability[61]

Apart from Rwanda and São Tomé and Principe, Table 4 shows that the other countries, particularly Burundi, Chad, DRC and Equatorial Guinea are amongst some of the most corrupt countries in the world. Corruption is probably one of the biggest threats to peace and stability in Africa. Worse still, it casts an ominous dark shadow over the future political, economic and social progress of the continent, given the deleterious effects it is having on the faltering efforts to establish a culture of constitutionalism, democracy, respect for the rule of law and good governance.

As Kofi Annan, the former Secretary-General of the United Nations (UN), in lamenting about the destructive effects of corruption in developing countries, said:[62]

> Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a [g]overnment's ability to provide basic services, feeding inequality and injustice, and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.

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of the Constitution of the Central African Republic; arts 160-166 of the Constitution of Chad; arts 157-160 of the Constitution of DRC; arts 133-149 of the Constitution of Congo; art 95 of the Constitution of Equatorial Guinea; and arts 83-93 of the Constitution of Gabon.

61 This is elaborately discussed in CM Fombad & MC Fombad 'Rethinking anti-corruption strategies in Africa: Constitutional entrenchment as a basis for credible and effective anti-corruption clean-ups' (forthcoming).

62 In '"Foreword" United Nations Convention Against Corruption' http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_ E.pdf (accessed 31 August 2014).

Corruption in Africa today has had a huge negative impact on the transition to genuine democracy, good governance and constitutionalism. The great optimism that followed the wave of democratisation, and the political and constitutional reforms that went with it in the early 1990s with the apparent opening up of political space for competitive elections, have now been neutralised by the corruption of the electoral process by African leaders.[63] Generally, it is the poor who are vulnerable to extortion of bribes by public officials, especially the police. Corruption also causes enormous damage by distorting national priorities and diverting public expenditures away from less lucrative but critically important sectors, such as health, education and other labour-intensive activities which traditionally employ the poor into capital-intensive projects which generate larger kickbacks.

The countries in the region have signed and ratified a number of international and regional anti-corruption treaties.[64] Most of them have provisions in their constitutions which require a declaration of assets, and some have established specialised institutions to deal with corruption. In all these countries, there are fairly comprehensive legal frameworks which identify and sanction different forms of corrupt activities that take place.[65] These anti-corruption measures have in most cases failed woefully for a variety of reasons.

In most cases, anti-corruption legislation, especially the declaration of asset requirements, has seldom been fully implemented[66] or, where

63 See JD Long 'Electoral fraud and the erosion of democratic gains in Kenya' http://www.sscnet.ucla.edu/polisci/wgape/papers/18_Long.pdf (accessed 31 August 2013); R Lopez-Pintor 'Assessing electoral fraud in new democracies: A basic conceptual framework' http://www.ifes.org/~/media/Files/Publications/White%20PaperReport/2010/RLP_Assessing_Electoral_Fraud_White_Paper_Dec2010.pdf (accessed 31 August 2014); UB Ikpe 'The impact of manipulated re-elections on accountability and legitimacy of democratic regimes in Africa: Observations from Nigeria, Zambia and Kenya' (2009) 3 *African Journal of Political Science and International Relations* 300-310.

64 At the global level, there is the UN Convention Against Corruption (UNCAC), which came into force on 14 December 2004 and has been ratified by 42 of the 54 African countries, and the UN Convention Against Transnational Organised Crime which entered into force on 29 September 2003 and has been ratified by 42 of the 54 African countries. At the regional level, there is the African Union Convention on Preventing and Combating Corruption which entered into force on 5 August 2006 and has been ratified by only 33 of the 54 African countries. At the sub-regional level, there is the Southern African Development Community (SADC) Protocol Against Corruption, in force since 2005 and which has been ratified by 8 countries, and the Economic Community of West African States (ECOWAS) Protocol for the Fight Against Corruption which was adopted on 21 December 2001 and has not yet come into force.

65 The Angolan Constitution provides for an ombudsman in art 192; the Burundian Constitution addresses the issue of corruption in art 141 and in art 146 provides for a general declaration of assets by public servants; art 66 of the Cameroonian Constitution also provides for a declaration of assets; art 44 of the Central African Republic Constitution provides for a declaration of assets; art 104 of the Constitution of Chad provides for a declaration of assets; art 99 of the Constitution of DRC provides for a declaration of assets and art 165 provides for as some of the grounds for trying the President and ministers for high treason,

implemented, it has targeted the small fry and left the big fish to swim away undisturbed. In some cases, the declaration of assets laws are vague[67] or exempt certain senior officials who, ironically, are the most vulnerable to corruption, such as the President, Vice-President and President of the National Assembly in Angola.[68] Some countries, such as Gabon, have established specialised anti-corruption agencies (ACAs).[69] These ACAs have failed in the region, as elsewhere in Africa. First, they have suffered from serious design faults that have limited their independence and therefore exposed them to manipulation by politicians. Second, their record of bringing those responsible for corruption to book has been less than impressive. Inevitably, because of the overbearing control exercised by the politicians, many of whom owe their positions to various forms of corrupt practices, the ACAs turn to avoid confrontation with their political masters by investigating only 'safe' cases. Finally, many of the ACAs do not have sufficient powers to target corrupt activities or even to instigate 'own motion' investigations. The scope of their powers is often narrowly defined and they can only investigate matters reported to them and can do no more than recommend that a particular person be prosecuted.

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embezzlement, corruption and unlawful enrichment; in the Congo Constitution, art 47 prohibits corruption and unjust enrichment, while art 48 requires a declaration of assets; and arts 175 and 176 of the Constitution of Rwanda provides for the establishment of a number of special organs and national commissions which include the ombudsman and the office of Auditor-General of State Finances.

66 Eg, in Cameroon, neither the President nor parliament has enacted the law that is supposed to implement art 66 of the Constitution requiring a declaration of assets. This has also been the situation in Chad where no law has been enacted. Perhaps the most notorious instance of vulgar corruption reported in the last few years has been that involving the President of Equatorial Guinea, Obiang Nguema Mbasogo, and his son, Nguema Obiang Mangue. For details of this, see Fombad & Fombad (n 64 above), and US Department of State, Country Report on Human Rights Practices in Equatorial Guinea 2012 14-16 http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/ #wrapper (accessed 31 August 2014).

67 Eg, in Burundi, the law requires financial disclosure by elected officials and senior appointed officials once every five years, but it does not specify that such disclosure be made public. See US Department of State, Country Report on Human Rights Practices in Burundi 2012, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed 31 August 2014) 19. In the Central African Republic, the law requires senior officials to declare their assets and income upon entry into government. It does not, however, require them to make any similar declarations upon departing from government, nor does it explicitly state what constitutes assets or income, nor specify whether children and spouses must also make similar disclosures. See US Department of State, Country Report on Human Rights Practices in Central African Republic 2012 25 http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed 31 August 2014). There is also no requirement that the declaration of assets be made public in Rwanda; US Department of State, Country Report on Human Rights Practices in Rwanda 2012 30 http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed 31 August 2014).

68 See US Department of State, Country Report on Human Rights Practices in Angola 2012 24 http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper (accessed 31 August 2014).

69 In Gabon, it is called the National Commission Against Illegal Enrichment.

In many other African countries, attempts to fight corruption in the region have sometimes taken the form of periodic populist measures, such as purges or crack-downs.[70] However, these purges and crack-downs have not stopped the looting of public property in these countries. They have proven as ineffectual as a long-term and credible anti-corruption strategy as the others because most of the campaigns are simply a reaction either to a scandal or series of scandals or to strong external pressure from donors. This is often the case where the government itself is deeply involved in the corruption. Because these measures often aim at 'safe' targets, one cynic has compared corruption purges to an unusual fishing net which only catches small fish whilst the big fish swim free.[71] Perhaps the most serious problem with purges is that they often have been used by governments to carry out a witch-hunt of their opponents or to divert attention from more pressing problems. As a result, the exercise has barely diminished the level of all-pervasive endemic corruption that is destroying many countries in the region.

It is contended that entrenching a constitutional framework of principles, measures and institutions has the potential of bringing Africa's deeply troubling endemic corruption under control. The purpose of constitutional provisions that spell out the general principles underlying the fight against corruption is to ensure that the effective enforcement, whether in the form of enacting legislation or taking action against corrupt individuals, will not depend on the goodwill of certain individuals or institutions. In this respect, the general constitutional principles that are absolutely necessary can be succinctly summarised under a number of points which underscore the degree of revulsion against corruption and the need to severely punish those involved in it, and to discourage others from engaging in such activities.

The first of these principles is the need to criminalise all forms of corruption. No person or his relatives, friends or other associates should be allowed to benefit, whether directly or indirectly, from the proceeds of corruption or any corrupt activities. The second principle will require integrity and transparency from all public officers, whether occupying an elective political office or an appointive position in the civil service. For both positions, those who have been found guilty of corruption should be barred from holding any public office for a period of 10 to 15 years, depending on the gravity of the offence. Third is the principle that recognises a right of individual and collective action for the removal from office, and the trial and

70 See Cameroon's *L'Opération Epervier* and the analysis by L Luxner 'Former ambassador fights to prove innocence behind bars in Cameroon' (2010) 17 *The Washington Diplomat* (July 2010). This is further discussed in Fombad & Fombad (n 61 above).

71 See the novelist AK Armah, quoted in S Riley 'The political economy of anti-corruption strategies in Africa' in M Robinson (ed) *Corruption and development* (1998) 151.

prosecution of any public official alleged to have been involved in corruption or corrupt activities. This should also extend to a right to take action requesting the blacklisting of any person or business that has been associated with corrupt activities. Fourth is the principle that excludes all persons convicted of corruption or corrupt activities from the benefit of any pardons or amnesties and the principle that statutes of limitations shall not apply to any person alleged to have been involved in corruption or corrupt activities.[72] The fifth principle is that of reward and punishment. This will seek to encourage and protect those who report corruption and punish not only those who are engaged in it, but also those who negligently or deliberately refuse to report acts of corruption. In the sixth place there should be a duty to examine the assets of public officials who appear to be living beyond their means on grounds of suspicious wealth. Where the officials cannot satisfactorily explain such wealth, it should be confiscated by the state. Finally, members of the judiciary, the police service, the armed forces and custom services, from whom the highest standards of integrity are expected, must be given a higher penalty than ordinary offenders for any offence involving corruption and corrupt activities that they commit.

The main argument here is that the key to unlocking the stranglehold of endemic corruption lies in reconfiguring the present constitutions to make corruption a high-risk and no-gain activity for everybody, whether rich or poor. There is no better way for the constitution to protect the fundamental human rights of all citizens, to address the problems of underdevelopment, backwardness, illiteracy, lack of basic necessities such as water, food and healthcare, than to lay down in clear terms a strategy built around preventing, detecting, investigating and prosecuting those involved in corruption. Besides corruption, there are other issues that need to be mentioned, even though fairly briefly.

3.2.6 Other issues affecting constitutionalism and the rule of law

Two further issues deserve mention here. The first one is the problem of impunity. We have noted that, with the exception of Cameroon, the scope of human rights recognised and protected since the 1990s is far more extensive than it has ever been. However, a careful analysis of some of the indicators of the state of human rights protection from the 1990s to date suggests that there has been a progressive reduction in the quality of human rights enjoyed. The best indicator of this trend is an analysis of Freedom House's Freedom of the World

72 A proposed amendment to the 1991 Benin Constitution will, *inter alia*, make economic crimes imprescriptible.

from 1990.[73] This is partly because of the continuously deteriorating economic situation and the resulting unemployment and poverty that it has caused and the bitter conflicts provoked by the increasingly fractious, divisive and often tribalised nature of multiparty elections, most of which are a sham. Violence resulting in loss of life has become more frequent. What is becoming more and more problematic is the fact that many of those responsible for the violence get away with it. In many cases, this is due to incompetence in investigating and prosecuting cases, but fairly often this is because of a cover-up by powerful politicians who might have been behind the violence.[74] The new culture of impunity has not been helped by the numerous challenges that constrain the performance of the judicial institutions. These include poor infrastructure, a lack of adequate funds to cover running expenses, insufficient stationery and office equipment and limited working facilities such as courtrooms. In many countries, judges do not have access to sufficient legal information resources such as books, case reports, statute books and gazettes. This is particularly so in the rural areas where there are no libraries or where these have been neglected over the years. This is often aggravated by the lack of computer skills or a lack of motivation on the part of users. In some cases, there is no access to the internet or, where there is access, there are technical problems such as slow and erratic networks, unreliable power supplies and poor user support and maintenance systems. In addition to a more concerted effort being made to address these issues, serious consideration must now be given to investing in traditional courts. Given the general problem of access to justice and growing impunity, the *Gacaca* courts in Rwanda have shown that there is a potential role for traditional courts.[75] When considered as a part of the informal justice system, a recent study has indicated that they constitute a 'cornerstone of dispute resolution and access to justice for the majority of the populations in developing countries because they usually resolve from 80 to 90 per cent of disputes'.[76] For example, in Malawi, it is estimated that from 80 to 90 per cent of disputes are processed through traditional courts and, in the case of Burundi, the figure is about 80 per cent that go through

73 Some analysis of this is given in CM Fombad 'Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects' (2011) 59 *Buffalo Law Review* 1007-1108.

74 The current prosecution of President Uhuru Kenyatta and his deputy, William Ruto, for their part in the post-presidential election violence of 2008 in Kenya at the International Criminal Court and the support that they are getting from the AU to oppose the proceedings, show how deep-rooted the problem is in Africa as a whole.

75 The *Gacaca* courts are traditional community courts that were set up to prosecute the perpetrators of the 1994 Rwandan genocide. See further P Clark *The* Gacaca *courts, post-genocide justice and reconciliation in Rwanda. Justice without lawyers* (2010).

76 See E Wojkowska 'Doing justice: How informal justice systems can contribute' 5 http://www.democraciaejustica.org/cienciapolitica3/sites/default/files/doingjusticeewawojkowska130307.pdf (accessed 31 August 2014).

its *Bashingantahe* institution as a first or sometimes only instance.[77] Although the traditional justice system is popular, more easily accessible (especially to the poor, uneducated and marginalised), is quicker and provides affordable remedies, justice sector reforms have devoted more attention and most of the funding to supporting the formal judicial system. A lot of material and human resources are needed to research and develop strategies that will improve the quality of justice that comes from the traditional courts.

A second issue that should be discussed here is that of non-implementation of constitutions. Many governments, under pressure from both internal and external sources, agreed to changes to their constitutions, which some had no desire to implement. An extreme example of this is the Cameroonian 1996 Constitution. It took more than a decade for most of the new changes that were introduced in that Constitution to be implemented. For example, it provided for decentralisation (articles 55 to 60), only part of which was carried out in 2008, that is 12 years later. The changes from provinces to regions (article 61) only took place in 2012 (14 years later) and the Senate (articles 20 to 24) was finally established in 2013 (15 years later). The Constitutional Council (articles 46 to 52) is yet to be established. For many years, it was uncertain whether it was the 1972 or 1996 Constitution that was in force. The story of non-implementation of constitutional provisions is the same in many other countries in the region. This explains why there is often this wide gap between the constitutional text and constitutional reality.

4 Conclusion

In a very general sense, it can be said that the concept of the rule of law reinforces that of constitutionalism and provides certain norms, policies, institutions and processes that constitute the core values which every individual in a modern society needs to live peacefully. In advocating for certain basic but fundamental rights and entitlements and a system for peaceful and effective redress against any harm suffered in a manner that is fair to all regardless of their status, constitutionalism and the rule of law remain ideals. No society has attained or fully realised anything close to a perfect level of constitutionalism and respect for the rule of law. As an ideal, the most that can be said is that a society is making good progress towards these goals or that its constitutional framework provides it with either good or poor prospects to attain a high level of these goals.

77 The ancient institution of *Bashingantahe* in Burundi is made up of elders, and people of irreproachable morality and integrity who are responsible for settling conflicts at all levels. See further A Naniwe-Kaburahe 'The institution of *Bashingantahe* in Burundi' http://www.idea.int/publications/traditional_justice/upload/Chapter_6_The_institution_of_bashingantahe_in_Burundi.pdf (accessed 31 August 2014).

As Ogendo rightly pointed out, what we had in Africa before the 1990s were 'constitutions without constitutionalism' and, consequently, little basis for the respect of the rule of law.[78] The prospects soon after the fever of constitutional revisions started gave some reason for cautious optimism.[79] In reflecting carefully over the developments that have taken place over the last two decades in the 11 countries in Central Africa, particularly in light of the different governance survey indicators examined and discussed in this article, one cannot escape the rather pessimistic view that an authoritarian resurgence which combines intransigence with strategic adaptability is in progress. Constitutional developments on the continent have reached a point where we must go beyond the conventional Afro-pessimism or Afro-optimism into Afro-realism.

It is clear from our examination of the developments in these 11 central African countries that in many instances some of the changes that have been taking place under the guise of reforms are fast degenerating to sham, symbolic or token constitutionalism, devoid of the substantive values usually associated with the core elements of this concept, and therefore providing little foundation for the respect of the rule of law to take root. Whilst all countries will continuously face challenges in establishing, consolidating and sustaining the values, institutions and processes that make constitutionalism and respect for the rule of law real and effective, this article has shown that the current challenges faced by these countries are an impediment to their progress, be this social, political, economic or otherwise. In order to arrest the steady decline of good governance, constitutionalism and the rule of law in the countries in Central Africa, the main reforms that have been suggested in the article can be summarised into four main points.

First, the constitutional instability caused by the frequent making, unmaking and remaking of constitutions, whether by revision or re-crafting of new constitutions leading to abusive arbitrary changes, can be checked by restricting all constitutional changes to a permanent constitution review commission. This commission should be constituted in such a manner that no political party holds a majority and it should have exclusive powers to review and recommend amendments to the constitution.

Secondly, presidential term limits need to be restored, and the enormous presidential appointment powers should be limited by

78 O Ogendo 'Constitutions without constitutionalism' in I Shivji (ed) *State and constitutionalism in Africa* (1991) and, for a more general account, see GN Barrie 'Paradise lost: The history of constitutionalism in Africa post-independence' (2009) 2 *Journal for South African Law* 290-322.

79 See generally CM Fombad 'Post-1990 constitutional reforms in Africa. A preliminary assessment of the prospects for constitutional governance and constitutionalism' in A Nhema & T Zeleza (eds) *The resolution of African conflicts. The management of conflict resolution and post-conflict reconstruction* (2008) 179-199; HK Prempeh 'Africa's "constitutionalism revival": False start or new dawn?' (2007) 5 *International Journal of Constitutional Law* 469-606.

laying down strict criteria for appointments and promotions. This should be coupled with a constitutional right to expeditious, efficient, lawful, reasonable and procedurally-fair administrative action.

Third, because of the important role that the judiciary plays in ensuring respect for the rule of law, judicial appointments should be depoliticised by using appointment committees with less than half of their members having any links, whether directly or indirectly, to the executive and the legislature.

Finally, corruption is probably the worst cancer, not only destroying the economies of most of the countries in the region, but also undermining faith in constitutionalism, especially electoral democracy and respect for the rule of law. It has been suggested that radical anti-corruption measures should be constitutionalised, which will render corruption a business in which the risk totally outweighs the benefits.

The Central African region is seriously lagging behind the rest of the continent in progress towards constitutionalism and respect for the rule of law. Many of the present constitutions contain elements of what is needed to make progress. All that is needed is to stop the threats to undermine some of the important gains that have been made and to keep the pressure to improve on the others. In all this, the ordinary citizens hold the key rather than external forces and actors. With more education and awareness creation, more people will be able to fight for substantive and effective constitutionalism rather than to endure the hardship from the present tokenistic gestures.

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An assessment of the possibilities for impact litigation in Francophone African countries

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Summary

The advent of democratisation in Francophone Africa did not provide an enabling environment for the protection of human rights through impact litigation. Also referred to as strategic litigation or public interest litigation, impact litigation can be defined as 'a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected'. The article examines whether Francophone Africa's political and legal contexts are conducive to impact litigation. It concludes that, in general, the political context characterised by a weak separation of powers due to presidentialism, the timidity of constitutional judges, as well as the variance and complexity of electoral jurisdictions, hinder the possibilities for impact litigation. The article concludes that the legal context characterised by the lack of human rights mandates for constitutional jurisdictions (except Benin), the control of standing in constitutional matters by institutions and authorities, the limited standing afforded to NGOs and members of the public (except in Benin and Côte d'Ivoire) and the complete exclusion of amici curiae*, have also hindered the prospects for impact litigation. In the same vein, the subscription to a monism doctrine does not lead to the application of international law in domestic courts and the situation is aggravated by the lack of a culture of litigation.*

Key words: *impact litigation; Francophone countries in Africa; constitutionalism; access to court*

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1 Introduction

After independence African countries, generally, were more concerned with nation building and national unity than with issues such as democratisation and respect for human rights.[1] As a result, in spite of the adoption of constitutions enshrining human rights and fundamental freedoms, very little was done to guarantee human rights. The legal and political arrangements were not conducive to the protection of these rights. In this context, Francophone African countries chose a system of adjudication characterised by the prominence of the Supreme Courts, the highest jurisdiction of the countries or the courts of last resort in all matters.[2] However, in the 1990s, Francophone Africa experienced a wind of democratisation marked by 'a new juridical and political order',[3] and characterised by the creation of constitutional jurisdictions to ensure better protection of human rights. However, the question is whether the advent of constitutional jurisdictions has led to impact or strategic litigation which aims at establishing a human rights framework characterised by the pre-eminence of the rule of law and a transparent and accountable government.

The aim of this article is to examine whether impact ligation is possible in Francophone Africa; in other words, firstly, is Francophone Africa's constitutionalism conducive to impact litigation? Constitutionalism should be understood as[4]

> a system of government characterised by a separation of powers between the executive, the legislature, and the judiciary. It is a system where democratic elections, accountability, good governance, and respect for human rights characterise the government's activities.

Secondly, are judicial mechanisms, such as access to courts or standing, conducive to impact litigation? Put differently, the two questions investigate whether political and legal environments are conducive to impact litigation in Francophone African countries.

For the purpose of the article, I cannot provide an exhaustive investigation of possibilities for impact litigation in Francophone Africa. Nevertheless, broadening the investigation by moving from pure access to courts/*locus standi* and impact litigation to looking at the relationship between constitutionalism and impact litigation

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1 CM Fombad 'The new Cameroonian Constitutional Council in comparative perspective: Progress or retrogression?' (1998) 42 *Journal of African Law* 172; IM Fall 'Constitutional courts and the protection of fundamental rights: A new method of protecting public interests in Francophone Africa' (2009) *Journal of the West Africa Public Interest Litigation Centre* (*WAPILC Quarterly*) 27.

2 B Kante 'Model of constitutional jurisdiction in Francophone West Africa' (2008) 3 *Journal of Comparative Law* 158.

3 Kante (n 2 above) 59.

4 S Kamga & S Heleba 'Can economic growth translate into access to rights? Challenges faced by institutions in South Africa in ensuring that growth lead better living standards' (2012) *SUR International Journal on Human Rights* 85.

would contribute to the existing literature on impact litigation. Furthermore, the other contribution to the debate will be the examination of the prospect of impact litigation in Senegal under the new draft Constitution. Similarly, adding to the debate, the article will additionally focus on the role of electoral judges in enhancing prospects for impact litigation in Francophone Africa.

The article is divided into five sections, including this introduction. The second section defines impact litigation; the third section looks at the political and legal contexts in Francophone Africa. This will inform the analysis of the possibilities of impact litigation, which is the fourth section of the article. The fifth section summarises the article and offers recommendations to enhance the prospects for impact litigation.

2 What is impact litigation?

According to *Black's law dictionary*, impact litigation, also known as strategic litigation or public interest litigation (PIL), is[5]

> a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected.

For Judge Bhagwati, impact litigation entails[6]

> a co-operative and collaborative effort on the part of the petitioner, the state or public authority and the court to secure observance of the constitutional or legal rights benefits and privileges conferred upon the vulnerable sections of the community and to bring social justice to them.

In fact, a good strategic litigation is measured by its lasting impact. In this respect, Geary is of the view that strategic litigation[7]

> involves selecting and bringing cases to court with a goal of creating broader changes in society. People who bring strategic litigation want to use the law to leave a lasting mark beyond just winning the matter at hand. This means that strategic litigation cases are as much concerned with the effects that they will have on larger populations and governments as they are with the end result of the cases themselves.

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5 *Black's law dictionary* (1990) 1229; V Jaichand 'Public interest litigation strategies for advancing human rights in domestic systems of law' (2004) 1 *SUR International Journal on Human Rights* 127; F Falana 'The role of public interest litigation law in advancing goals of the constitution: Key gains, challenges and limitations of Nigerian democracy (1999-2007)' (2009) 1 *Journal of the West Africa Public Interest Litigation Centre* (*WAPILC Quarterly*) 14.

6 *Peoples Union for Democratic Rights v Minister of Home Affairs* [1986] LRC (cont) 547.

7 Child Rights Information Network 'Children's rights: A guide to strategic litigation' http://www.crin.org/docs/Childrens_Rights_Guide_to_Strategic_Litigation.pdf (accessed 22 October 2013).

Therefore, the end result of a particular case is not the benchmark to measure the success of strategic litigation, but the impact that the case will have in transforming the law for the good of populations in the long term. In this respect, litigating aims to change things and promote the public good as opposed to that of interest groups and political parties[8] who care only for their members. In short, among others, impact litigation entails the existence of a conducive political environment revolving around the separation of powers in which checks and balances are ensured as well as legal arrangements in which courts are accessible to all.[9]

Indeed, for impact litigation to flourish, there is a need to have a positive environment characterised by an existing constitution containing a bill of rights, a strong separation of powers, an open approach to *locus standi* or standing[10] to take legal action and the liberal treatment of *amici curiae* or 'friends of the court' who use their expertise to elucidate issues before the court.[11] In addition, the litigant must know 'the rules of the game',[12] which entails understanding the political context, checking the timing in understanding whether the matter is ripe or not moot[13] for litigation. Furthermore, the litigant should consider the appropriateness of other avenues, such as law reform, advocacy, legal education or the threat of litigation and the costs of the court orders. He or she should also

8 Falana (n 5 above) 21.

9 GS Nijar 'Public interest litigation: A matter of justice – An Asian perspective' http://www.aseanlawassociation.org/9GAdocs/Malaysia.pdf3 (accessed 22 October 2013).

10 An example of a liberal approach to standing could be found in sec 38 of the Constitution of the Republic of South Africa, 1996, according to which '[p]ersons who may approach the court are (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) acting in their own interest; anyone acting as a member of, or in the interest of, a group, or class persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members'. For more on standing, see A Skelton 'Constitutional protection of children's rights' in T Boezaart (ed) *Child law in South Africa* (2009) 267; P Cane *Administrative law* (2004) 63; also the Nigerian case *of Femi Falana v Attorney-General & 36 Others* (unreported) Suit FHC/ABJ/CS 82/2006), where the plaintiff had sought leave of the Federal High Court to compel the federal and state governments to comply with sec 15(1) of the Nigerian Child's Rights Act, which provides that '[e]very child has the right to free and compulsory and universal basic education and it shall be the duty of the government in Nigeria to provide such education'. In this case, the Court upheld the preliminary objection, arguing that the plaintiff lacked *locus standi* in the case; see also *Gani Fawehinimi v Inspector-General of Police* ((2002) 23 WRN 1; (2002) 1 NWLR (PT 767) 606, where it was held that the plaintiff had *locus standi* to prosecute a sitting governor. For more on these Nigerian cases, see Falana (n 5 above) 15; *The Centre for Child Law v Minister of Justice and Constitutional Development & Others (National Institution for Crime Prevention and Reintegration of Offenders as amicus curiae)* 2009 (2) SACR 477 (CC).

11 Jaichand (n 5 above) 130.

12 A Skelton 'Strategic children's rights litigation: An overview' seminar organised by Save the Children and the Centre for Child Law, held at the University of Pretoria, 31 October 2011 (on file with author).

13 For more on ripeness and mootness, see art 34 of the South African Constitution; also Skelton (n 10 above) 269.

assess the possibility of using international and regional instruments in the domestic courts[14] and identify the appropriate remedies[15] which should in principle have a long-lasting impact on society.

3 Political and legal context in Francophone Africa

3.1 Political context

As alluded to earlier, the 1990s were the beginning of democratisation in Africa. This era was marked by the separation of powers between the executive, legislative and judiciary. The peculiarity of this context was the creation or the replacement of Supreme Courts by Constitutional Courts in Mali, Benin, Mauritania, Togo, Niger, and Constitutional Councils in Cameroon,[16] Senegal and Burkina Faso. Only Guinea kept its Supreme Court.

However, in countries such as Benin, Mali, Burkina Faso, Côte d'Ivoire and Mauritania, the creation of constitutional jurisdictions did not lead to the abolition of the Supreme Court, but to some sort of cohabitation of the two institutions. Nonetheless, in Cameroon,[17] pending the establishment of the Constitutional Council, the Supreme Court remains the highest court of the land, whereas in Togo and Niger, the Supreme Court remained operational, although not very active and dealing with only a handful of cases. Unlike in France, where the creation of the *Conseil Constitutionnel* or Constitutional Council is aimed at protecting the executive from the legislative known for being too powerful under the Third and Fourth Republics[18] in Francophone Africa, the setting up of constitutional jurisdictions aimed not only to shield 'the legislative and judiciary, but also the ordinary citizens from the steadily-increasing and overbearing powers of the executive'.[19] This was done through the judicial review processes as affirmed by the US Supreme Court in 1803 in the case of *Marbury v Madison*.[20] Accordingly, the Supreme Court was

14 For more, see RLK Ngidi 'The role of international law in the development of children's rights in South Africa: A children's rights litigator's perspective' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010); A Skelton 'The development of a fledging child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' (2009) 9 *African Human Rights Law Journal* 482.

15 For more on remedies, see Cane (n 10 above) 82; Skelton (n 10 above) 274.

16 It is important to note that Cameroon is a bilingual country (French and English) with eight French-speaking and two Anglophone regions. Therefore, the analysis on Cameroon will be mostly based on the French-speaking context.

17 Even though French and British colonial rule left Cameroon with a dual legal system, with common law and civil law, when referring to Cameroon, the article will focus on civil law which is within its scope.

18 The constitutional periods of 1875-1946 and 1946-1958 respectively in France.

19 Fombad (n 1 above) 73.

20 *Marbury v Madison*, case decided in 1803 by the US Supreme Court; for more on this case, see http://www.infoplease.com/ce6/history/A0831715.html#ixzz1gQK3uFaE (accessed 20 October 2013).

empowered to take control of judicial review, which is the principal device used by the Court to oversee public decision making.[21] In other words, the highest court in the country is empowered to ensure 'accountability for the performance of public function',[22] which entails 'checking', 'controlling' and 'regulating'[23] decision-making processes.

Nevertheless, this attempt to shield other branches of government from the might of the executive is hindered by presidentialism which is endemic in Africa.[24] Presidentialism, also known as 'imperial presidency', is the dominance of the President of the Republic whose hand reaches the legislative and the judiciary and restricts their independence.[25] In this context, the power of the President to appoint members of the judiciary, to stand in the highest court of the land in constitutional and other matters and to legislate through decrees, are instrumental in deleting the frontiers of separation powers. This will be explored in detail while looking at how the separation of powers affects PIL in Francophone Africa.

3.2 Legal context

An examination of the legal context will focus on the nature of constitutions, access to court or *locus standi*, as well as the application of international law by domestic courts. For a legal environment to be conducive to impact litigation, there is a need to have a constitution which enshrines human rights; a constitution with a bill of rights in which protected rights are justiciable. Is it currently the case? In addition, the court, and especially constitutional jurisdictions, should be accessible to all citizens in all matters, especially in constitutional review-related matters and not only in electoral disputes as is currently the case generally.

Related to this is the question of access to the court for non-governmental organisations (NGOs) and associations. In general, access to courts is hindered by the principle of 'no interest, no action' of the French procedural law, which is a reality in Francophone Africa. However, there are a few opportunities that enable interested NGOs and associations to bring cases to court, through class action, for instance.

As far as adherence to international law is concerned, French-speaking African countries are parties to the main international and

21 Cane (n 10 above) 8.
22 Cane (n 10 above) 7.
23 As above.
24 K Prempeh 'Progress and retreat in Africa: Presidents untamed' (2008) *Journal of Democracy* 110.
25 As above; HS Adjolohoun 'Between presidentialism and a human rights approach to constitutionalism: Twenty years of practice and the dilemma of revising the 1990 Constitution of Benin' in MK Mbondenyi & T Ojienda (eds) *Constitutionalism and democratic governance in Africa: Contemporary perspectives from sub-Saharan Africa* (2013) 245.

regional human rights treaties and subscribe to the monist approach through which an international agreement automatically becomes part of domestic law upon its ratification and publication in the national gazette. The challenge is that Francophone African countries often do not give effect to international and regional agreements in their court rooms. Given these political and legal contexts, the next section of the article will examine whether these environments are conducive to impact litigation.

4 Prospects for impact litigation in Francophone Africa

Focusing on the assessment of avenues for impact litigation in Francophone Africa, this section examines the extent to which the environment is conducive to this litigation. In this respect, it assesses the extent to which the separation of powers is conducive to impact litigation. It also examines the legal architecture by assessing whether Francophone African countries have constitutions containing justiciable bills of rights, liberal standing requirements, and whether international and regional instruments are applied by domestic courts.

4.1 Separation of powers

Notwithstanding their official subscription to the separation of powers, Francophone African countries *de facto* apply 'imperial presidency'. In an analysis of the situation in Benin, Adjolohoun aptly demonstrates how the boundaries between the executive and other branches of governments are blurred to benefit the former.[26] In this regard, the President of the Republic is at the same time the head of state,[27] head of the executive[28] and the supreme head of the army.[29] He appoints cabinet members, and determines their duties and who they report to.

Furthermore, out of seven members of the Constitutional Court, the President appoints three. Empowered by article 54 of the Constitution, he also appoints the President of the Supreme Court and members of this Court, even though these appointees are chosen from the list prepared by the *Conseil Superieur de la Magistrature* (Judicial Service Commission). The President also appoints the president of the broadcasting body in the country as well as the ombudsman.[30]

26 Adjolohoun (n 25 above) 256-269.
27 Art 44 Constitution.
28 Art 54(1).
29 Art 54(2).
30 Adjolohoun (n 25 above) 256.

Moreover, the President is empowered to make law through 'projects' of law or 'executive bills'.[31] In this way, he shares the 'initiative of laws' with parliament. From this perspective, the President also approves legislation adopted by parliament and is mandated to initiate a referendum.[32] Although the National Assembly remains the main law-making body in the country, the vast powers of the President in law making cannot be ignored. In his analysis of presidentialism in Africa, Prempeh correctly argues that '[c]onstitutional design has helped to ensure presidential dominance over the legislature, typically by doing little to rebalance power between the two political branches'.[33] Indeed, it could be claimed that the might of the President in all spheres of power turns him into the alpha and omega or the beginning and end of the Beninese constitutionalism. Adjolohoun explains as follows:[34]

> [The] segregation of powers under the law is eroded by strong prerogatives afforded to the President of the Republic to both make the law and exercise important political influence-related powers over public administration, armed forces, the judiciary and other checks and balances institutions, including the media, social and economic councils, and the ombudsman institution.

The presidentialism observed above is not unique to Benin, but is the trend in Africa, and Francophone Africa in particular. For instance, in the Democratic Republic of Congo (DRC), the Constitutional Court is made up of nine members appointed by the President of the Republic who choses three of them on his own initiative, three are recommended by parliament in session and three recommended by the High Council of Magistracy. In Cameroon, the President appoints members to the bench and the legal department.[35] In addition to this, the President 'shall be assisted in this task by the Higher Judicial Council which shall give him its [non-binding] opinion on all nominations for the bench and on disciplinary action against judicial and legal officers'.[36] This provision turns judges into mere civil servants who aspire to nominations and promotions and will therefore not contradict the executive that takes decisions in terms of their careers. These judges will not stand for public interest when their personal interest is at stake. This cannot enhance the prospects of impact litigation.

Furthermore, the specificity of the Cameroonian Constitutional Council is that 'it is not a court of law and operates outside the judicial system'.[37] This is so because the 'judicial power' is located in Part 5 of the Constitution, whereas the Constitutional Council is located in

31 Art 57 Constitution.
32 Art 58.
33 Prempeh (n 24 above) 115.
34 Adjolohoun (n 25 above).
35 Art 37(3) Constitution.
36 As above.
37 Fombad (n 1 above) 176.

Part 7. The executive interferes with and dominates the Constitutional Council where the President of the Republic appoints 11 members for a non-renewable term of office of nine years 'from among personalities of established professional renown' and 'of high moral integrity and proven competence'.[38] In addition to this, all 'former Presidents of the Republic shall be *ex officio* members of the Constitutional Council for life',[39] even if they lack expertise in terms of law and human rights issues. According to Nguélé, a term of office of nine years ensures the independence of the Constitutional Council.[40] However, it is worth noting that an appointed judge of nine years' service could serve his or her employer's interests to the detriment of fundamental freedoms. An elected judge (by a commission made of his or her peers) would be more prone to serve the interests of justice through which strategic litigation could become a reality.

Moreover, the review of the constitutionality of laws has been conferred by article 47 of the Constitution to the Constitutional Council. Nevertheless, since the latter has never been established, section 67(4) of the Constitution, dealing with transitional and final provisions, states that the Supreme Court shall perform the duties of the Constitutional Council until the latter is set up. The Supreme Court can therefore exercise such powers as have been conferred on the Constitutional Council.[41] These powers are extremely restricted in two ways: Firstly, under article 47, the Supreme Court can only entertain disputes on a set number of issues. With respect to the most important issue concerning unconstitutional laws, its jurisdiction is limited to an abstract pre-promulgation review of laws. Hence, there is an urgent need to establish a strong separation of powers with an independent Constitutional Council.

In Senegal, the independence of the Constitutional Court is also questionable because all its members are appointed by the President of the Republic. Overall, Francophone African countries are characterised by the supremacy of the executive over other branches of government, by a 'quasi-subordination' of the judiciary to the executive, and this constitutes a hindrance to the flourishing of impact litigation. In fact, the pre-eminence of the executive in all spheres of the state led Pempreh to note:[42]

> [C]onstitutionalism (in the form of credible constitutional limits on executive power), Africa's post-1990 transitions have at best injected a few (but non-retrieval) democratising reforms into an old order that remains in key respects unreconstructed.

38 Art 51(1) Constitution.

39 Art 51(2).

40 MN Abada 'L'independance des juridictions constitutionnelles dans le constitutionalisme des Etats Francophones post guerre froide: L'exemple du conseil constitutionnel Camerounais' http://www.droitconstitutionnel.org/congresmtp/textes5/ABADA.pdf (accessed 22 October 2013).

41 CM Fombad *International encyclopedia of laws: Cameroon* (2003) 125.

42 Prempeh (n 24 above) 113.

However, in 2013, the government of Senegal established a National Commission for the reform of institutions. This Commission is mandated to reform national institutions to ensure democracy, good governance and respect for the rule of law in the country. After a nationwide consultation, the Commission produced an *avant projet de Constitution* or a draft Constitution, characterised by a balanced separation of powers between the executive, legislature and the judiciary.[43] To address the pre-eminence of the executive on the legislature, some of the new checks and balances proposed are that, although the President signs ordinances and decrees, most of his or her actions are countersigned by the Prime Minister, except in cases such as the attribution of distinctions to citizens who deserve them;[44] the exercise of presidential pardon happens after consultation with the *Conseil Superieur de la Magistrature*;[45] and the negotiation of international agreements can only be ratified by the President after the approval of the National Assembly,[46] to list some of them.

Similarly, to ensure the independence of the judiciary, judges are subject only to the authority of the law,[47] and as such cannot receive injunctions from the executive which cannot as well hinder the implementation of the courts' decisions.[48] In addition to this, the presidency of the Superior Council of Magistracy is headed by the president of the Constitutional Court. The Superior Council of Magistracy comprises the president of the Constitutional Court, appointed by the President of the Republic, two high-ranking personalities appointed by the president of the National Assembly, the president of other branches of the judiciary, such as *Conseil d'Etat,* the first presidents of the Court de Cassation, the public prosecutor at the same Court, and many other elected members.[49] Moreover, the Superior Council of Magistracy also acts as a discipline council for judges[50] who are as such protected from the might of the executive.

Furthermore, the Constitutional Court comprises three magistrates with at least 25 years' experience, appointed by the President of the Republic who elects them from a list of six proposed magistrates by the Superior Council of Magistracy. It also includes a law professor with at least 25 years' experience, chosen by the president of the of National Assembly, a lawyer with at least 25 years' experience chosen by the national bar, and another high-ranking personality with 25 years' experience chosen by the Prime Minister from a list of three nominations recommended by associations of human rights

43 Art 5 Draft Constitution of 1993.
44 Art 71.
45 Art 72.
46 Art 145.
47 Art 105.
48 Art 129.
49 Art 106.
50 As above.

organisations.[51] The tenure of the members of the Constitutional Court is six years and is non-renewable.

The diversity in membership of the Constitutional Court aims to ensure its independence from other branches of government. If adopted, the new Constitution of Senegal could become the model to be emulated in Africa as it addresses the various aspects of presidentialism which hinder access to justice and standing in court that are vital for impact litigation in Francophone Africa.

While waiting for the adoption of the new Constitution that can be used as a model in Francophone Africa, the other avenue to explore is the possibility of impact litigation in electoral disputes. In general, electoral judges are tasked with ensuring the rule of law and to guarantee free and fair elections. In this context, prior to elections, judges co-ordinate the registration of voters and monitor the candidates and electoral campaigns as well as their funding. After elections, judges are also tasked with announcing the election results and to handle elections disputes.[52] These disputes question the validity of the elections. In various African French-speaking countries, including Cameroon, Benin, Burkina Faso, Gabon, Guinée-Bissau, Madagascar, Mauritania, Niger, Rwanda, Senegal, Tchad, Togo, Mali and Senegal, the Constitutional Court handles electoral disputes as a court of the first and last resort.

In Mali, for example, the Constitutional Court is tasked with addressing disputes related to presidential and parliamentary elections, whereas local and municipal elections are the domain of the Administrative Chamber at the Supreme Court.[53] Similarly, in Senegal, the Constitutional Council not only receives electoral lists for presidential elections, but is also tasked with handling disputes related to presidential and parliamentary elections and releasing the results of these elections.[54] As far as local or municipal electoral disputes are concerned, in Mali[55] and Senegal[56] the Administrative Chamber of the Supreme Court is in charge.

Furthermore, through election disputes, electoral judges are also mandated to protect human rights and fundamental freedoms. For instance, in Mali the right to equality of all Malians to run for presidential office was protected by declaring that a provision of the electoral law prohibiting independent candidacy was unconstitutional.[57] In a similar decision, a constitutional judge ordered the National Committee for Equal Access to State Media to

51 Art 108.

52 AA Sow 'La contribution du juge des elections dans la construction de l'etat de droit au Senegal' in H Hamann *et al* (eds) *African law study library* (2012) 2.

53 Law of 12 February 2002 relating to elections.

54 See arts 29, 30, 32, 33, 34, 35, 37 & 41 of the Senegalese Constitution. Also, Decree 92-916 of 17 June 1992, art 2.

55 Malian Law of 12 February 2002.

56 *Loi 92-15 du 7 février 1992 portant code électoral au Sénégal.*

57 Arrêt CC 96-003 du 25 octobre 1996.

ensure that Mr Mohamed Kimbiri, a candidate for presidential election, was given equal access with other candidates to state media.[58]

In Senegal, during the 1993 presidential elections, the Constitutional Council protected the right to equality between the candidates by rejecting the candidacy of Landing Savané which was submitted after the deadline for submission.[59] The other illustration of the freedom of the Constitutional Council was demonstrated when it rejected a request from President Diouf because it was submitted late.[60] Still in Senegal, the Constitutional Council has recorded similar bold decisions related to legislative elections. For instance, in distancing itself from the position of the executive, the Constitutional Council held that rules related to the ineligibility of candidates for election should be interpreted narrowly and could not be broadened to include cases non-explicitly provided for by the law.[61] Similarly, the Constitutional Council forbade the use of the name and picture of former President Abdoulaye Wade by 'the Wade Coalition' on ballots during legislative elections.[62] This decision was aimed at protecting equality between political parties and various coalitions during legislative elections.

The separation of powers characterised by the independence of the electoral judges opens more space for impact litigation and the protection of human rights to flourish. However, the boldness of the electoral judges in constitutional jurisdictions is more theoretical than a reality. Generally, the weakness of the electoral judges is visible after the elections.[63] These judges often find excuses not to take action to address fraudulent elections. For instance, in Senegal in Decision 10/ 93 – Case 20 to 23/E/C/93, the judge was of the view that the irregularities noted during elections benefited all political parties and could not be relied on to declare the elections void.

Furthermore, instead of using his or her discretionary power, the constitutional judge defers the matter to another court. Such an approach was used by the Constitutional Court of Senegal in Decision 10/93 – Case 20 to 23/E/C/93. In this decision, some issues were qualified as criminal offences and were deferred to the competent judge by its electoral counterpart.[64] Moreover, as correctly observed by Sow, in that judgment, the judge spent more time expressing

58 Arrêt CCEL-044 du 11 avril 1997.

59 Décision 1/93-Affaire 1/E/93 (Publication of the list of candidates for presidential elections of 21 February 1993).

60 Constitutional Council decision 3/93 Case 4/E/93,

61 Constitutional Council decision 33/98 Case 1/E/98 et 2/E/98; for more on this decision, see Sow (n 52 above) 8; *Les décisions et avis du Conseil constitutionnel du Sénégal, Rassemblées et commentés sous la direction de Ismaila Madior Fall*, CREDILA (2008) 206.

62 Décision 81 - Affaires 2/E/2001-3/E/2001- 4-/E/2001. For more on this decision, see Sow (n 52 above) 8 9.

63 Sow (n 52 above) 9.

64 For more on this decision, see Sow (n 52 above) 10.

regret over the wrongdoings during elections than taking action to remedy these wrongs.[65] This attitude was illustrated by Decision 6/93 – Case 7 to 12/E/93, where the judge simply 'regretted' that a television channel aired a political campaign after the closure of the electoral campaign period.

It is important to note that the timidity of the constitutional jurisdictions is not unique to Senegal, but is the trend in Francophone Africa. For instance, in Mali the Administrative Chamber of the Supreme Court in charge of local elections disputes is often weak and cannot easily compel the administration to follow or not to follow the law.[66] The timidity and incapacity of constitutional jurisdictions to declare elections void could be linked to the fact that, in the first place, these jurisdictions are generally mandated to run the election processes and ensure their fairness. Therefore, declaring the elections void at the end will amount to an acknowledgment of incapacity and a vote of non-confidence in themselves.[67] It could be argued that, to some extent, constitutional jurisdictions are both the judges and the parties in election disputes and this can only hinder the prospects for significant impact litigation.

Besides the timidity of the constitutional judges, the variance or multiplicity of electoral jurisdictions tasked to handle different types of electoral disputes can be confusing and lead to incomprehension and interferences between these jurisdictions. Furthermore, in countries where many people are still illiterate, the complexity related to diversity of jurisdiction cannot encourage the populations in need of justice.[68] Consequently, there is a need to centralise electoral disputes to one well-equipped and capacitated specialised jurisdiction. Subsequently, populations should be educated and empowered to use the specialised jurisdiction as this will enable them to effectively take cases to the jurisdiction.

In general, notwithstanding some positive attempts by constitutional jurisdictions, it could be argued that much more needs to be done by these jurisdictions to make a significant impact. Indeed, after almost every election in Francophone Africa, the constitutional jurisdiction is called upon to address a crisis.[69] This situation is likely to weaken the jurisdiction and discourages citizens and groups who in

65 As above.

66 *'Le juge suprême et la gestion du contentieux des élections locales' Les actes du colloques de Cotonou* 14-16 May (2002) 45.

67 D Sy '*La condition du Juge en Afrique: l'exemple du Sénégal'* (2003) 19 http://afrilex.u-bordeaux4.fr/la-condition-du-juge-en-afrique-l.html (accessed 19 September 2014).

68 J de Gaudusson '*Les élections à l'épreuve de l'Afrique' Les cahiers du Conseil constitutionnel 13, 'Etudes et doctrine. La sincérité du scrutin'* (2002) 103.

69 AH Diompy '*Les dynamiques récentes de la justice constitutionnelle en Afrique Francophone'* http://afrilex.u-bordeaux4.fr/sites/afrilex/IMG/pdf/JOURNEE_DE_LA_JEUNE_RECHERCHE_EN_DROIT_CONSTITUTIONNEL.pdf25 (accessed 20 September 2014).

principle should litigate. This situation will, therefore, hinder the prospect for impact litigation.

4.2 Constitutions/bills of rights

In general, Francophone African countries' constitutions contain preambles that list fundamental rights. Although some scholars have questioned the legal value of the Preamble, arguing that it provides mere contextual guidance and is therefore non-justiciable,[70] the legal value of the Preamble has been expressly recognised in many Francophone African countries' constitutions. For instance, in Cameroon, the Constitution itself is unequivocal on the legal status of the Preamble. The Constitution, in article 65, clearly states that the Preamble 'is part and parcel of the Constitution' and is as such justiciable. This, however, remains controversial because the Cameroonian Supreme Court's emphasises that the Preamble only provides contextual guidance and contains mere principles, and is therefore not justiciable.[71] In fact, the Cameroonian Constitution does not contain 'constitutional provisions which enable private individuals to petition the court in case of an alleged violation'[72] of human rights. This was noted by the United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee). During the examination of the 1998 Cameroon report, the ESCR Committee raised its concern 'about the legal status of the Covenant in the Cameroonian legal system'.[73] The Committee[74]

> regrets that the delegation [of Cameroon] has not been able to clarify the position of the Covenant in Cameroonian law, nor provide any specific references to cases in which the Covenant has been invoked in national courts of law.

This remark led Che to argue that 'Cameroon should clearly and unequivocally integrate socio-economic and political rights in its Constitution, as well as adopt definite measures for their enforcement by state organs'.[75] In other words, the enumeration of fundamental rights in the preambular paragraph of the Cameroonian Constitution cannot be an appropriate substitute for a bill of rights. Therefore, the country should revise its Constitution with specific attention to the

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70 V Bhagwan & V Bhushan *Comparing constitutions* (1987) 12.

71 *Rapport de la Cour Suprême du Cameroun* (2000), as quoted by GZ Sebenzile 'The Treatment Action Campaign (TAC) case as a model for the protection of the right to health in Africa, with particular reference to South Africa and Cameroon' unpublished LLM dissertation, University of Pretoria, 2005 41.

72 MD Afuba 'The constitutional protection of civil and political rights in Cameroon' (2006) 3 *University of Botswana Law Journal* 68-69.

73 Concluding Observations of the ESCR Committee: Cameroon 8 December 1999 E/C12/1/Add.40 para 11.

74 As above.

75 CAC Che 'Challenges of incorporating and enforcing a bill of rights in the Cameroonian Constitution' (2008) 2 *Cameroon Journal of Democracy and Human Rights* 1 http://www.cjdhr.org/2008-06/Christian-Che.pdf (accessed 22 October 2013).

incorporation of a bill of rights, and the provision of remedies in cases of human rights violations. In this vein, Cameroon should act to institutionalise the justiciability of all fundamental rights because, as correctly observed by Arbour, 'it is through action at the national level that international human rights obligations can be translated into reality'.[76]

In Senegal, the Preamble is part and parcel of the Constitution and is as such justiciable as a bill of rights provision. The Preamble subscribes to international human rights instruments which have contributed to the elaboration of global standards of human rights,[77] and this strengthens its legal value and renders it justiciable. This was confirmed by the Constitutional Council in its decision of 23 July 1993.[78] In this decision, the Constitutional Council extended the block of constitutionality to the Preamble, integrated the Bill of Rights of man and the citizen of 1789, the Universal Declaration of Human Rights (Universal Declaration) and the African Charter on Human and Peoples' Rights (African Charter) in the Constitution. This action underlines the justiciability of the Preamble that can be used for constitutionality control. In fact, the position of the Senegalese Constitutional Council has become the recent trend in Francophone Africa. Nevertheless, this does not lead to impact litigation because besides Benin, constitutional jurisdictions in Francophone Africa do not have a human rights mandate.[79] Furthermore, even in Benin, ligation on socio-economic rights that could be a basis for impact ligation is still scarce.

4.3 Standing in constitutional matters

Linked to access to justice, standing can be defined as an applicant's right to make a legal claim or seek judicial enforcement of a duty or right.[80] In principle, Francophone African countries' constitutionalism allows constitutional challenges. However, constitutional jurisdictions ar not easily accessible to all, except in cases of electoral disputes. In Cameroon, only the President of the Republic, the president of the National Assembly, the president of the Senate, one-third of the members of the National Assembly or one-third of the senators, can bring a case to the Constitutional Council,[81] except in cases concerning election disputes. In other words, individual Cameroonians do not have the standing to challenge the

76 L Arbour *The Plan of Action of the Office of the United Nations High Commissioner for Human Rights in Protection and Empowerment* (2005); Rights and Democracy Annual Report 2005/2006 1.

77 HS Adjolohoun 'Visiting the Senegalese legal system and legal research: A human rights perspective' (2009) http://www.nyulawglobal.org/globalex/SENEGAL.htm (accessed 20 September 2014).

78 RIDA-EDJA 23, 72 E.

79 Fall (n 1 above) 30.

80 *Black's law Dictionary* (n 5 above) 1999; C Tobias 'Standing to intervene' (1991) *Wisconsin Law Review* 420.

81 Para 47(2) Constitution.

constitutionality of laws. The same trend is followed in the DRC, where only the President of the Republic, the Prime Minister, the president of the Senate and one-tenth of senators or members of parliament can bring constitutional matters to the Constitutional Court that is given 30 days to render its decision and eight days when there is an urgent matter or by request from the government.

Similarly, in Senegal, the President of the Republic is empowered to seize the Constitutional Council to declare a law unconstitutional, and this should be done within six days after he has received the law passed by at least one-tenth of the members of the National Assembly. Additionally, a tenth of the members of the National Assembly can seize the Constitutional Council for unconstitutionality.[82] However, as will be discussed further below, in relation to Francophone Africa in general, individuals may invoke the exception of unconstitutionality of law during proceedings before the Court of Cassation or State Council.[83] Subsequently, these courts will refer the matter to the Constitutional Council for the final say. In addition to this, registered political parties and a coalition of parties have standing before the Constitutional Council.

In Côte d'Ivoire, only the President of the Republic has standing to challenge the constitutionality of bills at the Constitutional Court. Nevertheless, when human rights are encroached upon, associations and NGOs also have standing. In Mali, only the President of the Republic, the Prime Minister, the speaker of the National Assembly, one-tenth of the members of the National Assembly, the Chairperson of the Supreme Council of the Local Authorities or a tenth of the national councillors, and the Chief Justice can challenge the constitutionality of laws.[84] Fall observes that in Francophone Africa, only authorities and institutions have the right to access constitutional jurisdictions.[85] The exclusion of citizens from the sphere of constitutional justice is also characteristic of Guinea, Burkina Faso and Togo.

Although in Mali and Benin, the president of the High Council of Local Authorities and president of the High Broadcasting Authority and Communication are also allowed to bring matters to the Constitutional Court and Constitutional Council respectively, in general, French-speaking African citizens are still not empowered to reach the constitutional courts' doors. This effectively renders the process meaningless because the very people who usually initiate laws are the only people competent to challenge the constitutionality of these laws. This is implausible.[86] In general, in many Francophone

82 Art 74 Constitution of 2001.
83 Art 96.
84 Constitution of Mali; Fall (n 1 above) 29.
85 Fall (n 1 above) 30.
86 SA Djoyou Kamga 'Realising the right to primary education in Cameroon' (2011) 11 *African Human Rights Law Journal* 190.

African countries, constitutional courts exercise a sort of quasi-judicial control of the constitutionality of bills or non-promulgated legislation and a monitoring of state institutions. In other words, it is almost impossible to scrap a Bill after it has become law.[87] Apple and Deyling are of the view that[88]

> [j]udges in the civil law systems view themselves less as being in the business of creating law than mere appliers of the law, ie [having] a more technical and less active role in the development of the law than their common law counterparts.

This cannot enhance the prospects for impact litigation. However, Benin is the only African French-speaking country that opens the doors of its Constitutional Court to all. According to article 22 of the Benin Constitution, anyone can directly approach the Constitutional Court to challenge the constitutionality of laws *in abstracto*. This is called '*le control de constitutionalité des lois par voie d'action'* or the ability to challenge the constitutionality of laws directly to the highest court in the land. According to Fall, it is 'the direct method that allows citizens to challenge directly before a constitutional judge, a legislative or jurisdictional act that is violating fundamental rights'.[89]

Besides the possibility of going directly to the Constitutional Court for a constitutional matter, French-speaking civil law jurisdictions such as Benin, DRC, Burkina Faso, Mali, Niger, Senegal, Chad, Côte d'Ivoire, Cameroon and Togo also afford their citizens the possibility to raise constitutional matters incidentally or *in concreto*. It is called '*control de constitutionalité des lois par voie d'exception*', in other words, during the hearing of a particular case, the plaintiff can raise the unconstitutionality of a law that he or she believes violates the Constitution. Nevertheless, unlike in American courts, where the judge before whom the plea of unconstitutionality is made can resolve the issue, in French-speaking African countries, the administrative or judicial judge in charge of the case postpones the verdict and submits 'the issue of constitutionality to the constitutional court which is the sole authority [competent] to deal with constitutional disputes of any nature'.[90] It is, however, important to note that the institution of judicial review *in concreto* is a departure from the classical French system which until 2008 did not allow such a review.[91]

Nevertheless, in Francophone African countries, the provision for a plea of unconstitutionality is mere words on paper. This is so because of the lack of a culture of ligation and the limited understanding of the justiciability of fundamental rights compared to regular laws, focusing on the protection of individual rights and public liberty and

87 Fombad (n 1 above) 180.
88 J Apple & R Deyling *A primer on the civil law system* (1997) 37.
89 Fall (n 1 above) 31.
90 Fall 30.
91 Kante (n 2 above) 161; F Delperee *Le recours des particuliers devant le juge constitutionnel* (1991) 221.

administrative acts (by the administrative judge), but not on constitutional issues.[92] According to Fall, this is[93]

> a restricted human right protection as it is only directed towards the jurisdictional supervision of administrative acts (and not legislative acts or jurisdictional acts that violate fundamental human rights) and by a judge who is not always independent of the public service.

Sharing this view, Kante argues that constitutional law 'is still more institutional than substantive'.[94] Benin, however, is the exception, not only with a liberal standing approach in the Constitutional Court, but also with the ability of its Court to deal directly as a court of first instance with all issues of human rights violations. According to the Constitution of Benin, the Constitutional Court is competent to rule on '[t]he constitutionality of laws and regulatory acts deemed to infringe on fundamental human rights and on public liberties, and in general on the violation of the rights of the individual'.[95] In other words, besides its competency on electoral matters mentioned earlier, the highest court in the land is competent to address issues related to the violation of fundamental rights. Nevertheless, in this approach, the Court is overburdened by re-examining the facts of the case without proper investigations,[96] and remedies are provided for the violation of all fundamental rights caused by a law or administrative acts or whenever it occurs.[97] However, fundamental rights are paramount, hence the Constitutional Court works towards their realisation. For instance, in protecting the right not to be detained for a duration greater than 48 hours except by a decision of the magistrate before whom he must have been presented, the Court ruled that difficult working conditions could not constitute an excuse to detain a suspect beyond the deadline.[98]

From the same perspective, while ruling on the right to equality provided for by article 26 of the Constitution, the Court held that 'equality is to be analysed as a rule according to which individuals of the same category can be subjected to the same treatment without discrimination'.[99] This was also the position of the Court in its Decision DCC 96-067 of 21 October 1996.[100] The right to equality was actually protected through an interesting case of impact litigation where the Court, in examining the law related to the Individual and Family Code, noted that 'there is unequal treatment between men

92 Fall (n 1 above) 31.
93 As above.
94 Kante (n 2 above) 170.
95 Art 117 Constitution of Benin.
96 Konrad Adenauer Foundation *Commentaire de la constitution Beninoise du 11 Decembre 1990* (2009) 223.
97 Konrad Adenauer Foundation (n 96 above) 224.
98 High Court Ruling DCC96-006 of 19 January 1996; for more on this judgment, see Fall (79 above) 33.
99 High Court DCC 96-025 of 2 May 1996.
100 For more on this decision, see Fall (n 79 above) 33.

and women where the option provided for in paragraph 2 of article 143 allows the man to be polygamous whereas the woman can only have one husband'. This provision was unconstitutional for conflicting with article 26(2) of the Constitution that provides for equality between men and women. As a result of this ruling, polygamy was abolished in the country.[101] This is a positive example of strategic litigation.

The Constitutional Court goes as far as protecting third generation human rights. This was the case when the Court protected the right to a healthy environment[102] by ruling against the setting up of a chicken farm which polluted the neighbourhood through the spreading of chicken feathers and stench which caused lung disease.[103] Overall, the liberal approach to standing and the openness of the Court to all human rights violations at the Beninese Constitutional Court enhance the prospects for impact litigation development and should be emulated by other Francophone African countries.

As far as standing for NGOs and associations is concerned, Francophone African countries apply the French procedural law principle that 'a plaintiff must demonstrate a personal interest in order to have standing to institute a suit in a court of law'.[104] According to the French New Code of Civil Procedure:[105]

> Anyone who has an interest in a claim being successful or rejected, may institute proceedings, except for those cases where the law grants a right of action to those persons qualified to support or contest a claim, or to defend a given interest.

This provision highlights the need to have an individual and direct interest in a case to have standing. This requirement keeps NGOs and associations away from courts. Nevertheless, NGOs, trade unions and professional associations are allowed to sue in the collective interests of their members[106] in the form of class or group action. However, under article 120 of the Constitution of Benin, NGOs, associations and even national human rights institutions have standing at the Constitutional Court on matters of human rights. Similarly, as alluded to earlier, NGOs and associations also have standing in matters of human rights in Côte d'Ivoire.

In spite of the positive examples from Benin and Côte d'Ivoire, generally in Francophone Africa, when the doors of the courts are

101 Decision DCC02-144 23 December 2004.

102 Art 27 Constitution.

103 Constitutional Court Ruling DCC02-065 of 5 January 2002.

104 YM Badwaza 'Public interest litigation as practised by South African human rights NGOs: Any lessons for Ethiopia?' unpublished LLM dissertation, University of Pretoria, 2005 22; C Dadomo & S Farren *The French legal system* (1993) 158.

105 Art 31.

106 Arts L 411-11, *Code du travail* cited in Dadomo & Farren (n 104 above) 158; Badwaza (n 104 above) 22.

open to NGOs or associations, this is subject to several conditions. In Cameroon, for instance, the NGO must be approved by public authority. As well, to be approved, the NGO must prove to have made an effective contribution of at least three years in one of the following domains: legal, economic, social, cultural, health, sports, education, humanitarian, environmental protection or the promotion of human rights.[107] These conditions are sufficient to discourage NGOs that are poor.

Nevertheless, Law 99/014 of 24 December 1999 regulating NGOs in Cameroon allows for the creation of an organisation/association, called *association unipersonnelle*, which is given special treatment in that it can be given approval without the mandatory three-year waiting period that applies to other NGOs. This practice, which to some extent allows NGOs to have standing, should be emulated by other Francophone African countries. In general, the French principle of 'no interest, no action in the court of law' not only hinders access to justice through NGOs, but also excludes *amici curiae* which can play a vital role in strategic litigations.

In spite of challenges to standing in constitutional jurisdictions, the electoral disputes discussed earlier provide an avenue for other citizens to have standing in these jurisdictions. In this regard, in Senegal, while any candidate for presidential and parliamentary elections can approach the Constitutional Council within 72 hours from the proclamation of results to contest these results,[108] every voter can approach the Appeal Court to request the annulment of regional elections[109] or municipal and rural elections within five days after the proclamation of the election results.[110] From the same perspective, according to the Malian Law of 12 February 2002 relating to elections,[111] any individual, political party or groups of political parties as well as a representative of an independent candidate can approach the Constitutional Court or the Supreme Court for presidential or parliamentary as well as local or municipal election disputes respectively. Indeed, generally, in Francophone Africa, the constitutional courts and councils are open to all in matters of electoral disputes. This led Kante to argue that 'constitutional jurisdiction in former French colonies nations are all considered … as jurisdictions of electoral disputes'.[112] Nevertheless, as discussed earlier, the timidity of the electoral judges in the constitutional jurisdictions hinders the opportunity afforded to citizens through electoral disputes and as such constrains the prospects for impact litigation.

107 Law 99/014 of 24 December1999 regulating NGOs in Cameroon.
108 Art 29 Constitution; art LO 135 & LO 185 Electoral Code.
109 Electoral Code L220.
110 Electoral Code L254.
111 Art 175(1).
112 Kante (n 2 above) 160.

However, in the Senegalese context, the new draft Constitution increases access to constitutional courts for *controle par voie d'action* to individuals and groups. In this regard, groups of at least 10 000 people registered on electoral lists and living in more than half of the regions can now approach the Constitutional Court for a *controle par voie d'action*, six days after the adoption of a law which they find unconstitutional.[113] In addition to this, every individual or moral person can approach the Constitutional Court whenever a legislative measure violates human rights.[114] Put differently, the Constitutional Court is now mandated to receive complaints related to human rights violations from individuals and NGOs. Indeed, if adopted, the new Constitution will enhance the prospect of impact litigation in Senegal. Overall, besides some possibilities to access constitutional jurisdictions through electoral disputes and cases of violations of human rights in some Francophone African countries, in general, access to these jurisdictions is open to very few individuals and institutions.

4.4 International law in domestic courts

In general, Francophone African countries subscribe to the monist approach to international law. Accordingly, international agreements automatically become part of domestic law as soon as they are entered into. It follows that national courts are obliged to apply international law without further parliamentary processes.[115] Article 45 of the Cameroonian Constitution provides as follows:

> Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement.

From a monist perspective, in Cameroon, any treaty provision is self-executing[116] if it is directly applicable and does not require 'further implementing action for it to be legally binding at national level'.[117] The provision should be given effect immediately at the local level. Therefore, human rights provided for by international and regional treaties are justiciable and directly applicable and self-executing in Cameroonian domestic law. Consequently, these rights could be the subject of impact litigation. Just like Cameroon, Benin adopts a monist approach, with international law overriding national law.[118] This approach is also followed by Burkina Faso,[119] Niger,[120] Central

113 Art 121 Draft Constitution.
114 Art 109.
115 J Dugard *International law: A South African perspective* (2005) 47.
116 For more on self-executing treaties, see T Buergenthal 'Self-executing and non-self-executing treaties' (1992) IV *Recueil des Cours* 343.
117 E Denza 'The relationship between international and national law' in MD Evans (ed) *International law* (2006) 437; M Dixon *Textbook on international law* (2007) 88.
118 Art 147 Beninese Constitution.
119 Art 151 Constitution of Burkina Faso, 1992.
120 Art 132 Constitution of Niger, 1999.

African Republic[121] and Chad.[122] Inspired by the 1958 French Constitution, the implementation of these clauses is, however, subjected to reciprocity. In other words, international agreements are implemented only when the other parties fulfil their obligations by implementing them as well. Nevertheless, while it is relatively easy to monitor the implementation of a treaty by a party in a bilateral agreement, it is rather difficult to do so for a multilateral agreement.[123] Nonetheless, as correctly observed by the Konrad Adenauer Foundation, the condition of reciprocal implementation does not apply to international agreements related to the protection of human rights. This would be a violation of the Vienna Convention on the Law of Treaties, according to which '[a] material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part'.[124] This does not 'apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties'.[125] Consequently, monist Francophone African countries are bound to apply international human rights treaties upon ratification and this provides an entry point for impact litigation.

However, as correctly demonstrated by Killander and Adjolohoun,[126] in practice, monist African French-speaking countries are reluctant to automatically implement international treaties. Therefore, these treaties do not play a significant role in litigation in national courts.[127] For example, according to the Senegalese Constitution,[128] after ratification and publication in the official gazette, international treaties are superior to national law in Senegal. They become law in the national legal architecture as they are directly incorporated into national law.

Nevertheless, as demonstrated through the *Habre*[129] and *Fall*[130] cases, 'direct incorporation' does not automatically lead to 'direct application'.[131] Indeed, direct incorporation would lead to direct application in court only if the treaty is 'self-executing' or 'lends itself to judicial or administrative application without further legislative

121 Art 69 Constitution Central African Republic, 1995.
122 Art 122 Constitution of Chad.
123 Konrad Adenauer Foundation (n 96 above) 298.
124 Art 60(1) Vienna Convention on the Law of Treaties, 1969.
125 Art 60(5).
126 M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An introduction' in Killander (n 14 above) 3-4.
127 M Killander 'How international human rights law influences domestic law in Africa' *Law, Democracy and Development* (forthcoming).
128 Art 98.
129 The *Issene Habré* case of 20 March 2001, decided by the Court of Cassation.
130 *Sega Seck Fall* case of 29 January 1975, decided by the then Supreme Court of Senegal.
131 Adjolohoun (n 77 above).

implementation'.[132] In the *Habre* case,[133] the Court of Appeal of Dakar and the Senegalese Court of Cassation were of the view that Convention Against Torture (CAT) was non-self-executive. They argued that, although the Senegalese Criminal Code recognises torture as a crime in accordance with article 4 of CAT, universal competence was not granted to the municipal judge because the country did not enact legislative measures for the implementation of article 5(2) of CAT. So, the fact that there was a need to mandate municipal judges to adjudicate cases related to CAT rendered the treaty non-self-executive, hence the Court refused to apply international law.

Similarly, the *Sega Seck Fall* case[134] also demonstrates the reluctance of the courts to apply international law in domestic courts. Senegal is party to the World Trade Organisation (WTO) Convention 87, in which article 4 prohibits the dissolution of workers' associations by an administrative act. However, based on the WTO Convention referred to above, Fall, a trade union leader, approached the Supreme Court for the annulment of a presidential decree which outlawed the Senegalese Teachers' trade union. The Supreme Court rejected the application on the basis that there was no evidence that WTO Convention 87 had been published and that, even if it had been published, the 'present conditions' would not dictate the application of the Convention in the local court. This was simply a refusal to apply international law in the local jurisdiction because, as correctly argued by Adjolohoun,[135] the specificity of the circumstances or conditions was not clarified by the Court.

The *Habre* and *Fall* cases clearly show that applicability may be hampered by the lack of judicial activism, which enables purposive and progressive interpretation of international law. In these conditions, the prospects for impact litigation are limited. Overall, in spite of their official subscription to the monist approach to international law, African French-speaking countries refuse the automatic application of international agreements in domestic courts on the grounds that it is yet to be inserted in the national gazette, or cast doubt on the self-executive character of the treaty or silently refuse to give effect to the treaty at the national level.[136] Indeed, this refusal to apply treaties in domestic courts does not enhance the prospect for impact litigation.

132 V Leary *International labour conventions and national law* (1982); MCR Craven 'The domestic application of the International Covenant on Economic, Social and Cultural Rights' (1993) 40 *Netherlands International Law Review* 367.

133 *Habré* (n 129 above).

134 *Sega Seck Fall* (n 130 above).

135 Adjolohoun (n 77 above).

136 Killander & Adjolohoun (n 126 above) 6-7.

4.5 Regional instruments in domestic courts

As far as the place of regional instruments in domestic law is concerned, most Francophone African countries merely 'affirm [their] attachment to fundamental freedoms'[137] contained the international instruments, including the African Charter, in the preambles of their constitutions. Nevertheless, Benin goes further in the following provision:[138]

> The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organisation of African Unity and ratified by Benin on January 20, 1986 shall be an integral part of the present Constitution and of Beninese law.

This provides a platform to use the African Charter in impact ligation. This was done in Benin when a plaintiff alluded to the violation of article 7 of the African Charter to claim his right to be tried within a reasonable period of time. In this case, the Constitutional Court ruled that the timeframe of 14 months and 10 days set by the Cotonou Magistrate's Court in pronouncing its ruling on a case of *flagrante delicto*, was a violation of the Constitution.[139]

Similarly, while protecting the right to freedom of movement provided for by article 25 of the Beninese Constitution and article 12(1) of the African Charter, the Constitutional Court ruled that, given that no one can be detained for more than 48 hours without the ruling of a magistrate before whom he is to appear,[140] difficult working conditions cannot be an excuse to detain a suspect for a period longer than the deadline provided by the Constitution.[141]

Overall, besides some positive examples from Benin, the prospects of impact litigation in Francophone African countries are hindered by several factors, including the lack of constitutions containing bills of rights, a weak separation of powers, the lack of universal standing in constitutional jurisdictions, the lack of a popular culture of litigation, limited access to courts afforded to NGOs and associations, as well as the lack of standing for a*mici curiae.*

5 Concluding remarks

This article assessed the avenues for impact litigation in Francophone African countries. After showing that impact litigation entails bringing cases to court to use the law to leave a lasting mark, the article examined various political and legal contexts to assess the extent to

137 1996 Cameroonian Constitution, Preamble, para 5; also Preamble to the Constitutions of Senegal and DRC.
138 Art 7.
139 DCC 97-006 of 18 February 1997. For more on this see, Fall (n 37 above) 34.
140 Art 18(4) of the Constitution.
141 DCC 96-006 of 19 January 1996.

which these countries' legal frameworks are conducive to impact litigation.

The article demonstrated that the political context is not conducive to impact litigation. In reaching this conclusion, the article showed that the separation of powers is hindered by presidentialism. Although electoral disputes provide avenues for judges to distance themselves from other branches of government, electoral judges are weakened by their timidity. Additionally, the variances and complexity of electoral jurisdictions hinder the possibility of impact litigation.

The article also found that the legal context is not conducive to impact litigation. In reaching this conclusion, the article shows that, although Francophone African countries' constitutions have binding preambles, this does not lead to impact litigation because, aside from Benin, constitutional jurisdictions do not have a human rights mandate. In addition, the monopoly of standing in constitutional matters by institutions and authorities, the limited standing afforded to NGOs and members of the public (except in Benin and Côte d'Ivoire), and the complete exclusion of *amici curiae* have hindered the prospects for impact litigation. In spite of following the monist doctrine in international law, Francophone African countries are reluctant to give effect to international treaties in domestic courts. From this perspective, they often claim that the treaty is yet to be inserted in the national gazette, or cast doubt on the self-executive character of the treaty, or silently refuse to give effect to the treaty at national level. The situation is worsened by the lack of a popular culture of litigation and, more importantly, of impact litigation. Therefore, in remedying the situation, Francophone African countries should establish a conducive environment for impact litigation. This can be done by the adoption of a constitutionalism informed by a real separation of powers without presidentialism, and by ensuring access to constitutional jurisdictions for all, including NGOs, associations and *amici curiae* and empowering these jurisdictions to address any matter pertaining to fundamental rights.

Furthermore, there is a need to mandate all constitutional jurisdictions to address human rights violations, to educate people and lawyers on the need to use impact litigation to ensure the realisation of human rights, as it has a long-lasting effect. Moreover, it is imperative to give effect to international law in domestic courts by being faithful to the monism doctrine.

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Child marriage in Northern Nigeria: Section 61 of Part I of the 1999 Constitution and the protection of children against child marriage

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Summary

Although the Nigerian government has tried to stamp out child marriage with the enactment of the Child Rights Act of 2003, the practice of child marriage is still prevalent among the Hausa-Fulani tribe (predominantly Muslim) who occupy Northern Nigeria and where Shari'a law is in force. While the Child Rights Act has sharp teeth, it has no bite because each state in Nigeria has to enact the Act under its own state laws before it is enforceable. This means that a social evil such as child marriage can be practised in a state that is yet to pass the Child Rights Act as domestic law. The article presents arguments outlining the reluctance of some of Nigeria's northern states to enact the Act. The author maintains that the right of the girl child in relation to marriage is not adequately protected, due to Part 1 Section 61 of the 1999 Constitution of the Federal Republic of Nigeria. As a result, the article proposes three steps to ensure the legal protection of a girl child against child marriage: Firstly, Part 1 Section 61 of the 1999 Constitution should be modified; secondly, there should be a uniform age set for a child to marry in all of Nigeria's legislation that deals with children; thirdly, while pressure should be put on all Nigerian states which are yet to domesticate the Child Rights Act, there is a need for a new Act (Prohibition of Child Marriage Act) which, if enacted, should automatically apply to all states in Nigeria in order to protect the girl child.

Key words: *Child marriage; Northern Nigeria; Child Rights Act; 1999 Constitution; Ahmed Yerima*

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1 Introduction

The betrothal of female children to adult males is still a regular phenomenon among the Hausa-Fulani ethnic group who occupy the northern part of Nigeria and, to a lesser extent, is prevalent also in other parts of the country. In Northern Nigeria, child marriage is a traditional cultural practice which is heavily influenced by Islam, a religion which historically has been practised in the region and which continues to be practised. Due to pressure exerted on children to marry young in Northern Nigeria, 48 per cent of Hausa-Fulani girls are married by age 15, and 78 per cent are married by age 18.[1]

These appalling statistics led Elizabeth to describe the life of a girl child in Northern Nigeria as 'pathetic'. To buttress her assertion she maintains that, while the ideal marriage age of women, although it varies, is between 20 and 26 years old,[2]

> [i]n the North, little girls who have started menstruating are considered mature for marriage and the case of menstruation varies as a girl of twelve can be given out for marriage based on the fact that she has started menstruating.

Despite the prevalence of child marriage among the Hausa-Fulanis, child marriage is illegal in Nigeria. As a step towards showing that it does not support child marriage, Nigeria has signed and ratified international and regional instruments which regulate the rights of children. Nigeria ratified the Convention on the Rights of the Child (CRC) on 16 April 1991, and the African Charter on the Rights and Welfare of the Child (African Children's Charter) on 12 July 2001. Additionally, Nigeria took steps to domesticate both instruments in the form of the Child Rights Act (CRA). However, irrespective of Nigeria's passing of the CRA in 2003, the adherence to Islam and the application of Shari'a in the northern parts of Nigeria, where child marriage is practised, continue to violate the provisions of CRC, the African Children's Charter and the CRA.

The article examines international and regional instruments such as CRC and the African Children's Charter, which prohibit the practice of child marriage. Particular attention is given to Nigeria's domestication of both instruments through the CRA. Irrespective of the promulgation of this Act, I argue that child marriages are, to a certain extent, tolerated in Nigeria because of the weakness of the CRA. Such weakness stems from the fact that the CRA has to be passed into law in each state in Nigeria before child marriage may be considered illegal. Therefore, because the CRA is not enforceable across all Nigerian states, it leaves children in states that have not signed the

1 United Nations Population Fund 'Early marriage in Nigeria' http://nigeria.unfpa.org/ nigeirachild.html (accessed 10 August 2013).

2 E Elizabeth 'Child marriage: An undying culture?' http://www.thetidenewsonline.com/2009/12/28/child-marriage-an-undying-culture (accessed 10 August 2013).

CRA vulnerable. Other than this weakness, the article points out flaws in the 1999 Constitution that are loopholes that allow child marriage in Nigeria.

Part II of the article examines CRC, the African Children's Charter and the promulgation of the CRA in Nigeria despite it being met with opposition from religious groups and traditionalists. In this section problems with the CRA and its conflict with the Islamic practice of child marriage are discussed. Part III deals with the practice of Shari'a law in Northern Nigeria, the reasons why child marriage is practised in that region and the effects of child marriage that have been documented. Part IV argues that despite the enactment of the CRA, the girl child in Nigeria is not adequately protected and that this inadequacy stems from the wording of Part 1 Section 61 of the 1999 Constitution. Part V draws conclusions and proposes recommendations, such as the need for a 'Prohibition of Child Marriage Act', in order to protect the girl child in Nigeria.

2 International and domestic legal framework

2.1 Convention on the Rights of the Child

The CRC, which was adopted and was opened for signature on 20 November 1989, is the first legally-binding international instrument that deals with a full range of human rights issues pertaining to children. Due to the range of children's rights protected, ranging from civil to political rights, Woodhouse describes CRC as a comprehensive charter of children's rights.[3] However, scholars such as Warner[4] and Askari[5] disagree with Woodhouse's description of CRC as a comprehensive treaty. According to Warner, CRC contains no explicit provision on child marriage,[6] an omission which she describes as 'odd and downright baffling'. Warner argues that perhaps the drafters of CRC thought that the subject of child marriage was already covered by the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (Marriage Convention) and that, therefore, it was unnecessary to deal with child marriage in CRC. Askari exposes the gender bias inherent in CRC, and asserts that, while CRC covers violations that affect boys (for instance, child soldiers), it does not give consideration to a social evil such as child marriage which predominantly affects girls.[7]

3 B Woodhouse *Hidden in plain sight: The tragedy of children's rights from Ben Franklin to Lionel Tate* (2008) 32.

4 E Warner 'Behind the wedding veil: Child marriage as a form of trafficking in girls' (2004) 12 *Journal of Gender, Social Policy and the Law* 233-271.

5 L Askari 'The Convention on the Rights of the Child: The necessity of adding a provision to ban child marriages' (1998-1999) 5 *ILSA Journal of International and Comparative Law* 124.

6 Askari (n 5 above) 251.

7 Askari 124.

Despite these criticisms, a number of CRC's provisions could apply to child marriages, such as the protection of children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.[8] CRC also provides that children have the right to health,[9] education,[10] and protection from economic exploitation.[11] It is too difficult to imagine that child marriage is a violation of the above provisions. An important clause which can be invoked against child marriage is article 24(3) of CRC, which states:

> State Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

This provision is perhaps the most relevant clause against child marriage, given that the Hausa-Fulani practice of child marriage is part of their tradition and, as this traditional practice is detrimental to the health of children, CRC can be read to recommend the abolition of traditional practices such as child marriage.

Irrespective of the provisions listed above that can be invoked against child marriage, there are other provisions of CRC that seem to support child marriage. Article 1 of CRC states:

> For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

While CRC defines a child as a person under the age of 18, the provision 'unless under the law applicable to the child, majority is attained earlier', contradicts this and does not help to eradicate child marriage. For instance, in Northern Nigeria, where traditional and cultural practices are heavily influenced by Islam and laws derived from Shari'a, the age of majority for girls is attained pre-puberty. Therefore, CRC's provision is problematic in terms of not adequately stating the age when a child becomes an adult.

Article 14(2) states:

> State Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

This provision indicates that Nigeria, as a state party to CRC, should respect the rights of parents as guardians and controllers of the lives of their children in respect of education, religion and culture. Therefore, CRC grants the right to a Hausa-Fulani Muslim parent in Northern Nigeria to educate his or her daughter to follow the

8 Art 19 CRC.
9 Art 24 CRC.
10 Art 28 CRC.
11 Art 32 CRC.

teachings of the Quran and, in turn, she can be married off at the age of nine because it is sanctified by Islam.

Bearing in mind the deficiency in CRC identified in articles 1 and 14(2), it is difficult for a country such as Nigeria to consider CRC to be a strong framework for the prevention of child marriage.

2.2 African Charter on the Rights and Welfare of the Child

The African Children's Charter was signed by Nigeria on 13 July 1999, and ratified on 23 July 2001. Unlike CRC, the African Children's Charter is a more comprehensive instrument as it deals with a multitude of rights of the child, including marriage. Also, unlike CRC, the African Children's Charter sets the age of childhood below 18 years,[12] without affording states the opportunity to prescribe otherwise. Therefore, while the practice of child marriage in Northern Nigeria may not contravene article 1 of CRC, it does contravene article 1 of the African Children's Charter. In contrast to CRC, the prohibition of child marriage is included in the African Children's Charter under article 21(2), which states:

> Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

Similar to the African Children's Charter, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), which defines women as including girls, stipulates 18 years[13] as the minimum age of marriage for women.[14] Furthermore, a number of articles under the African Children's Charter specifically deal with child marriage. These include, but are not limited to, the protection of children from economic exploitation[15] and sexual abuse.[16] Much like article 24(3) of CRC,[17] the African Children's Charter also contains a provision that urges states to protect children against harmful social and cultural practices.[18] Under article 21 of the African Children's Charter, state parties are urged to:

> … take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
> (a) those customs and practices prejudicial to the health or life of the child; and

12 Art 1 African Children's Charter.
13 Art 1 African Women's Protocol.
14 Art 6 African Women's Protocol.
15 Art 15(1) African Children's Charter.
16 Art 16(1) African Children's Charter.
17 State parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
18 Art 21 African Children's Charter.

(b) those customs and practices discriminatory to the child on the grounds of sex or other status.

This article stamps out the major causes of child marriage, namely, customs and traditional practices. In the Nigerian context, the Hausa-Fulani undoubtedly are in violation of article 21 of the African Children's Charter.

Despite being a signatory to both the African Children's Charter and CRC, Nigeria saw the need to domesticate both instruments and to promote the protection of children in Nigeria. This desire to protect and promote the rights of the Nigerian child began with a Bill of Child Rights in 1993.

2.3 Child Rights Bill

The aim of this Bill was to domesticate CRC and the African Children's Charter into Nigerian law. However, with heated debates in parliament and an unstable government, the Bill could not be passed into law. As Nasir maintains, the difficulty that the Child Rights Bill met came from religious groups and traditionalists.[19] Nasir's assertion is correct because, in October 2002, the Nigerian Parliament rejected the Child Rights Bill on the grounds that the Bill's content was contrary to culture, tradition and the Islamic values of the Hausa-Fulanis of Northern Nigeria.

In relation to marriages in Northern Nigeria, Salamone maintains:[20]

> Hausa women are put into *purdah* (seclusion) directly upon marriage if their husbands can afford to do so. They are cut off from contact from all males but kinsmen. There are strict regulations regarding their public movements. For women, marriage is the only path to virtue. Consequently, marriage is common for young girls between the ages of ten and twelve.

A major objection to the Child Rights Bill was the setting of the age of marriage to 18 years, which was clearly contrary to Hausa culture and traditions, where marriage is common for girls as young as nine years old. As the Child Rights Bill brought about a clash between law, religion and tradition, a special committee was established to 'harmonise the children's Bill with Nigeria's religious and customary beliefs'.[21] Alongside the special committee, demands from international and national non-governmental organisations (NGOs) put pressure on the senate to reconsider and rekindle their discussions on the Child Rights Bill, irrespective of religious and cultural conflict.

Consequently, after about ten years of pressure from international and national organisations, several Heads of State and heated

19 J Nasir 'Shari'a implementation and female Muslims in Nigeria's Shari'a states' in P Badru & B Sackey (eds) *Islam in Africa south of Sahara: Essays in gender relations and political reform* (2013) 256.

20 F Salamone *The Hausa of Nigeria* (2010) 134.

21 O Akinwumi 'Legal impediments on the practical implementation of the Child Right Act 2003' (2009) 37 *International Journal of Legal Information* 386.

parliamentarian debates, the Child Rights Bill was finally passed into law by the National Assembly in July 2003 and came into force in September 2003 after being assented to by the then president of Nigeria, Olusegun Obasanjo. It was promulgated as the CRA.

2.4 Child Rights Act, 2003

The passing of the CRA signalled Nigeria's domestic intentions to protect and preserve the rights of the Nigerian child. The CRA not only specifies that the best interests of the Nigerian child should be central to all actions, but it also provides the duties and obligations of parents, the government and organisations towards children. The CRA is the most complete legislation dealing with the rights of a child in Nigeria as it covers every situation where a child may be subjected to abuse. Some of the relevant sections which provide for the protection of children include, but are not limited to, the prohibition of the use of children in criminal activities;[22] the use of children in exploitative labour;[23] unlawful sexual intercourse with a child;[24] and the recruitment of children into the armed forces.[25] While the CRA also contains other provisions relating to children with regard to their care and supervision and the custodial possession of children, an important prohibition relates to child marriage.

2.5 Child Rights Act and child marriages

The CRA prohibits both the marriage of those considered to be children and the betrothal of children. In relation to child marriages, Part III Section 21 states:

> No person under the age of 18 years is capable of contracting a valid marriage, and accordingly a marriage so contracted is null and void and of no effect whatsoever.

Also, Part III Section 22, which prohibits the betrothal of children, maintains that '[n]o parent, guardian or any other person shall betroth a child to any person'. A contravention of either section 21 or section 22 amounts to a fine of 500 000 Naira (the equivalent of £2 046 or $3 123) or imprisonment for a term of five years or to both a fine and imprisonment.[26]

While the CRA imposes sanctions on child marriages and betrothal, the use of the conjunction 'or' is worrisome because there is an indication that those who partake in child marriages and, in turn, contravene the CRA, may escape jail by only paying the stipulated fine of 500 000 Naira. However, the option to pay a fine for a heinous act such as child marriage appears to be the least of the CRA's problems.

22 Sec 26 CRA.
23 Sec 28 CRA.
24 Sec 31 CRA.
25 Sec 34 CRA.
26 Sec 23(d) CRA.

2.6 Problems regarding the Child Rights Act

A major problem with the CRA is its differing levels of acceptance. When the law was passed, it was not automatically enacted into law in each of Nigeria's 36 states. Each state had to pass the Bill into their state laws for it to become enforceable in order to guarantee and protect the rights of children and, most importantly, to prevent child marriages. Since the CRA was passed in 2003, 12 states have yet to domesticate it.[27] What this means is that children may have no rights in states which are yet to enact the law and, subsequently, if child marriage is practised, it is not an offence.

Furthermore, apart from the state of Enugu, the 11 states which are yet to domesticate the CRA are in the northern part of Nigeria and these have adopted a penal code which is based mainly on Shari'a law.[28] It is not surprising that states in Northern Nigeria, inhabited predominantly by Muslims and with a culture and tradition heavily influenced by Islam, have objected to receiving and passing the CRA because it conflicts with the Islamic point of view, particularly in relation to the minimum age of marriage. While the law sets a child to be a person under 18, in Islam there is no age that marks childhood. A child's maturity is established by signs of puberty such as menstruation, the growth of breasts and pubic hair. To further buttress the argument that age is a factor contributing to the reluctance of many northern states to pass the CRA, when one of Nigeria's northern states, Jigawa, accepted the CRA, its state law did not adopt the age of 18 as the age of majority as specified in the Act. Instead, it determined the age of childhood in relation to puberty.[29]

Additionally, other than the age conflict between the CRA and Islam, the CRA creates a conflict between human rights and religion, which is arguably one of the other major reasons for its rejection by most Northern Nigerian states. For example, while the CRA is aimed at protecting the human rights of children, it also infringes the rights of freedom of thought, conscience and religion as provided for in section 38(1) of the 1999 Constitution:

> Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

From the above statement it is evident that there is a potential conflict between the practice of child marriage in Northern Nigeria, which is derived from Islam, and the CRA's protection of children by outlawing

27 Enugu, Kaduna, Kano, Sokoto, Kebbi, Borno, Yobe, Gombe, Adamawa, Bauchi, Katsina and Zamfara.

28 Northern Nigeria consists of 19 states of which 12 have penal laws enacted under the aegis of Shari'a, namely, Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe and Zamfara.

29 Jigawa Child Rights Law, 2008.

child marriage. While the CRA's outlawing of child marriage infringes upon the right to practise a certain part of Islam (child marriage), a stronger argument can be made that when there is a clash between law and religion in respect to children, as in the case of Nigeria, the best interests of the child should be given paramount consideration. In weighing the interests of the child, consideration should be given to the emotional, physical and psychological wellbeing of the child. In addition, protection should be afforded to children and adolescents until they are mature enough to make decisions about marriage. The Islamic practice of child marriage inhibits children from making independent decisions about marriage, which may lead to their emotional, physical and psychological harm. Therefore, if such a practice may harm a child, the right to freedom of religion becomes limited.

Moreover, it is clearly stated in the 1999 Constitution that the right to freedom of religion is not absolute. Section 45(1) states that nothing in section 38 will invalidate any law that is reasonably justifiable in a democratic society:

(a) in the interest of defence, public safety, public order, public morality or public health; or
(b) for the purpose of protecting the rights and freedom or other persons.

Therefore, for the sole purpose of protecting the rights of children against a social evil such as child marriage, it is justifiable to restrict the freedom to practise a component of Islam such as child marriage, which infringes the rights of children.

3 Child marriage in Northern Nigeria

3.1 Shari'a law in Northern Nigeria

The Hausa-Fulanis in Northern Nigeria show a strict adherence to the Quran and the Prophet Muhammad's Sunnah. As Islam plays a pivotal role in the lives of most northern Nigerians, the culture and traditions of the Hausa-Fulanis are intertwined with Islamic religion. Therefore, due to the influence of Islam and Muhammad's marriage to Aisha, as reported in the Hadiths, it is not surprising that Muslims in Northern Nigeria endorse and practise child marriage.

Of the 36 states in Nigeria, 12 of the northern states introduced Shari'a law into their jurisdictions in contravention of section 10 of the 1999 Constitution, which prohibits states in Nigeria from adopting state religion. Although subject to different interpretations, it can be argued that the adoption of Shari'a by these states is equivalent to adopting a state religion. As a result of this insubordination and a breach of section 10 of the 1999 Constitution, the rest of the nation watched to see what the federal authorities would do, but nothing happened. When in 1999 the plan of adopting Shari'a law was underway, the then President, Olusegun Obasanjo, opposed the

movement but, as Lapidus notes, the northern states 'slipped out of federal control'. However, while it may be argued that the 12 northern states are in breach of section 10 of the 1999 Constitution, section 4(7) of the 1999 Constitution makes it legal for states to make laws for peace and good government in their territories. Therefore, these northern states may have acted within the Constitution by implementing Shari'a, which they consider will promote peace and good government.

3.2 Reasons and consequences of child marriage in Northern Nigeria

According to the organisation Girls not Brides, while 45 per cent of girls in Nigeria were married before they turned 18, the practice of child marriage was more rampant in the northern part of Nigeria, with figures as high as 76 per cent.[30] The high percentage of child marriage in Northern Nigeria can be attributed mostly to the fact that the practice of Islam in the region endorses child marriage. However, other than Islam, additional factors contribute to this practice.

Firstly, one of the underlying reasons for child marriage is poverty. According to the National Bureau of Statistics, the rate of poverty is at 67,1 per cent.[31] In Northern Nigeria, the poverty level is 77,7 per cent in the North-West and 76,3 per cent in the North-East.[32] Poverty in the region undoubtedly fuels child marriage. According to Erulkar and Muthengi, child marriage is advantageous to poor families in rural locations. To buttress their argument, the authors state that the betrothal of girls at a young age relieves parents of the costs and responsibilities of raising a girl.[33] Erulkar and Muthengi's assertion is supported by Otoo-Oyortey and Pobi, who maintain:[34]

> Globally, poverty is a major cause, as well as a consequence, of early marriage for many young girls under the age of 18. In many traditional settings, poor families use the early marriage of daughters as a strategy for reducing their own economic vulnerability, shifting the economic burden related to a daughter's care to the husband's family.

Adopting Askari's, Otoo-Oyortey's and Pobi's argument and placing it in the context of Northern Nigeria, there is no doubt that poverty is an underlying reason for child marriage in the region. Due to the

30 Girls not Brides 'Child marriage around the world: Nigeria' (2014) http://www.girlsnotbrides.org/child-marriage/nigeria/ (accessed 24 July 2014).

31 '112 million Nigerians living below poverty level – Report' *Premium Times* http://www.premiumtimesng.com/news/4211-112million_nigerians_living_below_poverty_level. html (accessed 26 July 2014).

32 BBC 'Nigerians living in poverty rise to nearly 61%' http://www.bbc.com/news/world-africa-17015873 (accessed 26 July 2014).

33 A Erulkar & E Muthengi 'Evaluation of Berhane Hewan: A programme to delay child marriage in rural Ethiopia' http://www.guttmacher.org/pubs/journals/3500609.html (accessed 26 July 2014).

34 N Otoo-Oyortey & S Pobi *Early marriage and poverty: Exploring links for policy and programme development* (2003) 11.

endemic poverty among the Hausa-Fulani, female children are viewed as an additional burden on family resources. As a result of this, the betrothal of female children is used as a strategy for family survival.

Secondly, in Northern Nigeria child marriage is seen and used as a method for the preservation of the virtue of girls. The rationale for the practice of child marriage in Northern Nigeria is to ensure the preservation of virginity of women and, also, that women do not become pregnant out of wedlock. Based on these reasons, it is not uncommon to find children married at the age of 10 in Northern Nigeria. Additionally, other than the rationale that child marriage protects girls from social ills, such as promiscuity, it is also carried out for the preservation of family honour. Therefore, in order to avoid dishonour and the shame attached to pre-marital sex, girls are married off before reaching puberty.

Although there may be reasons put forward in defence of child marriage, nonetheless the disastrous effects on children who marry early outweigh these and undoubtedly make child marriage a social evil. One of the disastrous effects is the development of vesicovaginal fistula, which is an abnormal duct between the vaginal wall and bladder or urethra. In a study carried out by Ijaiya *et al*, it was revealed there was a high prevalence of vesicovaginal fistula in Northern Nigeria. According to the study, in Kano State, 120 vesicovaginal fistula patients were admitted in two months. In other northern states such as Maiduguri, there were 241 vesicovaginal fistula patients in two years, and Jos and Sokoto had 932 cases in seven and a half years and 31 cases in one year respectively.

In addition to vesicovaginal fistula which has been linked with early marriage, studies have also revealed that children who marry early are at risk of contracting sexually-transmitted diseases, including HIV/AIDS. In a study conducted by Karlyn *et al* on early marriage in Northern Nigeria,[35] it was revealed that the early marriage of children is a contributor to the spread of HIV/AIDS.

The NGO Girls Not Brides has also revealed other health consequences of child marriage. According to Girls Not Brides, the likelihood of the baby of a girl under 18 years dying is 60 per cent and, in addition to that, girls under 15 are five times more likely to die in childbirth than women in their twenties.[36] Furthermore, other than health risks associated with child marriage, one of the most damaging consequences of child marriage is its effect on the educational development of the girl child. Studies have revealed that child marriage equals illiteracy as many girls who marry as children are deprived of a basic education. In relation to the link between illiteracy

35 A Karlyn *et al* 'Adolescent early marriage in Northern Nigeria: Evidence to effective programmatic intervention' paper presented at the Union for African Population Studies, Tanzania, 2007.

36 'The global partnership to end child marriage' Girls Not Brides http://www.girlsnotbrides.org/themes/health/ (accessed 10 August 2013).

and child marriage in Nigeria, the 2008 National Demographic and Health Survey revealed that there was a higher level of illiteracy among women in Northern Nigeria than any other part of the country.[37] Statistics of the National Demographic and Health Survey showed that 68 per cent of women in the North-East and 74 per cent of women in the North-West had no formal education and the cause of this astonishing fact was the practice of child marriage in those regions.

4 Legality of child marriage in Nigeria

4.1 Is child marriage illegal in Nigeria?

Having stated the reasons for and effects of child marriage, it needs to be determined whether child marriage is illegal in Nigeria. While this might seem an absurd question, bearing in mind Nigeria's enactment of the CRA which contains sections outlawing child marriage, there is a strong argument to be made out that child marriage is not illegal in Nigeria under Second Schedule Part 1 item 61 of the 1999 Constitution. This section states:

> The formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial causes relating thereto.

As Nigeria operates a tripartite legal system with civil, customary and Islamic law operating simultaneously, in relation to marriage the federal government has no control over customary and Islamic marriages but only marriages conducted in a civil manner. What this means is that, according to Part 1 Section 61 of the 1999 Constitution, when a person marries a child under Islamic law in Northern Nigeria and is consequently in contravention of the CRA, such a person cannot be prosecuted because the federal government would be interfering with an Islamic marriage and would be in violation of Part 1 Section 61 of the 1999 Constitution. Therefore, in relation to child marriage, Part 1 Section 61 of the 1999 Constitution renders the CRA useless, as the 1999 Constitution serves as the supreme law of the land in Nigeria, overriding all other legislation. An example of how Part 1 Section 61 of the 1999 Constitution can be used as a constitutional backing for child marriage was shown in 2010, when a Nigerian senator, Ahmad Yerima, married a 13 year-old Egyptian girl.

4.2 Ahmad Yerima

In 2010, Ahmad Yerima married the daughter of his chauffeur, a 13 year-old Egyptian girl, after allegedly paying a dowry of $100 000. Although the marriage created an uproar as it was in contravention of

37 Nigeria Demographic and Health Survey, 2008.

Section 21 of the CRA, Yerima justified the marriage on religious grounds:[38]

> Prophet Muhammad (SAW) married Aisha at the age of nine. Therefore, any Muslim who marries a girl of nine years and above is following the teaching and practices of prophet Muhammad (SAW). If there is anybody who will tell me that what you did contradicts Islam, I will say I will submit, and I will do whatever they ask me to do.

According to Tardzer, although Ahmad Yerima's conduct seemed reprehensible, there was nothing anyone could do about his marriage to the child.[39] While Tardzer makes it clear that Yerima was never prosecuted, the Attorney-General of the Federation, Mohammed Bello Adoke, maintained that because Ahmad Yerima's marriage was contracted under Islamic law, he would not face prosecution. According to Mohammed Bello Adoke:[40]

> I do not like pedophile and I see the action of Senator Yerima as one that can be likened to pedophile. Let me say as irresponsible as his conduct is but I have to prosecute him according to the dictates of the law. The Child Rights Acts is meant for Nigerian child but the girl in question is an Egyptian and the girl was brought into the country by her parents for marriage to Senator Yerima.

His statement that the CRA is directed at Nigerian children is false and surprising due to his position as the Attorney-General of Nigeria. The CRA is meant to protect anyone considered a child within the Nigerian jurisdiction, irrespective of race or nationality. In addition, if the CRA was only designed for Nigerian children as he maintains, it means that anyone who indulges in child marriage by marrying a non-Nigerian child is exempted from prosecution, which is not what the CRA was created for. Furthermore, while there are continuous calls by rights groups, such as Women Empowerment and Legal Aid,[41] for Ahmad Yerima to be prosecuted, Tardzer has posed a good question: Does a religious practice override the laws of the land even when there is nothing in the operating law that provides for such an exemption? In relation to Tardzer's question, the answer is no. However, if a child marriage is contracted under Islamic law or custom, the federal government cannot interfere with such marriages under Part 1 Section 61 of the 1999 Constitution. Therefore, while Ahmed Yerima is in contravention of the CRA because his marriage is alleged to have taken place in Nigeria's capital Abuja, he cannot be prosecuted because the federal government would be in

38 YouTube 'Nigerian senator defends teen marriage' http://www.youtube.com/watch?v= rQJ8Rbgiox4 (accessed 10 August 2013).

39 CSK Tardzer *My odyssey, my country* (2012) 77.

40 L Akinboade 'Okigbo report. We can't prosecute IBB, says FG' *Vanguard* http://www.vanguardngr.com/2010/08/okigbo-report-we-cant-prosecute-ibb-says-fg (accessed 10 August 2013).

41 A Adesomoju 'Adoke gets ultimatum to prosecute Yerima' *Punch* http://www.punchng.com/news/adoke-gets-ultimatum-to-prosecute-yerima (accessed 10 August 2013).

contravention of Part 1 Section 61 of the 1999 Constitution. Consequently, it is as a result of this constitutional provision that it is illegal and difficult to prosecute Ahmed Yerima for his violation of section 21 of the CRA.

5 Conclusion and recommendations

5.1 Conclusion

An attempt has been made to show that, despite Nigeria's adoption of the CRA, the rights of the girl child in respect of marriage are not adequately protected by law. Firstly, this inadequacy stems from the approach taken that states in Nigeria have to domesticate the CRA before it applies in those states. Secondly, Part 1 Section 61 of the 1999 Constitution, which provides that the federal government cannot interfere with Islamic and customary marriages, weakens and fails to give effect to the CRA to protect children against a social evil such as child marriage. Although the wording of Part 1 Section 61 of the 1999 Constitution gives people the freedom to conduct marriages according to their religion and customs, it is a dangerous clause which serves as a loophole for child marriages and serves as constitutional support to those who partake in child marriage and justify it as an Islamic practice. Therefore, as argued previously, the major problem in the inadequate protection of the girl child in Nigeria is to be found in Part 1 Section 61 of the 1999 Constitution.

5.2 Recommendations

Firstly, in order to protect the girl child from child marriage, Part 1 Section 61 of the 1999 Constitution needs to be modified to involve the federal government in 'the formation, annulment and dissolution of all marriages, which includes customary and Islamic marriages'. While it may be argued that such modification goes against the Islamic practice of child marriage in Northern Nigeria, such a modification is necessary because, as revealed in this article, the Islamic practice of child marriage in Northern Nigeria does more harm than good to the girl child.

Secondly, the Nigerian Senate needs to promulgate the marriageable age as 18 years for women in the 1999 Constitution. As the 1999 Constitution serves as the supreme law of the land, any traditional or religious marriage practice that contravenes the age of marriage in the 1999 Constitution will be void. Thirdly, all Nigerian statutes dealing with children and marriage need to adopt a uniform age of 18 as the age of majority. While the CRA stipulates the age of majority to be 18 years, other Nigerian statutes have differing provisions. For example, under article 2 of the Children and Young Persons Act of 1943, which was revised in 1958, a child is defined as a young person under the age of 14 years, while a 'young person' means a person who has attained the age of 14 years and is under the

age of 17 years. The Children and Young Persons Act is one of the few texts which show the different ages that constitute childhood In Nigeria. As Akinwumi maintains, the varieties of minimum age limits are problematic in the sense that they can cause discrimination between children of the same age in different parts of the country.[42] Additionally, legislation such as the Marriage Act, which is silent on age permissible for marriage, needs to be modified to include the minimum age of 18. The Marriage Act under section 3(1)(e) merely provides that a marriage will be void if 'either of the parties is not of marriageable age'. Similarly, like the Marriage Act, the Matrimonial Causes Act does not prescribe a minimum age of marriage.

Fourthly, there is a need to enact a 'Prohibition of Child Marriage Act' which deals broadly with the issue of child marriage. The discussion and prohibition of child marriage in the CRA are restricted to a single section and do not illuminate the disastrous effect of child marriage. For example, the CRA does not stipulate a sentence for those who conduct child marriages.

Finally, the ongoing practice and high prevalence of child marriage in Northern Nigeria point to the Nigerian government's failure to comply with its international and regional human rights obligations. As a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women, CRC, the African Children's Charter and the African Women's Protocol, Nigeria is bound to uphold its contract for the protection of women, which includes the girl child. Therefore, for the Nigerian government to observe its treaty obligations in good faith, it must make a concerted effort to realise the implementation of the provisions pertaining to child rights in order to combat the adverse consequences of child marriage.

42 O Akinwumi 'Legal impediments on the practical implementation of the Child Right Act 2003' (2009) 37 *International Journal of Legal Information* 386.

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Implementing environmental rights in Kenya's new constitutional order: Prospects and potential challenges

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Summary

Since independence, the process of implementing environmental rights in Kenya has encountered a myriad of challenges. For example, until about a decade ago, the country never had any law or policy specifically designed to address violations of environmental rights. Litigants had to resort generally to the law of contract and tort to redress environmental breaches. Environmental matters were strictly private law affairs that were of less concern to the main branches of public law. Worse still, Kenya's environmental law regime was characterised by the existence of a variety of sectoral laws dealing with specific issues related to environmental conservation, improvement and protection. The promulgation of a new Constitution in August 2010 signifies a paradigm shift in so far as the implementation of environmental rights is concerned. In contrast to its predecessor, the 2010 Constitution of Kenya strengthens the implementation of environmental rights. In particular, it significantly expands the scope of fundamental rights as well as their enforcement mechanisms. The article evaluates how the new Constitution deals with the question of the implementation of environmental rights in Kenya. It reviews the efficacy of both the normative and institutional mechanisms put in place to implement environmental rights. It also highlights the potential challenges to the enforcement of these rights in the country. As a way forward, the article suggests approaches to enhance the effective implementation of these rights.

Key words: *environmental rights; Kenya; 2010 Constitution of Kenya; implementation*

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1 Introduction

On 27 August 2010, Kenya promulgated a new Constitution after a successful national referendum that witnessed overwhelming support for a new constitutional dispensation in the country.[1] Credit can be given to the important step it has taken in elevating environmental protection to significant levels. In contrast to its repealed predecessor, the Constitution dedicates a number of its provisions specifically to environmental rights and their protection.[2] Most notably, it entrenches environmental protection in the Bill of Rights, something that did not exist in the previous constitutional dispensation.[3]

Until about a decade ago, the country never had any law or policy specifically designed to address violations of environmental rights. Litigants had to resort generally to the law of contract and tort to redress environmental breaches.[4] Environmental matters were strictly private law affairs that were of less concern to the main branches of public law.[5] These were compounded by the fact that the country's environmental law regime was characterised by the existence of a variety of sectoral laws dealing with specific issues of environmental conservation, improvement and protection.[6] Such a fragmented legal framework made the implementation of environmental rights elusive.[7] This called for the consolidation of the existing environmental laws with a view to producing a comprehensive legal framework for environmental management and governance that would in turn enhance the enforcement of environmental rights in the country.

The desperate search for a sustainable framework for the effective management of the environment culminated in the enactment of the Environmental Management and Co-ordination Act (EMCA) in 1999.[8] Although it was largely expected that the enactment of the EMCA would facilitate the realisation of environmental rights in Kenya, this did not happen. Rather unfortunately, the Act turned out to be too weak for such an expectation. The repealed Constitution did not make

1 Kenya National Commission on Human Rights *Making the Bill of Rights operational: Policy, legal and administrative priorities and considerations* (2011) 1.

2 See, eg, chs 4 & 5 of the Constitution. See the Preamble; arts 2(5) & (6) on international law and its relevance; arts 10, 42, 60 & 69-72.

3 B Sang 'Tending towards greater eco-protection in Kenya: Public interest environmental litigation and its prospects within the new constitutional order' (2013) 57 *Journal of African Law* 29-30; art 43 Kenyan Constitution.

4 See JB Ojwang *Environmental law and political change in Kenya* (1992); BD Ogolla 'Environmental management policy and law' (1992) 22 *Environmental Policy and Law* 176.

5 Ogolla (n 4 above) 176.

6 Ogolla (n 4 above). EG Kenya Wildlife Services Act 1989, Water Act 2007 & Forest Act 2005.

7 CO Okidi *Review of the policy framework and legal and institutional arrangement for the management of environment and natural resources in Kenya* (1994) 6-13.

8 Act 8 of 1999.

matters any better as it failed to expressly give credence to environmental rights and their implementation.

Environmental rights were not among the rights listed in chapter V of the repealed Constitution. The said chapter contained a catalogue of human rights. It is worth noting that the enforcement of environmental rights under the previous constitutional dispensation was a herculean task. This was due mainly to the rigidity of the laws that restricted the institution of legal proceedings against violations of rights. The courts also relied heavily on administrative law principles of *locus standi* to stifle the enforcement of environmental rights. This explains why, in several instances, the courts relied overly on common law principles to determine environmental issues. For example, in *Wangari Maathai v Kenya Times Media Trust Ltd*,[9] the High Court ruled that only the Attorney-General could sue on behalf of the public and, therefore, the plaintiff had no right of action against the defendant. In this case, the High Court relied on administrative law to determine the question of *locus standi*. The enforcement of environmental rights in Kenya, during the existence of the repealed Constitution, was to a large extent based on the common law principles established in the case of *Gouriet v the National Union of Post Office Workers*,[10] where the Court had held:

> It was a fundamental principle of English law that public rights could only be asserted in a civil action by the Attorney-General as an officer of the Crown representing the public. Except where statute otherwise provided, a private person could only bring an action to restrain a threatened breach of the law if his claim was based on an allegation that the threatened breach would constitute an infringement of his private rights or would inflict special damage on him.

The High Court of Kenya entrenched this position in many cases involving violations of environmental rights.[11] Simply put, a weak constitutional and legal framework was a major drawback to the realisation of environmental rights in the country. With the coming into force of the 2010 Constitution, however, a paradigm shift occurred in the implementation of environmental rights in the country. In contrast to its predecessor, the current Constitution strengthens the implementation of environmental rights as it significantly expands the scope of fundamental rights as well as their enforcement mechanisms.

It is against this background that the article evaluates how the new Constitution deals with the question of the implementation of

9 (1989) 1 KLR (E&L).

10 (1977) 3 All ER 71-72.

11 See, eg, *Wangari Maathai & 2 Others v City Council of Nairobi & 2 Others* (1994) 1 KLR (E&L); *Nairobi Golf Hotels (Kenya) Ltd v Pelican Engineering and Construction Co Ltd* HCCC 706 of 1997; *Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited* HCCC 97 of 2001; *Mbole Nzomo Anthony & 3 Others v Shreejii Enterprises Ltd & 4 Others* HC, Civil Suit 265 of 2010; and *Kenya Bus Service Ltd & 2 Others v The Attorney-General & 2 Others* (2005) eKLR.

environmental rights. The second part of the article compares and contrasts the former and current legal frameworks for the implementation of environmental rights in the country, with the aim of indicating how the new Constitution has improved the protection of these rights. In part three, a review of the mechanisms put in place by the 2010 Constitution to implement environmental rights in Kenya is analysed. The fourth part of the article evaluates the potential challenges to the enforcement of these rights. As a way forward, the article suggests approaches to enhance the implementation of environmental rights under the new constitutional order.

2 Environmental rights in Kenya: A review of the legal framework

2.1 Kenya's environmental rights regime prior to the 2010 Constitution

Kenya's current environmental rights regime is a product of prolonged growth over a long period of time. During this period, the regime has experienced not only normative, but also institutional transformation that had a negative and positive impact in an almost equal proportion.

At the end of the twentieth century, the country had approximately 77 statutes dealing with environmental issues.[12] In a way, this was similar to what obtained in the colonial era: Kenya's post-colonial environmental law regime was somewhat obscure and largely scattered in a patchwork of sectoral legislation. Upon attaining independence in 1963, Kenya inherited sectoral laws and institutions established by the British colonial government. These covered a number of sectors, such as forest conservation, wildlife conservation, geology and mining, agriculture, livestock husbandry, water conservation and waste disposal. The country's post-colonial environmental law regime was to be understood from fragmented sectoral laws that purported to deal with environmental conservation, improvement and protection.[13] These laws were ill-structured to deal with the systemic environmental concerns that faced post-independence Kenya.[14] Notwithstanding this fact, the post-independence state adopted and continued to propagate the sectoral approach inherited from the colonial state. The desire to have a more co-ordinated approach towards the protection and promotion of environmental rights led to an unyielding search for a sustainable

12 C Okidi 'Background to Kenya's framework environmental law' in Okidi (n 7 above) 126.

13 A Angwenyi 'An overview of the Environmental Management and Co-ordination Act' in CO Okidi *et al* (eds) *Environmental governance in Kenya: Implementing the framework law* (2008) 143.

14 P Kameri-Mbote & H Ouedraogo *Partnership for the development of environmental law and institutions in Africa (PADELIA): Evaluation report* (2006) 21.

environmental rights framework. This quest led to the enactment of the EMCA in 1999.[15]

For many reasons, there was great anticipation that the enactment of the EMCA would better facilitate the promotion and protection of environmental rights in the country than was the case with the sectoral laws. First, EMCA consolidated power and responsibility for environmental management.[16] Previously, such power and responsibility had been diffused to various government departments, making it difficult to co-ordinate the promotion and protection of environmental rights. Secondly, unlike the sectoral approach, EMCA provided for the sound management and utilisation of natural resources.[17] Thirdly, EMCA provided a focal point from which the policies and activities of the various sectoral bodies dealing with the environment would be regulated and co-ordinated for the harmonised protection of environmental rights.

Kenyan courts almost entirely relied on the rules established in *Gouriet v the National Union of Post Office Workers*[18] to decide environmental cases. This precedent was not accommodative as it barred private persons from bringing to court actions for environmental breaches. In essence, this precedent disenfranchised private persons from instituting proceedings to enforce their rights against real or perceived environmental breaches, because such breaches were perceived as 'public', as opposed to 'private' affairs. It is rather unfortunate that Kenyan courts adopted this skewed position whenever they were called upon to deliberate on environmental concerns. In *Wangari Maathai v Kenya Times Media Trust Ltd*,[19] for example, the court turned a blind eye to the fact that the preservation of a public park is in itself a right of individuals who constitute the entire public. The court should have appreciated the fact that all public rights are also individual or private rights. The plaintiff in this case had applied for orders to restrain the defendant from constructing a multi-storey building in Uhuru Park, Nairobi. It was the plaintiff's case that the proposed construction would adversely affect the city's environment. The court ruled that the plaintiff had no *locus standi* in a public interest matter. Similarly, in *Nairobi Golf Hotels (Kenya) Ltd v Pelican Engineering and Construction Co Ltd*,[20] where the applicant had sought a permanent injunction to restrain the defendant from constructing a dam on or across Gathani River, the court ruled that the plaintiff had no *locus standi* since the river belonged to the government.

15 This Act attempted to co-ordinate the management of environmental matters in the country and incorporated international environmental principles such as sustainable development, polluter pays and precautionary principles.

16 Kameri-Mbote & Ouedraogo (n 14 above).

17 As above.

18 n 10 above.

19 n 9 above.

20 HCCC 706 of 1997.

In *Kenya Bus Service Ltd & 2 Others v The Attorney-General & 2 Others*,[21] the court held that private individuals could enforce the fundamental rights and freedoms set out in the Bill of Rights of the repealed Constitution only against the state and state organs, but not against another private individual. Thus, it was absolutely untenable for private individuals to enforce their environmental rights during this period.

With the coming into force of the EMCA, however, decisions of courts begun to take a slightly different turn as the Act provided for the right to a clean environment.[22] Thus, in *Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited*,[23] the court granted the applicants an injunction against the mining of titanium in Kwale. The applicants brought the petition on behalf of 'mere ordinary rural farming inhabitants'.[24] In granting the injunction, the court held:[25]

> Environmental degradation is not necessarily individual concern or loss but public loss so in a matter of this kind the convenience not only of the parties to the suit, but also of the public at large is to be considered so that if the injunction is not issued it means that any form of feared degradation, danger to health and pollution will be caused to the detriment of the population.

The rulings opened a new frontier for the protection and promotion of environmental rights in Kenya, which frontier was cemented with the coming into force of the new Constitution in 2010.

2.2 Kenya's environmental rights regime in the 2010 Constitution

Kenya's 2010 Constitution, in a marked departure from its predecessor, has deliberately dedicated a number of its provisions to the promotion and protection of environmental rights. Such provisions can be found in chapter IV,[26] chapter V,[27] chapter X,[28] the Fourth Schedule[29] and the Fifth Schedule.[30] As stated above, the enactment of this Constitution, for various reasons, signals a new dawn to the realisation of environmental rights in the country. First, the Constitution imposes obligations in respect of the environment and outlaws processes and activities likely to endanger the environment.[31] Secondly, it seeks to protect and promote substantive

21 (2005) eKLR.
22 Environment Management and Control Act of 1999, sec 3.
23 HCCC 97 of 2001.
24 As above.
25 As above.
26 See Constitution of Kenya, ch 4, 'Rights and Fundamental Freedoms'.
27 See Constitution of Kenya, ch 5, 'Environment and Natural Resources'.
28 See Constitution of Kenya, ch 10, 'Judicial Authority and Legal System'.
29 See Constitution of Kenya, Fourth Schedule, 'Distribution of Functions between National and County Governments'.
30 See Constitution of Kenya, Fifth Schedule, 'Legislation to be enacted by Parliament'.
31 Art 69.

environmental rights.[32] Thirdly, it provides an avenue for redress of environmental rights breaches.[33] Fourthly, it encourages greater public participation in the enforcement of environmental rights.[34] These issues are discussed in detail below.

2.2.1 Obligations in respect of the environment

The 2010 Constitution prescribes obligations that can, to a great extent, facilitate the realisation of environmental rights in the country. Specifically, article 69 sets out certain obligations of both the state and persons in respect of the environment. Obligations accruing to the state include ensuring the sustainable exploitation, utilisation, management and conservation of the environment and natural resources;[35] achieving and maintaining a tree cover of at least 10 per cent of Kenyan land;[36] protecting and enhancing intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;[37] encouraging public participation in the management, protection and conservation of the environment;[38] protecting genetic resources and biological diversity;[39] establishing systems of environmental impact assessment, environmental audit and monitoring of the environment;[40] eliminating processes and activities that are likely to endanger the environment;[41] and utilising the environment and natural resources for the benefit of the people of Kenya.[42]

With regard to persons, the Constitution imposes a 'duty to co-operate with the state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources'.[43] It is worth noting that the Constitution defines a 'person' to include 'a company, association or other body of persons, whether incorporated or unincorporated'.[44] A constructive reading of article 69(2) of the Constitution could, therefore, provide the basis to compel companies to comply with environmental standards as well as to enforce environmental rights.

An in-depth reading of article 69 of the Constitution reveals the deliberate attempt by the drafters of the Constitution to strike a balance between the right to utilise environmental resources, on the

32 Art 42.
33 Art 70.
34 Through devolution. See Fourth Schedule to the Constitution.
35 Art 69(1)(a).
36 Art 69(1)(b).
37 Art 69(1)(c).
38 Art 69(1)(d).
39 Art 69(1)(e).
40 Art 69(1)(f).
41 Art 69(1)(g).
42 Art 69(1)(h).
43 Art 69(2).
44 Art 260.

one hand, and the duty to ensure sustainability of the environment, on the other. Thus, by providing that '[t]he state shall ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources', article 69(1)(a) seeks to promote the right to utilise environmental resources, while at the same time ensuring environmental sustainability.

Apart from the state and persons, the Constitution also imposes an obligation on parliament to 'enact legislation to give full effect' to the environment and natural resource provisions of the Constitution.[45] The timeframe for the enactment of such legislation is provided in the Fifth Schedule to the Constitution as 'within four years from the time of promulgation of the Constitution'. At the time of the enactment of the 2010 Constitution, the main environmental legislation was the EMCA.[46] It is worth noting that the Constitution compels parliament to enact new legislation on the environment. It also demands public participation in the enactment of new laws[47] that would affect their environmental rights. The 2010 Constitution requires parliament to seek the input of the public before enacting legislation. Previously, legislation in the country was enacted without the input of the public. The need and importance of public participation in the enactment of environmental legislation are discussed comprehensively below.

2.2.2 Substantive environmental rights

Chapter V of the repealed Constitution contained a number of provisions relating to the protection of fundamental rights and freedoms. These entitlements were, however, limited to the traditional civil and political rights and did not expressly encompass other fairly important genres of rights such as environmental rights. Compared to the Bill of Rights in the repealed Constitution, the new Constitution contains provisions that expressly enhance the enforcement of environmental rights.

Article 42 of the Constitution, for example, recognises the right to a clean and healthy environment. This, according to the Constitution, is a two-fold right. First, it is a right to have the environment protected

45 Art 72.

46 Subsidiary legislation enacted to support EMCA includes Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution) Control Regulations of 2009; Environmental Management and Co-ordination (Wetlands, Riverbanks, Lake Shores, and Sea Shore Management) Regulations of 2009; Environmental Management and Co-ordination (Air Quality Standards) Regulations of 2007; Environmental Management and Co-ordination (Controlled Substances) Regulations of 2007; Environmental Management and Co-ordination (Waste Management) Regulations of 2006; Environmental Management and Co-ordination (Water Quality) Regulations of 2006; Environmental Management and Co-ordination, Conservation of Biological Diversity (BD) Regulations of 2006; and Environmental Management and Co-ordination (Fossil Fuel Emission Control) Regulations of 2006.

47 Art 118(b).

for the benefit of present and future generations[48] and, secondly, it is a right to have obligations relating to the environment fulfilled.[49] The approach taken by the Constitution on the right is unique in the sense that, by invoking article 70, the Constitution broadens the scope of this right to include 'the right to adequate remedy' for environmental rights breaches. Article 70, thus, provides for the enforcement of environmental rights. More importantly, article 70 does away with need to demonstrate *locus standi* for access to justice. This is because 'an applicant does not have to demonstrate that any person has incurred loss or suffered injury'.[50]

The recognition of the right to a clean and healthy environment in Kenya is not novel as it was initially acknowledged in the EMCA. What is novel, however, is the elevation of this right to constitutional status. Kenya has now joined ranks with a number of other African countries with relatively new constitutions, such as South Africa and Namibia, which entrench environmental rights. This right has in the recent past become very important and relevant to Africa as a whole. The importance culminated after the toxic waste dumping of 1988 in some African countries by international corporations.[51] After discovering the dumping, the former Organisation of African Unity (OAU) took quick action to forestall future occurrences. In the same year, the OAU Council of Ministers passed a resolution condemning the importation of toxic waste to Africa, and emphasised that toxic dumping was a crime against Africa.[52] This resolution was followed by the adoption of a convention banning the importation of toxic waste into Africa.[53] The right was subsequently domesticated by many countries across the continent, including Kenya.

2.2.3 Procedural environmental rights

A novel feature of the new Constitution is its emphasis on public participation in every sphere of government. Specifically, chapter XI provides for a devolved system of government. Article 174(g) enumerates the main objects of this system of government to include ensuring 'equitable sharing of national and local resources throughout Kenya'. The term 'resources' here could be interpreted broadly to

48 Art 42(a).
49 Art 42(b).
50 Art 70(3).
51 See VO Nmehielle *The African human rights system: Its laws, practice and institutions* (2001) 157.
52 OAU Council of Ministers Resolution on Dumping of Nuclear and Industrial Waste in Africa, adopted at Addis Ababa, 23 May 1998. CM/Res 1153 (XLVIII) (1989) 28 *International Legal Materials* 567.
53 Bamako Convention on the Ban of Importation into Africa and the Control of Transboundary Movement and Management of Hazardous Waste Within Africa, concluded at Bamako, 29 January 1991 (1991) 30 *International Legal Materials* 775.

include 'environmental and natural resources'.[54] Seen from this context, the devolved system of government will be instrumental in the promotion and protection of environmental rights in the country.

Under the devolved system, the Kenyan government is divided into two levels: national and county.[55] The Fourth Schedule to the Constitution details the distribution of functions between the national and county governments. With regard to the environment, the national government is responsible for

> [p]rotection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular (a) fishing, hunting and gathering; (b) protection of animals and wildlife; (c) water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and (d) energy policy.

On the other hand, county governments are responsible for the 'implementation of specific national government policies on natural resources and environmental conservation, including (a) soil and water conservation; and (b) forestry'.

The new approach adopted by the Constitution has the potential to enhance public participation in the enforcement of environmental rights simply because the implementation of environmental policies is no longer a preserve of the national government. The approach is also in line with the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters[56] and the United Nations (UN) Conference on Environment and Development,[57] both of which emphasise public participation in environmental decision making.

It is needless to emphasise that public participation in environmental decision making is crucial to the enforcement of environmental rights. This is because the process often involves all the stakeholders in both the formulation and enforcement of environmental policies. At every stage, consultations are usually conducted before decisions are made. During such consultations, awareness is created about the existence of environmental rights and their importance. As a result of such awareness, the enforcement of environmental rights becomes easier and quicker.

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54 According to art 260, 'natural resources' means the physical non-human factors and components, whether renewable or non-renewable, including (a) sunlight; (b) surface and ground water; (c) forests, biodiversity and genetic resources; and (d) rocks, minerals, fossil fuels and other sources of energy.

55 Art 1(4) Constitution.

56 See Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (Aarhus Convention) of 1998, http://www.unece.org/ env/pp/documents/cep43e.pdf (accessed 2 July 2013).

57 See United Nations Conference on Environment and Development (Rio Conference) of 1992, http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm (accessed 2 July 2013).

3 Mechanisms for the enforcement of environmental rights under the 2010 Constitution

The enforcement of environmental rights in Kenya can be pursued either through the courts or through an administrative action.

3.1 Enforcement through the court system

Through the courts, the enforcement of environmental rights is dealt with under article 70 of the Constitution. Accordingly:[58]

> If a person alleges that a right to a clean and healthy environment recognised and protected under article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

The Constitution permits the court to make any order or give any directions it considers appropriate.[59] This may include orders or directions to prevent, stop or discontinue any act or omission that is harmful to the environment; to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or to provide compensation for any victim of a violation of the right to a clean and healthy environment.[60] The Constitution provides very wide jurisdiction to environmental rights litigants since 'an applicant does not have to demonstrate that any person has incurred loss or suffered injury'.[61]

The prioritisation of environmental rights under the new constitutional dispensation is underscored by the fact that a specialised court has been designated to deal with environmental disputes. Article 162(2)(b) of the Constitution mandates parliament to establish courts with the status of a high court 'to hear and determine disputes relating to the environment and the use and occupation of, and title to land'. Giving such a court the status of a high court in itself is significant, as it ensures that the court does not conflict with other institutions dealing with the enforcement of environmental rights, such as the Public Complaints Committee and the National Environment Tribunal.

In accordance with article 162(2)(b) of the Constitution, parliament enacted the Environment and Land Court Act[62] which establishes the Environment and Land Court. The Court consists of a presiding judge, elected in accordance with article 165(2) of the Constitution[63] for a

58 Art 70(1) Constitution of Kenya.
59 Art 70(2).
60 Arts 70(2)(a)-(c).
61 Art 70(3).
62 Sec 4. This Act effectively repealed the Land Disputes Tribunal Act 18 of 1990.
63 Sec 6(1).

non-renewable term of five years,[64] and such number of judges as may be determined by the Judicial Service Commission (JSC).[65] The presiding judge has supervisory powers over the Court and reports to the Chief Justice.[66]

The Environment and Land Court has jurisdiction to adjudicate disputes both originally and on appeal, as well as to review decisions of other tribunals in certain instances. Such jurisdiction includes the power to adjudicate disputes for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedoms relating to a clean and healthy environment as provided for under the Constitution.[67] The Court may also exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals,[68] such as the National Environmental Tribunal[69] from which appeals formerly lay with the High Court.[70] The architects of the Court reserved for alternative dispute resolution a pride of place.[71] Thus, it is within the Court's power to give these mechanisms a chance, especially where these are conditions precedent in the matter before it.

The importance of an effective judiciary in the protection and advancement of environmental rights cannot be over-emphasised. The judiciary plays a vital role in enforcing human rights. It is the institution that is constitutionally designed to be objective, fair and just in applying the law when controversial issues are brought before it. Without a working, independent and competent judicial system, the attainment of the rule of law and the fair administration of justice, which is the cornerstone of protecting, promoting and advancing human rights, becomes elusive. In the area of environmental management, the judiciary has a key role to play, not only in enforcing domestic law, but also in integrating the human rights values set out in international instruments.

In environmental management, the judiciary plays a balancing role between various interests, such as in ensuring that what the present generation values, is spread to the benefit of generations to come. Judicial decisions often help to sustain such values for the benefit of many who are unable to speak for themselves, either because they are not yet born, or because of the many obstacles placed in their way by procedural legal requirements, or in view of inhibiting poverty and other socio-economic factors.

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64 Sec 6(2).

65 Sec 5.

66 Sec 6(3). In the absence of the presiding judge or in the event of a vacancy in the office of the presiding judge, the judges of the Court may elect any other judge of the Court to exercise the functions of the presiding judge – sec 6(4).

67 Sec 13(3).

68 Sec 13(4).

69 Established by sec 125 of the Environmental Management and Co-ordination Act, ch 8, 2003.

70 Sec 130 Environmental Management and Co-ordination Act.

71 Sec 20.

Over the last two decades, there has been a dramatic increase in the number of judicial decisions on environmental issues in the country. This is as a result of growing awareness of the link between damage to human health and to the ecosystem by a range of human activities.[72] Kenya's judiciary has responded to this trend by refashioning sometimes age-old legal tools to meet the demands of the times, with varying degrees of success. Thus, it is encouraging to note that the 2010 Constitution seeks to enhance access to justice in environmental rights litigation in two main ways. First, unlike in other forms of litigation, an environmental rights litigant need not prove that he has suffered injury to obtain relief from the courts.[73] In most civil litigation, the plaintiff is only granted relief once the case is proved on a balance of probabilities. In litigation relating to environmental rights, this requirement is waived. Most environmental cases are proved using scientific imperatives that require highly-trained experts to demonstrate the injury suffered.

Secondly, the requirement for *locus standi* has been relaxed.[74] Article 22(2) is clear that the person taking an action to court need not be the victim of the environmental harm or threatened harm.[75] Such a situation gives wide room to whistle-blowers and environmental activists in the non-governmental organisation (NGO) sector. Due to poverty and ignorance, most ordinary citizens do not understand their basic rights. The position initiated by the 2010 Constitution makes it possible for vigilant activists to take legal action on behalf of vulnerable groups. The new provisions grant environmental whistle-blowers and other public-spirited interest groups the opportunity to challenge any action or decision that may impact on the environment in a negative way. This change of approach is bound to significantly alter the landscape of environmental rights litigation in the country.

The new constitutional order has also dealt a blow to undue technicalities that used to frustrate environmental rights litigants in Kenya under the previous dispensation. Article 159(2)(d) of the Constitution provides that 'justice shall be administered without undue regard to technicalities'. In the past, critical environmental matters were dismissed on technicalities without consideration of their

72 The increase in the volume of court actions throughout the world is attested to by the number of cases published in the UNEP Compendium of Judicial Decisions on Matters Related to the Environment. So far, they are volume I (1998); volume II (July 2001) and volume III (October 2001).

73 Art 70(3) provides that an applicant does not need to have to demonstrate that any person has incurred loss or suffered injury.

74 Art 70(3) Constitution of Kenya.

75 Art 22(2): 'In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by (a) a person acting on behalf of another person who cannot act on their own name; (b) a person acting as a member of, or in the interest of, a group or class of persons; (c) a person acting in public interest; or (d) an association acting in the interest of one or more of its members.'

merits. A case in point is that of *Wangari Maathai*.[76] While denying the plaintiff *locus standi,* Dugdale J ruled that 'it is well established that only the Attorney-General (AG) can sue on behalf of the public'.[77]

Prior to the enactment of the EMCA that expanded *locus standi*, litigation on behalf of the public was effectively blocked. This is because the AG did not generally bring actions against government departments. As a matter of law, the AG must be named as a defendant in suits against government officials and departments.[78] This renders him incapable of suing on behalf of the public in cases where a government department action is to be challenged. Other than being the principal legal advisor to the government,[79] the AG also acts as its advocate, handling legal suits on its behalf through the Department of Civil Litigation in his office.[80] The same provision of law also requires the would-be plaintiff to serve the AG with 30 days' notice prior to filing suit against the government. The law, therefore, created unnecessary hurdles and difficulties for private parties intending to bring suits against the government.

In the *Wangari Maathai* case, the court failed to take account of factors that would have allowed the plaintiff to pursue the matter on behalf of the public. This includes the fact that, as a resident of Nairobi, she was a ratepayer and as such had an interest in how the affairs of the city were carried out. She would easily have established that she had the right to oppose the development of structures that had deleterious effects on the environment. Although her case was dismissed on the basis of a lack of *locus standi*, it received widespread support from the media, hence heightening debate and increasing awareness of environmental protection.

In the case of *Maina Kamanda and Another v Nairobi City Council,* Akilano Akiwumi J was faced with similar facts on requirements for *locus standi*.[81] The defendants argued that the plaintiff had no standing*,* since he required the permission of the AG to bring the action, which he had not obtained. In dismissing this contention, the judge quoted with approval the decision in the English case of *IRC v National Federation of Self-Employed and Small Business Limited.*[82] He held:[83]

> I think that it is now well settled that a ratepayer, as opposed to a tax payer, has sufficient interest as such, to challenge in court the action of a public body to whose expenses he contributes.

76 *Wangari Mathai v Kenya Times Media Trust* (n 11 above).
77 UNEP's Compendium (n 74 above) 17.
78 Ch 40, Laws of Kenya. See in particular sec 13A.
79 Sec 26(2) Constitution.
80 Sec 13A of the Government Proceedings Act ch 40, Laws of Kenya.
81 Nairobi High Court Civil Case 6153 of 1992 (unreported).
82 (1982) AC 617 740.
83 See volume 1 UNEP Compendium, December 1998 78.

3.2 Enforcement through administrative action

Currently, Kenya does not have legislation relating purely to administrative action. Instead, the principles of common law and doctrines of equity guide the courts when adjudicating on administrative disputes. For a long time, the High Court has had jurisdiction to exercise the judicial review remedies of *certiorari*, prohibition and *mandamus*.[84] It may issue a declaratory order, an injunctive order or order payment of damages.

The 2010 Constitution compels parliament to enact legislation that gives effect to the right to expeditious, efficient, lawful, reasonable and procedurally-fair administration.[85] According to the Fifth Schedule to the Constitution, the envisaged legislation must be enacted within four years of promulgation of the Constitution.[86] The enactment of legislation on fair administration will enhance the realisation of the right to a clean and healthy environment. Article 47 of the Constitution gives the direction administrative law should take. It states:

> (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
> (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action.

The requirement that administrative action be fair is strengthened by the right of access to information. Article 35 of the Constitution states:

> (1) Every citizen has the right of access to -
> (a) information held by the state; and
> (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
> (2) The state shall publish and publicise any important information affecting the nation.

Administrative action and access to information are important components of enforcing environmental rights. They ensure transparency and accountability in decision making. They also provide mechanisms through which litigants who have filed cases in court can access records held by both the state and private individuals that impact on the environment.

Administrative bodies are diverse. In the context of the right to a clean and healthy environment, they would include the National Environment and Management Authority (NEMA), Kenya Wildlife Services (KWS), Kenya Forestry Services (KFS) and other lead agencies that are charged with the management of sectoral environmental

84 See the Judicature Act Cap 8 section.
85 Art 47(3).
86 The new Constitution was promulgated on 27 August 2010.

law.[87] Environmental management bodies exercise public functions when they intervene or participate in a function that has a bearing on public interest. Administrators have a wide range of powers which have often been abused.

The enactment of new administrative legislation, together with the right of access to information, will therefore ensure a more accountable, responsive and transparent system of enforcing environmental rights. Administrators would be effectively checked so that their functions are confined to those that are in line with best public interest. The rationality and reasonableness of a decision would become the threshold to test administrative actions. Both procedural fairness and the merit of the decision will stand to be questioned. This is a shift from the situation where the court is concerned only with procedural requirements.

4 Possible challenges to the implementation of environmental rights under the new constitutional order

The implementation of environmental rights in Kenya's new constitutional order is a process that will most likely encounter numerous challenges. The realisation of these rights requires that institutions dealing with their implementation comply with the Constitution. However, as in the past, there is the danger that vested interests among these institutions may affect legislation, interpretation, administration and other aspects of the implementation of environmental rights. As noted by the Constitution Implementation Commission (CIC) in one of its reports:[88]

> … selective reading and misinterpretation of provisions of the Constitution by implementing agencies, deliberate misinformation to members of the public by some members of both the executive and the legislature, a lack of guidance from the office of the Attorney-General in the process of implementation of the Constitution, political risk, and the increasing trend by the executive and some members of the legislature to create grey areas regarding the interpretation of the Constitution. All these have the unfortunate propensity to create confusion and to delay the implementation of provisions of the Constitution.

The reality of the above observation by CIC is vivid in the process of enacting appropriate environmental legislation as contemplated in the Constitution. The Fifth Schedule to the Constitution requires legislation regarding the environment to be enacted within four years from the effective date. This task is complex and will certainly require significant technical and intellectual input from environmental

87 Lead agencies are defined in the National Environmental Co-ordination Act 1999 (EMCA).

88 See Commission for the Implementation of the Constitution *Second quarterly report on the implementation of the Constitution (CIC)* (2011) 45.

experts. However, experience has shown that Kenya's Parliament has often been reluctant to adhere to recommendations by experts, particularly in matters where the Members of Parliament have vested interests.[89] One would therefore expect that 'appropriate legislation' on the environment will take quite some time to be legislated in line with the new Constitution's requirement. What will most likely come from parliament within the four years of existence of the Constitution is legislation that will hurriedly be enacted to beat the constitutional deadline.

Even where appropriate legislation is enacted, there is the likelihood of a lack of co-operation and collaboration among stakeholders in the implementation process. The effective implementation of environmental rights will ordinarily require co-operation and collaboration among the various stakeholders. Experience has shown that meaningful and effective stakeholder participation is lacking in the country's environmental sector. A willingness to explore new participatory approaches in the sector is lacking, mainly due to an inadequate flow of information within the sector.[90] It follows, therefore, that many individuals and communities, especially those in rural areas, are unaware of their rights. Such lack of awareness has led to indifference, as a result of which the violation of environmental rights has become the general rule, with their effective implantation being the exception.

Much as the implementation of environmental rights at the two levels of government is applauded, as explained above, this may nonetheless pose a challenge. Administrative bureaucracy is likely in the process of the implementation of environmental rights as there are jurisdictional overlaps. The 2010 Constitution, in the spirit of devolution, has created two levels of government which are distinct and interdependent. Both levels of government are instrumental in the implementation of environmental rights, since they have concurrent and exclusive jurisdiction on environmental matters. Like the national government, each of the 47 county governments has its own legislative assembly with the power to enact environmental legislation. In such circumstances, jurisdictional overlaps and conflicts may arise, inhibiting the effective implementation of environmental rights, unless proper measures are put in place.

89 Eg, the current parliament has often risen to oppose the recommendation for salaries and allowances recommended by the Salaries and Remuneration Commission. This is a constitutional commission established to recommend rates of salaries to be earned by state and public officers.

90 See a similar argument in R Naome *et al* 'Challenges in implementing an integrated environmental management approach in Zimbabwe' (2012) 3 *Journal of Emerging Trends in Economics and Management Sciences* 410.

Ambivalent administrative bureaucracy is also likely to be experienced in the process of the implementation of environmental rights by both levels of government.[91] As already stated, environmental legislation is currently administered by several agencies established by national legislation. With the institution of counties, it is expected that more environmental agencies will soon be created. This may lead to a duplication of efforts, the splitting of resources and unnecessary bureaucracy.

The lack of political will by the leadership in either level of government to implement the laws and policies of the other level may cause bureaucracy to be increased. For example, political representatives at the counties may be reluctant to enforce 'unpopular regulations' from the national government for fear of destroying their political base. It must be emphasised that political support is crucial for the effective implementation of environmental rights.

The realisation of environmental rights may also be hampered by a lack of capacity, both in terms of staff and resources. The effective enforcement of environmental legislation and policies is contingent upon the availability of competent staff and adequate financial resources. In the previous constitutional dispensation, the appointment of competent staff to implement environmental legislation and policies was more often than not wanting. Appointments to key positions in environmental agencies, like all others in the public sector, were motivated by political and ethnic considerations as opposed to professionalism and competence.[92] The management of such agencies[93] therefore was epitomised by corruption, negative ethnicity, gross incompetence, political interference and patronage. In a country where such vices have been rife, conscious efforts should be made to reverse the trend, otherwise the effective enforcement of environmental rights will remain a myth. The new Constitution enjoins the executive at both levels of government and all state organs to recruit competent personnel through competitive processes.[94]

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91 B Sihanya 'Constitution implementation in Kenya 2010-2015: Challenges and prospects' *FES Occasional Paper 5* (2011) 35.

92 Sec 24 of the repealed Constitution empowered the President to create and abolish offices in the public service without parliamentary approval.

93 Agencies such as Kenya Revenue Authority, Kenya Wildlife Services, Kenya Bureau of Standards, Agricultural Finance Corporation, etc.

94 The Public Service Commission is created by ch 13 of the Constitution. Under the provisions of ch 15, it is an independent governmental organ. Art 232 enjoins it to adhere to certain values which include the following: (a) high standards of professionalism; (b) efficient, effective and economic use of resources; (c) responsive, prompt, effective, impartial and equitable provision of services; (d) involvement of people in the process of policy making; (e) accountability for administrative acts; (f) transparency and provision to the public of timely, accurate information; (g) subject to paragraph (h) and (i), *fair competition and merit as the basis of appointments and promotions* (my emphasis).

5 Conclusion

It is clear from the foregoing discussion that the 2010 Constitution has initiated a paradigm shift in the implementation of environmental rights in Kenya. In contrast to its predecessor, the Constitution strengthens the enforcement of environmental rights, as it significantly expands the scope of fundamental rights as well as their enforcement mechanisms. This notwithstanding, the process of implementing environmental rights in the country faces numerous challenges, as discussed in the previous section of the article. These challenges, however, are by no means insurmountable.

In the main, the government should formulate a comprehensive integrated environmental rights delivery strategy with sufficient institutional support and funding. Such strategy should focus on, among other things, providing environmental justice through the implementation of existing legislation and fostering public participation in the implementation of environmental rights. The strategy should also envisage continuing environmental education among stakeholders. The education programme should be co-ordinated by qualified environmental education officers at both the national and county levels of government. The programme should also focus on capacity building through the dissemination of information and the training of volunteers. Universities, colleges, high schools and primary schools can also be targeted for such education and training. Increasing awareness and education are important because it is necessary for people to know of their rights before their implementation.

Measures should be put in place to guarantee access to information and community participation in environmental decision making. This will encourage communities to support government policies and initiatives related to the environment as it will give communities the feeling of being 'partners with government'.

An integrated environmental rights delivery strategy may not be possible without the establishment of a co-ordination agency. With the existence of a devolved system of government, there is a need to have a co-ordination agency to streamline the implementation of environmental rights at both levels of government. The agency may also mediate disputes that may arise between the national and county governments in the course of the implementation of environmental rights. The agency should be empowered to create accessible claim mechanisms for environmental rights breaches at both levels of government to enable people to find redress more speedily.

Another measure the government can put in place is to increase resource allocation towards the enforcement of environmental rights. Resources for such purposes should be distributed equitably to all counties and must be made accessible to actors at the grassroots level. It is high time for budgetary allocation for environmental rights implementation to be made a priority in the same way as budgets for

other activities in the country. Experience has shown that the restraining of funds for environmental activities has been one of the major hindrances to the implementation of environmental rights.

Apart from the measures discussed above, there must be the political will to enforce environmental rights. Political leaders, both at the national and county levels of government, must work together to inculcate environmental stewardship in the country. They must show their commitment to the implementation of environmental rights by taking environmental issues more seriously. A show of commitment by the political class will automatically encourage the people they lead to follow suit.

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Human trafficking and human rights violations in South Africa: Stakeholders' perceptions and the critical role of legislation

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Summary

This article examines the perspectives of governmental and non-governmental stakeholders in South Africa on the dynamics of human trafficking in South Africa, and on efforts to protect the human rights of rescued victims of human trafficking prior to the promulgation of human trafficking legislation in the country. The authors seek to understand the range of views and approaches of stakeholders to trafficking, including possible links to HIV, as human trafficking is commonly discussed in the media, but empirical research on the scale, dynamics, and impacts of trafficking in South Africa is scarce. This exploratory situation analysis involves desk review and 24 key informant interviews, using purposive and sequential referral sampling. Respondents included government departments and non-governmental organisations working at a border-crossing site (Musina), and two major destination sites for irregular migrants, including trafficked people (Johannesburg and Cape Town).

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Almost all respondents reported that human trafficking is significant and complex, and that both cross-border and internal movement of trafficked victims violate victims' rights in several ways. While they suffer at the hands of organised crime syndicates, their rights are further violated even after rescue, prior to the recently-promulgated human trafficking legislation in the country. Victims' access to justice is also either delayed or denied in many cases due to the inability to prosecute the perpetrators. The study concludes that, despite the recent giant step in the right direction in promulgating human trafficking legislation in South Africa, there is a need for further efforts by the South African government to take additional proactive and practical measures for optimum effectiveness of the law without which the goal of the Act may remain a tall dream.

Key words: *Migration; irregular migration; human trafficking; human trafficking law; South Africa*

1 Introduction

Human trafficking is attracting global concern. Article 3(a) of the United Nations (UN) Convention Against Transnational Organised Crime (UNTOC) defines trafficking in persons as

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Human trafficking and smuggling have various human rights consequences.[1] Victims are subjected to various physical, sexual and emotional abuses.[2] The UN Convention added two Protocols

1 J Bhabha 'Trafficking, smuggling, and human rights' *Migration Information Source: Fresh thought, Authoritative data, Global reach* 2005 http://www.child trafficking.com/Docs/migration_funda_1007.pdf (accessed 4 July 2012); J Fitzpatrick 'Trafficking as a human rights violation: The complex intersection of legal frameworks for conceptualising and combating trafficking' (2003) 24 *Michigan Journal of International Law* 1143; A Gallager 'Human rughts and the new UN Protocols on Trafficking and Migrant Smuggling: A preliminary analysis' (2001) 23 *Human Rights Quaterly* 975; AD Jordan 'Human rights or wrongs? The struggle for a rights-based response to trafficking in human beings' (2002) 10 *Gender and Development* 28-37; K Kim & K Hreshchshyn 'Human trafficking private right of action: Civil rights for trafficked persons in the United States' (2004-2005) 16 *Hastings Women's Law Journal* 1-36; J Salt 'Trafficking and human smuggling: A European perspective' (2000) 38 *International Migration* 31-56.

2 F Curtol *et al* 'Victims of human trafficking in Italy: A judicial perspective' (2004) 11 *International Review of Victimology* 111-141; C Friesendorf 'Pathologies of security governence: Efforts against human trafficking in Europe' (2007) 38 *Security Dialogue* 378-402; A Gallagher & P Holmes 'Developing an effective criminal justice response to human trafficking' (2008) 18 *International Criminal*

(Palermo Protocols) to UNTOC in the year 2000.[3] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children consists of 20 articles, starting with general to specific provisions in relation to human trafficking. Specifically, article 5 criminalises trafficking in persons and mandates state parties to enact legislation to criminalise human trafficking. Article 6 provides for the assistance and protection of human trafficking victims through the provision of physical and psychological needs, as well as the social recovery of victims, including housing, counselling, information, safety, medical care, employment, educational and training opportunities. Also, article 7 provides for the conferment of refugee status on rescued victims at the receiving countries, while article 8 states procedures and responsibilities for the repatriation of rescued victims. In article 9, state parties are mandated to prevent human trafficking through research, information, mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons. State parties are also to initiate bilateral and multilateral co-operation with affected countries for the effective control of the crime. Article 10 encourages information exchange among affected countries, while article 11 mandates state parties to strengthen border control as one of the means of preventing human trafficking.

In addition to this, the Protocol against the Smuggling of Migrants by Land, Air and Sea also provides clarifications on human smuggling and trafficking and prohibits human smuggling and trafficking by land, air and sea. Article 3 of the Protocol states:

> 'Smuggling in migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national or a permanent resident.

Article 5 states that illegal migrants themselves must not be held responsible for the crime of smuggling that they are subject to, while article 6 defines the scope of criminalisation of human smuggling to include producing, procuring, providing or possessing a fraudulent

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Justice Review 318-343; JC Hathaway 'The human rights quagmire of 'human trafficking' (2008-2009) 49 *Virginia Journal of International Law* 1-59; CRJ Rijken & D Koster 'A human rights-based approach to trafficking in human beings in theory and practice' 2008, http://ssm.com/abstract=1135108 (accessed 4 July 2012); TD Truong & MB Angeles 'Searching for best practices to counter human trafficking in Africa: A focus on women and children' Report commissioned by United Nations Trafficking in Scientific and Cultural Organisation, http://www.unesco. org/shs/humantrafficking 2005 (accessed 4 July 2012).

3 United Nations (2000a), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, http://www.unodc.org/unodc/treaties/CTOC/; United Nations (2000b), Protocol against The Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime https://www.unodc.org/documents/middleeastandnorthafrica//organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf (accessed 4 July 2012).

travel or identity document for the purpose of smuggling of migrants and enabling a person to remain in the destination country illegally. Articles 7 to 9 deal extensively with measures related to the smuggling of migrants by sea, including the security and humane treatment of persons on board as well as the rights and obligations of the coastal states, while articles 10 to 18 deal extensively with measures to prevent human trafficking or smuggling, co-operation among state parties affected and other related measures.

The Palermo Protocols, therefore, seek to provide preventive, protective as well as prosecution-focused responses to human trafficking as a means of guaranteeing the human rights of victims. With these Protocols, state parties become obliged to devise preventive measures (including legislation and strengthening relevant law enforcement agencies), to protect the rights of rescued victims (for instance, medical care, to be treated as victims and not criminals, protection from recapturing by traffickers, granted refugee/asylum status in the case of foreigners, and so on) and to prosecute the perpetrators (traffickers, pimps, brothel owners, law enforcement agents who connived with perpetrators, and so on). In order to achieve this, state parties were enjoined to domesticate the Palermo Protocols, as incorporation and domestication of the Palermo Protocols will enable states to co-operate and collaborate more effectively and will promote the protection of victims' rights.[4]

In light of this, many countries of the world, including African countries, have specific legislation which criminalises human trafficking and smuggling in line with the provisions of the Palermo Protocols. For instance, Nigeria,[5] Ghana[6] and Tanzania,[7] among other countries, enacted various laws to combat human trafficking.

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4 SC Inglis 'Expanding international and national protections against trafficking for forced labour using a human rights framework' (2001) 55 *Buffalo Human Rights Law Revision* 55-104; A Joshi 'The face of human trafficking' (2002) 13 *Hastings Women's Law Journal* 52; G King & CJL Murray 'Rethinking human security' (2001) 116 *Political Science Quarterly* 585-610; N Ray 'Looking at trafficking through a new lens' (2006) 12 *Cardozo Journal of Law and Gender* 909; J Todres 'Law, otherness, and human trafficking' Georgia State University College of Law, Legal Studies Research Paper 2009-07, http//ssrn.com/abstract=13625421; (2009) 49 *Santa lara Law Review* 605-672.

5 Nigerian Child Rights Acts 2003 http://www.nassnig.org/nass/acts.php?pageNum_bill=2&totalRows_bill=194 (accessed 23 December 2012); Nigerian Trafficking in Persons Prohibition and Administration Act 2003 http://www.nassnig.org/nass/acts.php?pageNum_bill=2&totalRows_bill=194 (accessed 22 December 2012).

6 Ghana Children's Act 560 of 1998 http://www.parliament.gh/library.php?id=37 (accessed 23 December 2012);. Ghana Human Trafficking Act 694 of 2005 http://www.parliament.gh/library.php?id=37 (accessed 23 December 2012).

7 Tanzania Act of the Child 2009 http://www.parliament.go.tz/index.php/documents/acts/all/all/ (accessed 4 January 2013); Tanzania Anti-Trafficking in Persons Act 2008 http://www.parliament.go.tz/index.php/documents/acts/all/all/ (accessed 4 January 2013).

South Africa[8] has also enacted various laws related to child care, child justice and sexual offences and has only recently promulgated the Prevention and Combating of Trafficking in Persons Act,[9] which is meant to comprehensively address the problem. It is important to note that having human trafficking legislation may not eradicate human rights abuses associated with trafficking, although it has the potential to improve the rights enjoyed by any rescued victim. This calls for additional proactive and practical measures to be put in place for optimum effectiveness of the new law. This article aims at providing evidenced-based information and perspectives of stakeholders on the violation of human rights of victims, in general, and the rights of rescued trafficked victims, in particular, in the country prior to the promulgation of the Act, which may serve as a useful guide for such proactive and practical measures. This baseline information and perspectives of stakeholders are also important as it could provide part of the basis for the assessment of the effectiveness of the newly-promulgated law in the future and point to the areas in which additional intervention may be required.

2 Study design

2.1 Methods

This study employed an exploratory qualitative research design involving desk review and 24 key informant interviews using purposive and sequential referral sampling, as described below, in the context of a programme of Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) Research in Complex Contexts of Inequality (HARICCI), underway at the University of the Western Cape's (UWC) Centre for Research in HIV and AIDS. Migration – including forced migration and human trafficking – and its relationships to HIV and related health and human development issues are some of the areas of focus of the HARICCI programme.

8 South African Child Care Act 1983 http://www.parliament.gov.za/live/content.php?Category_ID=120; South African Prevention of Organised Crime Act 1998 http://www.parliament.gov.za/live/content.php?Category_ID=120 (accessed 4 January 2013); South African Children's Act 38 of 2005 http://www. parliament.gov.za/live/content.php?Category_ID=120 (accessed 4 January 2013); South African Children's Amendment Act 2007 http://www.parliament.gov.za/live/content.php?Category_ID=120 (accessed 4 January 2013); South African Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 http://www.parliament.gov.za/live/content.php?Category_ID=120 (accessed 4 January 2013); South African Child Justice Act 2008 http://www.parliament.gov.za/live/content.php?Category_ID=120 (accessed 4 January 2013).

9 South African Prevention and Combating Trafficking in Persons Act 2013 http://www.justice.gov.za/legislation/acts/2013-007.pdf (accessed 7 August 2014).

2.2 Study setting

The study was an entirely qualitative study with primary data collected through the use of key informant interviews in three locations: Cape Town in the Western Cape, Johannesburg in Guateng and Musina in the Limpopo province in South Africa. Johannesburg, Pretoria and Cape Town are major destinations for irregular migrants to South Africa, while Musina, as a border town, is a major point of entry for irregular migrants into the country.[10] In addition, there are also many non-governmental organisations (NGOs)[11] working on either human trafficking or HIV/AIDS in the locations selected for this study.

2.3 Study participants

The study explores the issue of human trafficking, but it is a baseline situation analysis based on key informant interviews with knowledgeable experts who are directly working in this field. The recruitment of key informants for the interviews therefore took place at various levels. At the first stage, a mapping of NGOs and inter-governmental agencies working on human trafficking and/or HIV/AIDS in the study locations was carried out. A combination of internet searching, review of media reports, and 'snowballing' techniques, through which respondents to semi-structured questionnaire interviews (face-to-face or by e-mail) were employed to map relevant organisations. This allowed us to describe the geographical spread as well as the main mandates of the NGOs. Officials at the level of directors, assistant directors or programme managers on human trafficking or HIV/AIDS, who had been working with the organisation for at least two years, were purposively selected for in-depth interviews. The NGOs and inter-governmental agencies included in Cape Town are AIDS Legal Network, Activist Networking Against the Exploitation of Children and Women (ANNEXCDW), Justice Acts, Molo Songololo, and International Organisation for Migration (IOM). In Johannesburg and Pretoria, the organisations are Community AIDS Response (CARe), IOM, Pretoria, Child Welfare South Africa, Johannesburg Child Welfare, MSF (Doctors without Borders), the Red Cross, Right to Care, Sonke Gender Justice and the Treatment Action Campaign (TAC). In Musina, a community leader was selected in addition to organisations such as Centre for Positive Care (CPC), Home-Based Carers, IOM, MSF and the Red Cross.

The second stage of selecting the study participants involved the mapping of all government agencies working on human trafficking and/or HIV/AIDS with a possible link to irregular migration or protection of victims of sexual exploitation. Applications for

10 International Organisation for Migration (IOM) – Migrants Needs and Vulnerabilities in the Limpopo Province, Republic of South Africa. Report on Phase Two. February–March 2009 http://www.irinnews.org/pdf/zimbabwe_iom.pdf (accessed 15 January 2013).

11 The names of NGOs selected are provided under study participants.

permission to conduct the study were then sent to the agencies, as most departments require official permission before individual staff can participate in research. The government agencies included in this study are the Department of Health (Gauteng Province); the Department of Social Development (Guateng Province); the Department of Home Affairs (Cape Town); the South African Parliament (Cape Town); the South Africa National AIDS Council (SANAC); and PHC Mobile Clinic, Musina. The permission requested from the South African Police Services was not granted, while the National Prosecuting Authority did not respond to the application despite persistent reminders over a period of five months. These two agencies were therefore not included in this study.

2.4 Data collection

Before the field work commenced, interview guides for the different stakeholders were developed in English. Information sheets about the study were sent to all the selected organisations in advance, while appointments were booked telephonically with all the organisations. The interview guides were divided into two sections. The first section was based on obtaining basic information about the organisations selected for this study, while the second section focused on the key informants' understanding of human trafficking, the causes of human trafficking, human trafficking and other related problems, and the challenges of combating human trafficking. It also elicited information on any perceived relationship between human trafficking and HIV, and finally invited reflection on strategies that could be used to combat human trafficking and HIV and AIDS in South Africa. Each interview session lasted for an average of 55 minutes. Questions were used to guide the discussion during the course of the discussions.

2.5 Data analysis

The analysis of data took place in two stages. A rapid analysis of the field notes was done first, and this suggested patterns in the data and helped in developing themes and codes for the second phase of the analysis. In the second phase of the analysis, data collected were transcribed and the transcripts were edited for accuracy. The transcripts were imported to Atlas.ti 7 software for qualitative analysis, and themes were developed in line with the objectives of the study. Transcripts were coded for new categories until the level of saturation was reached (that is, no new ideas emerging from the data). Analysis and presentation include illustrative quotations as well as thematic and network mapping of human trafficking and HIV and other related problems.

2.6 Ethical considerations and implications

All interviews were undertaken with the informed written consent of participants. Confidentiality and anonymity were maintained through the secure storage of data in password-protected computers and

under lock and key, and by using pseudonyms or generic summarisation of the data. Ethical clearance was obtained from the UWC Senate Research Committee.

No interview was conducted with victims of human trafficking in the course of this baseline study. Research on illegal activities and illegal migrants, including victims of human trafficking and particularly children, raises a number of potential ethical risks for all participants, for instance, illegal migrants' fear of being exposed to and arrested by security agents. For this reason, a baseline situation analysis of publicly-available documentation and interviews with publicly-accessible key informants is essential prior to further research to familiarise the researcher with the field and to have insights into possible dangers and strategies to minimise them. This study itself is unlikely to cause any embarrassment or discomfort to study participants. It will benefit study participants as they will learn about other perspectives and efforts in this difficult field. However, the primary intended beneficiaries are victims, including children who are suffering from the impact of human trafficking.

The study has begun to describe the scale and nature of the problem. Some suggestions on ways to address the problem more effectively have been made. It has also provided the foundation on which a larger empirical study on human trafficking, HIV and various intervention strategies can be developed.

3 Study results

3.1 Human trafficking in South Africa

Prior to the promulgation of trafficking law in South Africa, the existence of human trafficking in the country was affirmed by most stakeholders, despite continuous denials by some government agencies, especially parliament. Respondents reported that there was not enough advocacy or campaigns to address the problem. Some stakeholders believed that human trafficking was a serious problem in South Africa, while others continued to query its magnitude due to a lack of data. This, in turn, negatively influenced government's political will to combat the problem. The quotations from key informants below revealed both arguments in favour of and against the existence of human trafficking in South Africa. The quotations supporting the view that human trafficking exists in South Africa include:

> Trafficking is something that happens within the country (South Africa) and from other countries to South Africa too. It is a crime that exists and it is a crime that is very silent. There is not much research that takes place. As a result, people think that it doesn't exist.[12]

12 Interview granted to the authors during field work by an international NGO, Pretoria, South Africa.

> We conducted a study looking at trafficking of children in the Western Cape. What we found is that trafficking of children happens often than we would like to believe or than has been identified because of the complex nature. It happens right under people's noses and they don't recognise trafficked victims.[13]

A parliamentarian, however, questioned the existence of the problem:[14]

> Unfortunately, it is something [human trafficking] that I have no idea about. As much as it is being mentioned that there is human trafficking, I do not know if this is really a problem in South Africa.

Although events may have overtaken these arguments for or against human trafficking, it helps to understand the political environment leading to a prolonged delay in promulgating the enabling law against the crime.

3.2 Human trafficking syndicates across and within the borders of South Africa

The respondents' reports help to build a more comprehensive picture of the many role players involved in human trafficking in South Africa. Its complexity makes the crime difficult to combat. The role players include recruiters who often disguise themselves as labour brokers; transporters who may knowingly or unknowingly be involved; and brothel owners, night club owners, massage parlours and other business owners. It may also include medical doctors who help the traffickers to provide basic health care services for the victims, some individual households and other end users of trafficked victims' services. The syndicates reported to be operating within the country include the Russian Mafia, the Chinese Mafia, South African syndicates, Zimbabwean syndicates, Nigerian syndicates and Czech Republic syndicates. There are also pimps who own their girls and have territories where they operate.

At the border between Zimbabwe and South Africa, there are trafficking syndicates called *Ngumaguma* or *Malaisha* (traffickers), who pretend to assist people to cross into South Africa illegally but who in the end exploit them. Human trafficking syndicates have many tactics and are dynamic in their operations. Below are some specific quotations from key informants:

> When the Ngumagumas first meet their would-be victims, they will tell them that there is plenty jobs and plenty money in South Africa. They will then ask their victims to pay high prices before they are assisted to cross over because of the presence of the soldiers and the police. The would-be victims are then told to stay in a place while the Ngumagumas do the survey around to know where the soldiers and the police are hiding. When

13 Interview granted to the authors during field work by a local NGO, Cape Town, South Africa.

14 Interview granted to the authors during field work by a leading member of the South African Parliament.

> it is dark, the Ngumaguma comes back and put their victims in a car, van or taxis and that is when the trafficking starts. They are unable to see the road or know where they are travelling to because it is dark until the traffickers stop at a destination where the slavery starts.[15]

The traffickers use misrepresentations with regards to job offers. They use fictitious web pages for job offers. They also use Facebook and electronic media to disguise the enterprise or whatever the job might be. Once recruited, they will tell you that you are coming to work at room 504 for example as housekeeper only to find out when you get to room 504 that you will be working as sex worker generally. This was one of the ways they systematically recruit their victims.[16]

Some key informants narrated their personal encounters or real life stories with traffickers operating at the border and within South Africa, two of which are presented below:

> **Case 1: Interview with Home Affairs Department officer, Cape Town**
>
> **Interviewer:** Can you please narrate any 2 specific encounters that you have had with traffickers?
>
> **Respondent:** Yah, there were 3 personal encounters I have had with the traffickers because what happens is that by the time the case got to us as investigators we needed to check the status determination, repatriation for the victims and all those types of things. We don't really deal with frontline interventions. Frontline intervention is done by our counterparts from South African Police Service. There is occasion when I dealt with the traffickers or possible traffickers from a night club where 2 foreign nationals from Yugoslavia were taken to the high court for the interdict inhibiting them from leaving South Africa. The motivation for the high court was that they need to pay the debt to the particular institution. At the moment I cannot divulge the identity of these people. Just to give you a brief rundown of what happens, they got recruited in Yugoslavia. The employer offered to pay them their flights from Yugoslavia to South Africa and promised to pay upfront for their accommodation. Once they start earning from their employer, they start paying back the flight ticket and they have to pay the portion for rent and accommodation. That means they owe their prospective employers and when they wanted to go back the employer is claiming the money they owed him and refused them (victims) boarding to the flight. So that happens in the case of the 2 ladies.
>
> **Interviewer:** I'm sure the court was not aware of the type of bondage they were in.
>
> **Respondent:** Yah, this is why at the moment now migration act has been amended because of certain experiences within our justice system. Like I said there is exploitation of the legal system and if you have the understanding of civil litigation you will know how it could be exploited.

15 Interview granted to the authors during field work by a local NGO in Musina, South Africa.

16 Interview granted to the authors during field work by an officer in the Department of Home Affairs, Cape Town, South Africa.

Case 2: Interview with international NGO in South Africa

There is this issue that they call pay forward. Pay forward means that you pick up somebody without money and you communicate with the relative at your destination that I have this lady or this gentleman he says he knows you and doesn't have money. Do you agree that we transport him/her and deliver him/her at your house? Our normal fare is R150 from Musina to Pretoria. This is the pay forward and the person may be documented or undocumented.

This communication for some it's genuine where the prices will not change and on delivery you will go. On the other hand, some see more profit in having to do the deal by raising the price before getting to the destination. That communication keeps the victims thinking that they are safe since they have been communicating with my brother or cousin. Sometimes he (the trafficker) is not even communicating with anyone he is just calling an anonymous person but the victim will assume he is calling his/her relative. He doesn't give you a chance to talk to that person. He doesn't give you a chance to say hello I'm fine I have eaten he ask you to give him the number and he makes a phone call. After they have dropped everyone at the destination, they disappear with the victim.

At one point when I took a taxi from Musina here, I was meant to drop off in Pretoria, it took another route, a different route; they dropped me in Hillbrow somewhere in Johannesburg. When we got there, there was this huge man who came out from a house to the taxi and started screening the passengers before you can be allowed to go. He said you are not bringing your bags out until you have paid us our money. Did you pay? Yes I have paid. Are you documented? Yes I'm documented. He will check with the driver and if the driver says yes then you are released. You can't stop to see what is happening to others; you can't do anything you just have to go. Anybody who had not paid who was going to pay forward was taken to a building. I was sitting somewhere at the back with a lady carrying her child, they told her to leave her child, the bags and everything and look for her husband to come and pay her transport fare. She said but you spoke to my husband and he said he was going to pay, why can't you phone him and say we are here. They said we can't talk to your husband because we didn't give your husband a ride. I left the scene and quickly called my workmate in Johannesburg. I took the number plate of the taxi and reported to the Police but did not get a feedback. We couldn't do any follow up, because we live in Musina but the incident occurred in Johannesburg. It was hectic and these are the cases that fall within the gaps.

3.3 How, specifically, does human trafficking violate human rights?

All the key informants in this study believed that human trafficking has many human rights consequences well beyond the obvious offence of people being forced to move against their will. The victims are denied free movement, are used and are exploited. The participants noted that trafficked people, especially children, are denied access to schooling and their normal development processes are distorted. They are also removed from social support networks. They have no control over their lives and their labour. Respondents noted that, generally, many trafficked victims are ill-treated and subjected to inhuman conditions by their captors. The quotations below reflect the human

rights consequences of human trafficking from the perspectives of the stakeholders.

> Their human rights are violated because they are kept and most of them, especially females, are used for sexual exploitation or are exposed to sexual abuse, which make them vulnerable to STIs including HIV.[17]

> Most children who are trafficked have not completed their schooling for example and it removes them from opportunities to complete their education.[18]

3.4 Which specific human rights of the victims were violated in South Africa prior to the promulgation of the Prevention and Combating Trafficking in Persons Act?

Before the promulgation of the new law against human trafficking, the South African Constitution enshrined the rights of all people in South Africa.[19]

Also, the South African Children's Act[20] prohibits the use, procurement or offer of a child for slavery or practices similar to slavery, including debt bondage, servitude and serfdom, forced or compulsory labour or the provision of services, and for purposes of commercial sexual exploitation or trafficking. Sections 15, 16 and 17 of the Criminal Law (Sexual Offences and Related Matters) Act[21] criminalise the sexual exploitation of children in South Africa, while sessions 70 and 71 specifically criminalise human trafficking of both adults and children for sexual exploitation and provide for certain services, including access to health facilities and free HIV/AIDS services to victims of sexual exploitation. Efforts therefore were made to ask key informants about specific violations of human rights of the victims in South Africa. Based on the responses from the key informants, the rights of the victims violated can be categorised into three types. These include the denial of justice for many rescued victims, the perpetration of various crimes against victims and their use to perpetrate crime, and the negative consequences of human trafficking on the victims' health and their lack of access to health facilities.

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17 Interview granted to the authors during field work by a local NGO in Johannesburg, South Africa.

18 Interview granted to the authors during field work by a local NGO in Cape Town, South Africa.

19 The Bill of Rights in the Constitution of the Republic of South Africa, 1996 http://www.gov.za/documents/constitution/1996/a108-96.pdf (accessed 21 November 2013).

20 Sec 141 of the South African Children's Amendment Act 41 of 2007 http://www.polity.org.za/.../children039s-amendment-act-no-41-of-2007-2008 (accessed 21 November 2013).

21 Secs 15, 16, 17, 70 & 71 of the Criminal Law (Sexual Offences and Related Matters) http://www.justice.gov.za/legislation/acts/2007-032.pdf (accessed 21 November 2013).

The majority of the key informants considered the lack of human trafficking legislation as contributing to human rights violations. A key informant expressed as follows:[22]

> There were two pieces of legislation that speak to human trafficking. One is the Children Act which defines what it is but does not define the penalty. Then we have Sexual Offences Act which speaks to trafficking for sexual purposes only. If the victim of human trafficking is found and those two cannot be used, we encounter difficulties. For example, when someone is found guilty for labour trafficking, the most they will get is a fine from the Department of labour. Since they have the option of fine, they will say okay I will pay fine. The place will close down but they will open up somewhere else and continue with their business.

Most rescued victims in South Africa, therefore, either have no access to justice or were denied justice due to the difficulties involved in the prosecution of perpetrators. The quotations below show some cases of denial of rights to justice.

> Some cases have been in the court for the past 6 years without any meaningful progress. Some of the people that are testifying are married and are no longer interested because their husbands don't know that they were trafficked while some have died.[23]

> There are only 2 reported cases that have been prosecuted successfully in South Africa, one in Pretoria and one in Mitchell's plain, Cape Town.[24]

It was also evident in this study that human trafficking either occurs together with, or was associated with, other forms of crime in South Africa. In such crimes, the victims were either used for the crime or the crime perpetrated against them. The key informants noted that trafficked victims were used for drug trafficking, arms smuggling, and gang robbery. They were also victims of gender-based violence, especially sexual abuse, child prostitution, child abuse and xenophobic attacks. The key informants noted that many of the women and children used for sexual exploitation were forced to use drugs and this has led to drug addiction in many rescued victims. They were also exploited as they work long hours for little pay as cheap labour with poor working conditions. The quotations from some key informants show other crimes related to human trafficking in which trafficked victims were either the perpetrators or victims of crime, as reported by the respondents.

> The same people are the ones involved in rhino trafficking and drug trafficking.[25]

22 Interview granted to the authors during field work by a local NGO, Cape Town, South Africa.

23 Interview granted to the authors during field work by the Department of Social Development, Gauteng, South Africa.

24 Interview granted to the authors during field work by an officer of Department of Home Affairs, Cape Town, South Africa.

25 Interview granted to the authors during field work by the Department of Social Development, Gauteng, South Africa.

> Some human trafficking victims are also used as gangsters, armed robbers and in other crimes. They are usually put in certain spot so that when people comes they steal and rob them, working for that particular boss.[26]

> It's one of the biggest criminal activities that you find in syndicates. They sell drugs, arms and ammunition, buying and selling of human beings.[27]

Finally, the majority of the key informants reported that most trafficked victims suffer from a range of health problems, including physical injuries, depression, emotional shock and post-traumatic stress disorder leading to psychiatric problems. Some rescued victims have been found to be HIV positive. These health problems are combined with the difficulty of accessing health facilities by irregular migrants, including trafficked victims, despite government policy to provide health care to all foreigners irrespective of their migrant statuses. One informant reported:[28]

> We know that there were many migrants who could not access public health facilities because they don't have papers especially when the deportation of irregular migrants from Zimbabwe started again.

Furthermore, key informants noted that a lack of legislation on human trafficking was responsible for a lack of resources specifically allocated to the combating of the crime in South Africa, since it was difficult to have budgetary allocation to activities that were yet to be recognised by law. This had further negative effects on the care received by any rescued victims as there was no dedicated shelter for them. The victims were therefore often placed in the same shelter with children in conflict with the law, abused children and juvenile delinquent children, conditions which often do not meet the needs of the victims. All these problems involve the violation of the human rights of the majority of the rescued victims of human trafficking in South Africa. They call for special attention in the implementation of the new law against human trafficking in the country.

4 Discussion

This article examined the human rights of rescued victims of human trafficking violated in South Africa prior to the promulgation of human trafficking law from the perspectives of stakeholders working in the field.

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26 Interview granted to the authors during field work by a local NGO, Musina, South Africa.

27 Interview granted to the authors during field work by an international NGO, Cape Town, South Africa.

28 Interview granted to the authors during field work by an international NGO, Johannesburg, South Africa.

The study affirmed the existence of human trafficking in South Africa, despite a lack of sufficient data,[29] as concluded by earlier studies.[30]

As a state party to most UN conventions on human trafficking, including the Palermo Protocols, 2000, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC), South Africa is obliged to prevent, protect and prosecute human trafficking in all its ramifications. This study revealed that trafficked victims' rights were violated in two ways in South Africa prior to the promulgation of enabling law against human trafficking. While their rights are violated by the human trafficking syndicates by abusing them in various ways, the rights of rescued victims were further violated due to a lack of legislation on human trafficking. The basic minimum protection and care required by the UN conventions (Palermo Protocols) were not available: Justice was either delayed or even denied as they lack access to basic facilities, including health services. This reaffirms the findings of earlier authors that global political determinants of health have negative effects and are unfair to some groups of people, including the irregular migrants, and that there is a need for stronger cross-sectoral global action for health.[31]

It is important to note that the newly-promulgated Prevention and Combating of Trafficking in Persons Act has many benefits to offer to the victims as well as the country while it has the potential to reduce the incidence of human trafficking and improve the rights enjoyed by rescued victims. The three main focuses of the UN Convention on human trafficking include the protection of rescued victims as well as the prevention and prosecution of the crime, and many aspects of these have been addressed by the Act. Sections 6 to 9(3) of the Act address the issue of prevention of human trafficking by prohibiting any act that directly or indirectly facilitates or promotes the crime. These include the confiscation or destruction of travelling documents of victim(s) with the intention of exploitation; the use of services of human trafficking victim(s); the transportation of victim(s); and the provision of facilities to illegally-held victim(s) in bondage, among

29 International Organisation for Migration 'Breaking the cycle of vulnerability. Responding to the health needs of trafficked women in East and Southern Africa' IOM, Pretoria, South Africa (2006) http://iom.org.za (accessed 21 November 2013).

30 A Adepoju 'Review of research and data on human trafficking in sub-Saharan Africa' (2005) 43 *International Migration* 75-98; International Organisation for Migration (n 29 above); SS Kreston 'Trafficking in children in South Africa. An analysis of the pending legislation' (2007) 8 *Child Abuse Research in South Africa* 35-50; HB Kruger 'Combating human trafficking: A South African legal perspective' unpublished LLD thesis, University of the Free State, 2010; V Lalu 'Considering decriminalisation of sex work as a health issue in South Africa' (2005) 8 *The Experience of SWEAT. Research for Sex Work* 11-13.

31 OP Ottersen *et al* 'The political origins of health inequity: Prospects for change' (2014) 383 *The Lancet* 630-667 http://dx.doi.org/10.1016/S0140-6736(13) 62407-1 (accessed 11 February 2014).

others. Section 37 provides for international co-operation, while section 41(d) provides for an enlightenment programme for potential victims of human trafficking, as part of the efforts to prevent the crime.

Sections 9(4) to14 of the Act provide for the appropriate prosecution of the crime by stipulating appropriate penalties, including a fine or imprisonment for varying periods depending on the level of involvement of the offenders

Sections 15 to 23 provide for the protection of the victims by prohibiting unauthorised access and criminal prosecution of victims, the granting of access to health services and other basic needs, while sections 24 to 28 provide the conditions and minimum standard for the accreditation of organisations that can provide various support services to the victims of human trafficking. Sections 29 to 30 further recommend appropriate compensation for the victims and the state, while sections 31 to 36 stipulate a humane procedure for the repatriation of internationally-trafficked victims, the safe return of internally-trafficked victims and their protection upon return to the family. The Act finally provides for procedures for monitoring progress and ensuring compliance,[32] thereby having comprehensive provisions to address the problem of human trafficking as envisioned by the Palermo Protocols.

Despite this laudable and giant step already taken in the right direction in promulgating the law, the government needs further proactive measures, especially on the prevention of human trafficking. This calls for urgent attention and careful planning of the South African government to further enhance the recently-promulgated Prevention and Combating of Trafficking in Persons Act. At present, the Act does not provide for a support programme to ensure the proper reintegration of the victims, especially the internally-trafficked after being returned to their families. This is necessary as there may not have been any changes in the conditions that pushed them out of their homes and returning to such conditions without appropriate support may predispose them to re-trafficking. Although the Act provides for the education of the public in languages they will understand[33] and the training of relevant stakeholders who deal with trafficked victims,[34] there is also a need to strategically target the potential victims and returned victims in the case of internally-trafficked persons for economic empowerment. This has the potential to reduce vulnerability and proper reintegration, thereby enhancing the effectiveness of the newly-promulgated law.

There is also the need to incorporate associations of various transporters into South African Anti-Trafficking Task Team for proper

32 Secs 41-44 South African Prevention and Combating of Trafficking in Persons Act 2013.

33 Sec 41(d).

34 Sec 44(10).

monitoring and checkmating the activities of transporters (land, air and sea). This could encourage measures to control the activities of their members who may intentionally or unintentionally wish to transport trafficked victims. Members of the association may also have better knowledge about the illegal routes of traffickers and may facilitate prompt reports of suspected victims and transporters (members and non-members of their associations) engaging in transporting victims.

5 Conclusion

Despite the recent giant step in the right direction in promulgating human trafficking legislation in South Africa, there is a need for further efforts by the South African government to take additional proactive and practical measures for optimum effectiveness of the law. Without these, the prevention of the human trafficking crime and the protection of the rights of victims – and even rescued victims – as envisioned in the new law will remain a hard dream to achieve in the country.

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Providing reparations in Uganda: Substantive recommendations for implementing reparations in the aftermath of the conflicts that occurred over the last few decades

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Summary

Dealing with past human rights violations has become a common feature of societies that emerge from an atrocious past characterised by massive contraventions of human rights. Establishing a comprehensive version of the past is progressively being seen as vital, including dealing with issues of justice, truth, reconciliation, reparations and guarantees of non-repetition. The article examines the issue of reparations in the context of Uganda. It considers the right to reparations in international law. Through an analysis of international law, it is argued that the responsibility for the provision of reparations rests on the state of Uganda, even if the state was not directly responsible for the atrocities committed, although other actors may, and possibly should, assist in the provision of reparations, including the United Kingdom as the former colonial power. The article examines what reparations are, the types of reparations that can be provided, and the types of reparations that ought to be provided to the many victims in Uganda. The article examines the component parts of reparations and makes recommendations on the types of reparations that ought to be given to victims and the manner in which such a programme ought to be delivered. The violations that occurred in Uganda over a long period are examined briefly to provide a context to the discussion on the issues relating to reparations. The article studies urgent or interim reparations, collective and individual, symbolic and material types of reparations as well as the various types of reparations that could be provided in Uganda,

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looking at other countries to see what has been done elsewhere. The article recommends that urgent or interim reparations are paid in the short term, a truth-seeking mechanism provides recommendations on reparations in the medium term, and a full and comprehensive reparations process, instituted with a diverse and wide set of parameters, is established in the medium to long term. A variety of other recommendations are made throughout the article.

Key words: *Dealing with the past; reparations; transitional justice; human rights violations; Uganda; comparative approaches*

1 Introduction

Dealing with past human rights violations has become a common feature of societies that emerge from an atrocious past characterised by massive contraventions of human rights.[1] As Nelson Mandela noted:[2]

> As ... countries recover from the trauma and wounds of the past, they have had to devise mechanisms not only for handling past human rights violations, but also to ensure that the dignity of victims, survivors and relatives is restored.

Establishing a comprehensive version of the past is progressively being seen as vital.[3] The issues that are usually faced include whether to adopt or annul an amnesty law,[4] whether to have criminal trials[5] (and if so, who is to be prosecuted and how many people ought to be held accountable),[6] and whether or not to have a truth commission or some similar process.[7] Making those responsible for perpetrating crimes and to be accountable for their actions is critical to engender respect for a democracy, human rights and the rule of law.[8] Enhancing respect for human rights and developing a human rights

1 NJ Kritz 'The dilemmas of transitional justice' in NJ Kritz (ed) *Transitional justice* (1995) xix-xxx.

2 N Mandela 'Foreword' in Kritz (n 1 above) xi.

3 J Sarkin 'Integrating transitional justice and demobilisation, disarmament and reintegration: The need to achieve rehabilitation, reintegration and reconciliation for child soldiers and child victims of enforced disappearances' in I Derluyn *et al* (eds) *Remember: Rehabilitation and reintegration of war-affected children* (2012) 77-104; LJ Laplante 'Transitional justice and peace building: Diagnosing and addressing the socio-economic roots of violence through a human rights framework' (2006) 2 *International Journal of Transitional Justice* 331-355.

4 This continues to be an important issue for Uganda. See 'To pardon or to punish? Current perceptions and opinions on Ugandan's amnesty in Acholi land' (2011) *Justice and Reconciliation Project*.

5 J Sarkin *Carrots and sticks: The TRC and the South African amnesty process* (2004).

6 L Mallinder 'Can amnesties and international justice be reconciled?' (2007) 1 *International Journal of Transitional Justice* 208-230.

7 M Mutua 'Beyond Juba: Does Uganda need a national truth and reconciliation process?' (2007) 13 *East African Journal of Peace and Human Rights* 142.

8 L Huyse 'Justice after transition: On the choices successor elites make in dealing with the past' in Kritz (n 1 above) 104-115 337-349.

culture are critical to prevent future violations. Promoting justice and accountability is helpful to deter similar acts in the future. It should assist in promoting peace and human rights.[9]

Reparations as a means to provide various types of redress for past violations[10] are crucial[11] as they go[12]

> to the very heart of human protection – it has been recognized as a vital process in the acknowledgment of the wrong to the victim, and a key component in addressing the complex needs of victims in the aftermath of violations of international human rights and humanitarian law.

In a report by the United Nations Secretary-General to the Security Council in 2004 entitled 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General', it was noted:[13]

> States have the obligation to act not only against perpetrators, but also on behalf of victims – including through the provision of reparations. Programmes to provide reparations to victims for harm suffered can be effective and expeditious complements to the contributions of tribunals and truth commissions by providing concrete remedies, promoting reconciliation and restoring victims' confidence in the state.

As has been noted by Zalaquett:

> To provide for measures of reparation and prevention, it must be clearly known what should be repaired and prevented. Further, society cannot simply block out a chapter of its history; it cannot deny the facts of its past, however differently these may be interpreted. Inevitably the void would be filled with lies or with conflicting, confusing versions of the past. A nation's unity depends on a shared identity, which in turn depends largely on a shared memory. The truth also brings a measure of healthy social catharsis and helps to prevent the past from reoccurring.

Processes to assure victims that their needs are important, such as exposing as much truth as possible, holding perpetrators accountable for their actions, and ensuring that on-going violations cease, can also have a reparative effect.[14] Thus, steps to prevent non-recurrence should accompany reparations, as this tenders encouragement to victims that reparation is not a hollow promise or a temporary

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9 M Mekenkamp *et al* (eds) *Searching for peace in Africa: An overview of conflict prevention and management activities* (1999).

10 A more extensive discussion on what reparations are and the types of reparations that can be provided occurs later in the article.

11 J Sarkin 'Colonial genocide and reparations claims in the 21st century: The socio-legal context of claims under international law by the Herero against Germany for genocide in Namibia, 1904-1908' (2009) *Praeger Security International.*

12 Draft Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (2002).

13 UN Security Council 'The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General' UN Document S/2004/616, New York, 23 August 2004, paras 54-55.

14 J Sarkin & E Daly *Reconciliation in transitional societies: Finding common ground* (2007).

stopgap.[15] Reparations, however, cannot be a substitute for justice and prosecution. They need to be part of any transitional justice strategy together with strategies to obtain truth, justice and reconciliation.[16]

2 Overview

Uganda has suffered massive human rights violations over the last few decades. As will be examined later, many thousands of people have been killed, tens of thousands of people have been injured and suffered a variety of abuses, and many thousands have lost land and other property at the hands of a variety of rebel groups, including the Lord's Resistance Army, but also at the hands of government security forces. Presently, the government of Uganda is examining what to do about the past and specifically what to do about reparations. A government inter-ministerial working group dealing with transitional justice matters has been established to determine how these issues ought to be dealt with. It is important to acknowledge that the previous conflict-affected areas in Uganda are currently experiencing relative peace. This means that a reparation process can and should begin relatively easily and quickly.

This article, therefore, examines the issue of reparations in the context of Uganda. It examines the right to reparations in international law. It examines what reparations are, the types of reparations that can be provided and the types of reparations that ought to be provided to the many victims in Uganda. The article examines the component parts of reparations and makes recommendations on the types of reparations that ought to be given to victims and the manner in which such a programme ought to be delivered. It is argued through an analysis of international law that the responsibility for the provision of reparations rests on the state of Uganda, even if the state was not directly responsible for the atrocities committed, although other actors may, and possibly should, assist in the provision of reparations, including the United Kingdom as the former colonial power. The violations that occurred in Uganda over a long period are examined briefly to provide a context to the discussion on the issues relating to reparations.

Reparation is but one of five pillars of transitional justice, the others being truth, justice, reconciliation, and guarantees of non-repetition.[17] A comprehensive and workable process has component

15 See further R Mani 'Reparation as a component of transitional justice' in K de Feyter *et al* (eds) *Out of the ashes – Reparation for victims of gross and systematic human rights violations* (2006) 67.

16 J Sarkin 'Achieving reconciliation in divided societies: Comparing the approaches in Timor-Leste, South Africa and Rwanda' (2008) 3 *Yale Journal of International Affairs* 11-28.

17 Sarkin (n 11 above) 184.

parts of each. They are mutually supporting and, in fact, at times overlap. While Uganda has had such processes before, including two truth commissions – the Oder Commission established in 1974 and the Odoki Commission created in 1986 – they were not successful for various reasons, including that they were not open, transparent, credible, accepted or able to play the role that such bodies ought to.[18]

Establishing a reparations programme in Uganda will be a difficult and complex process. It will be fraught with the politics of the present and the politics of dealing with the past. There will be major questions that need to be addressed, such as how much resources the state will be willing to allocate. Will this programme be done at the expense of the development processes that government presently is carrying out? Who will be covered in such a process? Will it benefit the whole country? Which types of victims will be covered; will it also cover victims of government abuses? Will it be done on the basis of application wherein the applicant must prove when and by whom the loss occurred? Will the definition of victim include former combatants, including child soldiers who are accused of participating in the commission of atrocities? If yes, how will the impact of the proposed reparations vary from that of the amnesty packages which were misconceived by some victims as rewards to perpetrators for the crimes committed?[19]

Regardless, in Uganda reparations ought to be given in stages, with interim or emergency relief being given to those in dire need more quickly. Interim or emergency reparations ought to be paid to those in urgent need as soon as possible as those with medical and other immediate needs should not have to wait for years while all the other processes occur and a definitive reparations process is worked out. Longer term and full reparations can then be given after a truth process which makes full and comprehensive recommendations on a reparations process and its methodology.

This article addresses some of these issues and considers the types of reparations that should be paid. It therefore studies urgent or interim reparations, collective and individual, symbolic and material types of reparations, as well as the various types of reparations that could be provided, looking at other countries to see what has been done elsewhere. Recommendations are made throughout the article.

18 See JR Quinn 'Dealing with a legacy of mass atrocity: Truth commissions in Uganda and Chile' (2001) 23 *Netherlands Quarterly on Human Rights* 383.

19 See C Blattman & J Annan 'Child combatants in northern Uganda: Reintegration myths and realities' in R Muggah (ed) *Security and post-conflict reconstruction: Dealing with fighters in the aftermath of war* (2008) 11-12.

3 Human rights violations in Uganda

Uganda has a long history of human rights violations.[20] During the colonial period many violations were committed. That period saw the beginnings of the rifts between the northern and southern parts of the country. Divisions between the north and the south have been a critical aspect of the conflicts that have occurred over the last few decades.[21] Thus, it needs to be recognised that the legacy of the colonial period is a factor in the violations that have been committed, including those in the more recent past. While reparations should take into account the colonial period, it may be difficult to compensate for violations that occurred before independence. Nevertheless, understanding the effect of colonialism and dealing with its consequences are necessary to avoid future conflict. The issues related to non-recurrence as a part of reparations will be examined later.

Uganda's post-independence period has seen massive human rights abuses.[22] Tens of thousands were killed in the 1960s and 1970s. While there have been a number of rebel groups that have caused human rights violations, it is the hostilities between the government of Uganda and the Lord's Resistance Army (LRA), which began in the 1980s, and that have continued to occur for three decades, which has seen the most casualties. UN Under-Secretary-General for Humanitarian Affairs, Jan Egeland, in 2003 pronounced the conflict in Uganda as 'the biggest forgotten, neglected humanitarian emergency in the world'.[23] As a result of the conflicts, possibly two million people were displaced.[24] Many tens of thousands of civilians were killed and abducted.[25] The insurgency caused massive destruction with large numbers of civilians suffering a variety of violations. In just the period between 2008 and 2011, when the conflict was waning, about 2 500 people were killed by the LRA. In the same period, about 3 500 individuals were abducted by the LRA in the Central African Republic

20 B Afako *Northern Uganda: Justice in conflict* (2000).

21 M Mamdani *Imperialism and fascism in Uganda* (1983).

22 EK Baines 'The haunting of Alice: Local approaches to justice and reconciliation in Northern Uganda' (2007) 1 *International Journal of Transitional Justice* 91-114.

23 Agence-France Presse 'War in Northern Uganda world's worst forgotten crisis: UN' 11 November 2003 http://reliefweb.int/report/uganda/war-northern-uganda-worlds-worst-forgotten-crisis-un (accessed 18 April 2008).

24 UN Department of Public Information 'United Nations to step up support for Uganda's 2 million displaced people' 21 November 2005 http://www.un.org/News/Press/docs/2005/afr1290.doc.htm (accessed 18 April 2008). See also M Boas & A Hatloy 'Poor, terrorised and internally displaced: The humanitarian situation in Northern Uganda' (2006) 36 *Humanitarian Exchange* 21-22.

25 Human Rights Watch 'Uprooted and forgotten: Impunity and human rights abuses in Northern Uganda' (2005) 17 *Human Rights Watch* 1-75.

(CAR), in the Democratic Republic of the Congo (DRC), and in South Sudan, including 1 500 children.[26]

By 2007, research conducted indicated that between 24 000 and 38 000 children[27] and between 28 000 and 37 000 adults were abducted in Uganda.[28] Thus, the total of abductions that have occurred over the whole period is thought to be between 30 000 and 40 000 people. The number of internally-displaced persons (IDPs) caused by the fighting is believed to be about 1,7 million in Uganda alone in the period 1986 to 2007. Other countries also suffered as a result of the conflicts. Thus, there have been about half a million refugee IDPs in the DRC, CAR, and South Sudan.[29] This has had critical negative consequences on the lives of the people concerned.[30] As these are Ugandans, they need to be allowed to return if they have not done so already. However, finding ways of assisting people affected in these countries who are not Ugandans would also be helpful. It is, however, unlikely that Uganda will take responsibility for such people. The United Nations Refugee Agency (UNHCR) and others can play a role on this regard. Critically, violence against women (including girls)[31] has occurred on a massive scale in

26 'Torture tops 2012 human rights violations as complaints of human rights violations reduce' African Centre for Treatment and Rehabilitation of Torture Victims, http://www.actvuganda.org/index.php?q=story/torture-tops-2012-human-rights-violations-complaints-human-rights-violations-reduce (accessed 30 September 2014).

27 See further J Annan *et al* 'The state of youth and youth protection in Northern Uganda. Findings from the survey for war-affected youth' (2006) Report for UNICEF Uganda.

28 P Pham *et al* 'Abducted: the Lord's Resistance Army and forced conscription in Northern Uganda' (2007) Berkeley-Tulane Initiative on Vulnerable Populations.

29 See 14 December 2010, Oxfam, 'Ghosts of Christmas past: Protecting civilians from the LRA'; December 2009, HIU State Department, 'Conflict without borders: Lord's Resistance Army reported attacks (December 2008-November 2009), Displacement and peacekeepers'; June 2010, Ledio Cakaj, 'On the heels of Joseph Kony: The untold tragedy unfolding in the Central African Republic'; 25 November 2010, OCHA CAR 'Records of LRA attacks in CAR in 2010'; December 2010, Action Humanitaire en Province Orientale, 'Rapport mensuel et bilan annuel partiel 2010'; 16 October 2007, Institute for War and Peace Reporting (IWPR) 'Can traditional rituals bring justice to Northern Uganda'; 11 August 2010, Human Rights Watch 'CAR/DR Congo: LRA conducts massive abduction campaign: New regional strategy needed to protect civilians and rescue children'; 25 November 2010, OCHA CAR 'Records of LRA attacks in CAR in 2010'; 2007 SWAY Report 'The state of youth and youth protection in Northern Uganda'; February 2004, UNOCHA 'Child soldiers at centre of mounting humanitarian crisis'; 25 January 2012, OCHA 'LRA regional update: Central African Republic, DR Dongo and South Sudan: January-December 2011'; 14 October 2011, US Department of State 'Fact Sheet: US support to regional efforts to counter the Lord's Resistance Army'; 10 March 2011, UNOCHA 'DRC: ERC Amos calls for better security in LRA-affected areas' http://theresolve.org/key-statistics (accessed 30 September 2014).

30 T Allen & M Schomerus 'A hard homecoming: Lessons learned from the reception centre process on effective interventions for former "abductees" in Northern Uganda' (2006) *Management Systems International, Washington DC.*

31 See J Annan *et al The state of female youth in Northern Uganda: Findings from the survey of war affected youth: Survey for war affected youth* (2008).

Uganda.[32] Tens of thousands of women and girls were raped and had to endure other forms of sexual violence.[33] Those women and girls who have been so violated need to be assisted by providing counselling, support, medical treatment and other forms of reparations that are discussed below.

While the number of violations has decreased over the last three or four years, it was still estimated that there were 278 attacks in 2011.[34] However, the overwhelming majority of victims have not attained their right to reparation, as will be discussed below. Consultations with people in Northern Uganda have continuously revealed that reparations are seen by victims as a meaningful form of justice,[35] one that holds those responsible accountable by requiring them to adopt reparative measures that directly impact on victims' lives.

It is also important to understand the socio-economic[36] effects of the war.[37] Living conditions generally, and in the IDP camps in particular, have been harsh.[38] Access to food, water, shelter and sanitation has not been possible for countless people as a result of the war. Families and communities have been broken up. Land occupation and possession have been affected dramatically as a result of people fleeing the war.[39] These issues must be taken up in a reparations programme, but also in government development programmes. Reparations must allow people to return to their lives as before. Thus, such issues need to be taken up by the state, in addition to the injuries that people have suffered. Without dealing with such issues, there will be continued discontent which may lead again to conflict at some point in the future. In fact, unequal service delivery has been a cause of previous uprisings in the country. Thus, these matters should be issues that government, and particularly the specific government ministries, should watch carefully and deal with as much as possible, taking into account a scarcity of resources. However,

32 AM de Brouwer 'Reparation to victims of sexual violence: Possibilities at the International Criminal Court and at the trust fund for victims and their families' (2007) 20 *Leiden Journal of International Law* 207-237.

33 P Sooma 'Despair and disdain: A tale of sexual abuse against internally-displaced women in Northern Uganda' (2006) 12 *East African Journal of Peace and Human Rights* 91. See also Human Rights Watch Report (n 22 above).

34 IRIN News 'Security- questions over progress against the LRA' 24 February 2012 http://www.irinnews.org/Report/94941/SECURITY-Questions-over-progress-against-the-LRA (accessed 19 February 2014).

35 Human Rights Watch *Justice for serious crimes before national courts: Uganda's international crimes division* (2012).

36 I Muvingi 'Sitting on powder kegs: Socio-economic rights in transitional societies' (2009) 3 *International Journal of Transitional Justice* 163-182.

37 L Arbour 'Economic and social justice for societies in transition' (2007-2008) 40 *Journal of International Law and Politics* 1-27.

38 See generally on IDPs TJ Harris & S Rimmer 'Reconceiving refugees and IDPs as transitional justice actors' (2010) United Nations High Commissioner for Refugees, Geneva.

39 On Zimbabwe, see A Magaisa 'The land question and transitional justice in Zimbabwe: Law, force, and history's multiple victims' 30 June 2010 Oxford Transitional Justice Working Paper Series.

equality of the provision of such services is necessary, but so is dealing with past marginalisation of some communities, especially in the northern part of the country.

4 Defining reparations

Providing reparations to the victims of massive and systematic human rights violations is usually complex for a variety of reasons.[40] It is very challenging because there are many issues that need to be dealt with. Reparations are also not merely financial but contain a range of other possibilities, as will be discussed below.[41]

Reparation can encompass a variety of issues, including compensation, damages, redress, rehabilitation, restitution and satisfaction.[42] Although these concepts are often used generally and interchangeably to mean reparations in general, each has a different meaning. Each describes different types of remedies that are available to a victim.

The term 'reparation' or 'compensation' is used, although other terms can and have been used. Reparations are in fact a slightly broader-based form of compensation. Whereas restitution and compensation are typically for a particular wrong committed, reparations are typically from a government that takes responsibility for a policy or set of policies or actions. Thus, reparations represent a kind of moral accounting, where the payment represents the *fact* that harm was done, but not the amount of suffering or loss that was endured. For those who believe that the moral injustice needs to be corrected, reparations can assist in a variety of ways, including by ways of symbolic means, as will be discussed below.

Reparation as compensation typically refers to measures that seek to quantify and make up for harms suffered. This includes usually serious harms other than purely economic losses, such as physical, mental[43] and even moral injuries. However, questions on the extent of reparations programmes and to what extent they cover all harm suffered are affected by the extent of harm suffered and whether the state is able and willing to cover all harms.

How reparations are implemented depends on how all relevant issues, including the political, economic and social processes, affect the determination of whether and how to grant reparations. Generally, reparation is a series of actions expressing acknowledgment

40 See further P de Greiff 'Chapter 12 – Justice and reparations' in P de Greiff (ed) *The handbook of reparations* (2006).

41 De Feyter *et al* (n 15 above).

42 M Schotsmans 'Victims' expectations, needs and perspectives after gross and systematic human rights violations' in De Feyter *et al* (n 15 above) 160.

43 LJ Laplante & MR Holguin 'The Peruvian Truth Commission's mental health reparations: Empowering survivors of political violence to impact public health policy' (2006) 9 *Health and Human Rights* 136-163.

and acceptance of the responsibility that falls to the state due to actions that have resulted from gross violations. Reparations as a term is derived from the word 'repair'.[44] It is often seen to be the making of amends by providing recompense to persons who suffered some type of loss or harm. There are different means by which reparations can be given,[45] including though litigation in the courts.[46] Where the claimants are many, reparations systems by states are often the favoured route.[47]

Reparations are critically important for victims because the provision of reparations can have various effects. It provides financial assistance to victims so that they can better deal with the pecuniary dispossession they have had to suffer. Secondly, reparations allow an official acknowledgment of what occurred. It assists to restore the dignity of victims by allowing them to see that the state recognises their suffering and is assisting them. Reparations also should have an effect on levels of impunity. It can also play a dissuasive role by ensuring that perpetrators see that they may be responsible for their actions and thus have a deterrent effect.

Reparations can assist the process of grieving. It can assist in processes of recovery by ensuring that people focus on their grief. It can have this effect as victims are taken up by the processes, which aids in healing.

There are many component parts of reparations. These include individual and collective, symbolic and material. There are also reparations to be granted on a once-off basis or continually.[48] Each of these will be discussed and what they could contain in the Ugandan context.

5 Reparations in international law

Paying reparations for past human rights abuses has been recognised as a principle of international law for many years.[49] The right to reparations has also been recognised for a long time.[50] The Permanent Court of International Justice (PCIJ) in 1928 noted that 'reparation must, as far as possible, wipe out all consequences of the

44 See further S Vandeginste 'Reparation' in D Bloomfield *et al* (eds) *Reconciliation after the violent conflict: A handbook* (2003) 145-162.

45 B Hamber 'Narrowing the micro and macro: A psychological perspective on reparations in societies in transition' in De Greiff (n 40 above) 578.

46 As above.

47 P de Greiff 'Reparation efforts in international perspective: What compensation contributes to the achievement of imperfect justice' in E Doxtader & C Villa-Vicencio (eds) *To repair the irreparable: Reparation and reconstruction in South Africa* (2004) 321.

48 OHCHR *Rule-of-law tools for post-conflict states: Reparations programmes* (2008).

49 M du Plessis & S Pete *Repairing the past? International perspectives on reparations for gross human rights abuses* (2007).

50 D Shelton *Remedies in international human rights law* (2005) 60.

illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[51] In the years after World War II, the practice of providing reparations has evolved dramatically. There is a consciousness that the numerous human rights abuses, including war crimes, crimes against humanity, genocide, disappearances, torture, and other violations of human rights, need to be addressed, and reparation is one way of doing so.[52]

The right to reparations is now contained in a range of human rights treaties.[53] Several of these instruments require state parties to the relevant instrument to afford 'effective remedies' for acts violating human rights, or to provide for the 'right to be compensated' where acts have occurred that violate fundamental rights.[54] Such instruments include the Universal Declaration of Human Rights (Universal Declaration) (article 8); the International Covenant on Civil and Political Rights (ICCPR) (articles 2(3)(a), 9(5) and 14(6));[55] and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Article 14(1) of CAT states:

> Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

Uganda is a state party to several of the key international and human rights and humanitarian law treaties that incorporate victims' rights to remedy and reparations for serious violations. Uganda has ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1980); ICCPR (1995); the International Covenant on Economic, Cultural and Social Rights (ICESCR) (1987); the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1985); CAT (1986); the Convention on the Rights of the Child (CRC) (1990); the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2002); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1995); and the Convention on the Rights of Persons with Disabilities (2008). Uganda signed the International Convention for the Protection of All Persons from

51 PICJ case concerning the factory at Chorzow, 1927 PCIJ (Ser A) No 9

52 I Bottigliero *Redress for victims of crimes under international law* (2004).

53 M du Plessis 'Reparations and international law: How are reparations to be determined (past wrong or current effects), against whom, and what form should they take?' (2003) 22 *Windsor Yearbook of Access to Justice* 41-69.

54 J Edelstein 'Rights, reparation and reconciliation: Some comparative notes' Seminar paper 6 Johannesburg: CSVR, 27 July 1994 2-4.

55 E Klein 'Individual reparation claims under the International Covenant on Civil and Political Rights: The practice of the Human Rights Committee' in A Randelzhofer & C Tomuschat (eds) *State responsibility and the individual: Reparation in instances of grave violations of human rights* (1999) 27.

Enforced Disappearance in 2007. Uganda acceded to the Rome Statute of the International Criminal Court, and domesticated it in 2010.[56] Reparations will also be relevant for Ugandan victims from the International Criminal Court (ICC)[57] if those indicted by the Court stand trial and are found guilty, as reparations are then provided by the ICC Trust Fund.[58] Already the Trust Fund is engaged with certain projects in Uganda.

The right to reparations is also contained in a range of regional human rights instruments and mechanisms. It is found in international humanitarian law and international criminal law, and in various constitutional provisions in a number of countries around the world. However, the most important text dealing with reparations is the 2005 UN Basic Principles and Guidelines on Remedy and Reparations, which now sets the international standard for the provision of reparations around the world.[59] Although these Principles are soft law, they are seen to be the principles that states ought to comply with as far as reparations are concerned. They elucidate the basic standards applicable internationally and domestically for reparations. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law was adopted by the UN General Assembly in 2005.

The Basic Principles and Guidelines establishes state responsibility for the provision of reparation to victims. It provides that states are responsible for human rights violations even if perpetrated by non-state actors. The basis in law for the responsibility of states for human rights violations in any case flows from a breach of a human rights instrument or for violating a norm of customary international law.[60] While states have responsibilities to protect, respect, fulfil and promote human rights, the question of whether a state is obligated to provide reparations for violations committed by others has, at times, been controversial. However, a variety of institutions have found that states are possibly liable for the activities of non-state role players in

56 ICC Act of 2010.

57 A di Giovanni 'The prospect of ICC reparations in the case concerning Northern Uganda: On a collision course with incoherence?' (2006) 25 *Journal of International Law and International Relations* 27.

58 On the role the Court could play in Uganda, see J Sarkin 'Enhancing the legitimacy, status and role of the International Criminal Court by using transitional justice or restorative justice strategies' (2011-12) *Interdisciplinary Journal of Human Rights Law* 83-102. The first decision by the ICC awarding reparations to victims was the *Lubanga* decision in 2012, *Prosecutor v Thomas Lubanga Dyilo*, judgment pursuant to art 74 of the Statute, ICC-01/04-01/06, TCh I, 14 March 2012.

59 Adopted by the UN General Assembly in December 2005, published on 21 March 2006, A/RES/60/147.

60 Shelton (n 50 above); C Rose 'An emerging norm: The duty of states to provide reparations for human rights violations by non-state actors' (2010) 33 *Hastings International and Comparative Law Review* 307.

various circumstances, even if the state had no role in the violation.[61] Nonetheless, as a state has a duty to prevent others from committing violations, in other words a duty to protect, it is responsible where it does not do so even if it cannot. Thus, the African Commission on Human and Peoples' Rights (African Commission) has held in circumstances applicable to the situation that occurred in Uganda:[62]

> Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter.

Thus, state responsibility is the obligation of a state to make reparation when it has not complied with a requirement placed on it by international law. Thus, the International Law Commission has noted that states discharge their responsibilities for a breach of an international obligation by making good the harm by providing reparation for the injury caused.[63] Various other institutions, including the UN's Human Rights Committee and the Inter-American Court of Human Rights, have developed substantial jurisprudence on reparations and state responsibility, which provides that states are obligated in many circumstances to provide reparations.[64] The Basic Principles therefore provide that the state should establish a national programme for reparations. It is also provided that reparation ought to be provided in proportion to the gravity of the violation.

Uganda is a state party to the African regional human rights instrument, the African Charter on Human and Peoples' Rights (African Charter). The African Charter has been interpreted in a number of cases to provide for the right to reparations. In 1995, in the case of *Embga Mekongo v Cameroon,*[65] the African Commission held that the victim who had complained to the Commission was entitled to reparations for the prejudice he had suffered, but that the valuation of the amount of such reparations should be determined in accordance with the laws of Cameroon.[66] In *Malawi African*

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61 See further M Ssenyonjo 'Accountability of non-state actors in Uganda for war crimes and human rights violations: Between amnesty and the International Criminal Court' (2005) 10 *Journal of Conflict and Security Law* 405. See also Rose (n 60 above) 307.

62 *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 22.

63 Text and Commentary Article 6 *bis*, Part Two, in Report of the International Law Commission on the work of its 45th session, 3 May-23 July 1993, General Assembly, Official Records, 48th session, Supplement 10 (A/48/10) 143.

64 N Roht-Arriaza 'Reparations decisions and dilemmas' (2003-2004) 27 *Hastings International and Comparative Law Review* 157-220.

65 (2000) AHRLR 56 (ACHPR 1995).

66 As above.

Association & Others v Mauritania, the African Commission ordered remedies against the state of Mauritania.[67] Along with other remedies, the Commission ordered the Mauritanian government to pay compensatory benefits to the widows and other dependents of the victims.[68]

As for dealing with the violation of women's and girls' rights, noted above, various documents are important. In the African context, and applicable in the Ugandan context, is the Nairobi Declaration on Women's and Girls' Right to Reparations.[69] There is also the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) that ensures that women are provided with reparations (article 4). It also obligates the state to design processes that increase the participation of women in the development, preparation and implementation of reconstruction and rehabilitation practices (article 10).

Thus, the legal basis for reparations for victims of human rights and humanitarian abuses is well established and has been applied in a number of situations.

6 Reparations in Uganda

The Ugandan Constitution of 1995[70] in article 50 notes that '[a]ny person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation'.

The Agreement on Accountability and Reconciliation agreed to in 2006 by the government of Uganda and the LRA contains various principles for transitional justice processes, including the right to reparations. It recognises individual and collective reparations measures in various forms. It finds that reparations shall not occur in one form only and that formal and alternative justice mechanisms require reparations. It prioritises reparations for vulnerable groups, with special requirements for the handling of women and children, and calls for the active and significant participation by victims in all processes. The Agreement provides that the government is liable for reparations for victims. The Agreement also provides that the government must work out a reparations policy and then implement it.

67 (2000) AHRLR 149 (ACHPR 2000); S Gumedze 'Bringing communications before the African Commission on Human and Peoples' Rights' (2003) 3 *African Human Rights Law Journal* 118-148.

68 *Malawi African Association & Others v Mauritania* (n 67 above).

69 C Valérie 'The Nairobi Declaration: Redefining reparation for women victims of sexual violence' (2007) 1 *International Journal of Transitional Justice* 444.

70 HB Hansen & M Twaddle (eds) *From chaos to order: The politics of constitution making in Uganda* (1996).

The Implementing Protocol to the Agreement on Comprehensive Solutions, agreed to during the peace talks in 2007 between the government and the LRA, identified the government of Uganda as responsible for meeting the reparations needs of victims. It also provided that the Ugandan government shall develop and implement a policy for the support and rehabilitation of the victims of the conflict. In 2010, Ugandan President Yoweri Museveni undertook to pay monetary compensation to victims of the war between the LRA and the government.[71] Victims have also filed suit against the government for reparations which, together with the lack of a legal framework for the delivery of reparations that have been claimed, are the reasons for the delay of the provision of reparations.[72]

As far as developing a transitional justice process is concerned, in 2008 the Ugandan Justice and Law and Order Sector (JLOS), a cross-government department body, responsible for moving justice issues forward, but also for dealing with the past, established the Transitional Justice Working Group (TJWG). This was done to ensure the implementation of the provisions of the Juba peace agreements.[73] The TJWG has been entrusted with developing a transitional justice policy for the country. It has embarked on a process to study and understand attitudes and positions on transitional justice mechanisms, including reparations mechanisms and needs. A number of processes have occurred and studies undertaken to determine the views of victims on the issues of transitional justice and reparations in particular. The Office of the High Commissioner for Human Rights (OHCHR) in Uganda issued its first thematic report on transitional justice, Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda.[74]

In the report 'The Dust Has Not Yet Settled', the OHCHR conducted research amongst victims. One thousand seven hundred victims were surveyed on their views of justice, reconciliation and other transitional justice options for the country. The research indicated that victims saw reparations and truth as the most important processes that were needed to compensate the violations that they had suffered.

On 25-27 July 2012, JLOS and the Uganda Human Rights Commission convened a workshop on Reparations Policy and Programming. The purpose of the workshop was to assist the development of a reparations component of the National Transitional

71 IRIN News 'Uganda: LRA victims rap compensation delay' 13 July 2012 http://www.irinnews.org/report/95638/uganda-lra-victims-rap-compensation-delay (accessed 19 February 2014).

72 As above.

73 M Otim & M Wierda 'Justice at Juba: International obligations and local demands in Northern Uganda' in N Waddell & P Clark (eds) *Courting conflict? Justice, peace and the ICC in Africa* 21.

74 OHCHR 'Making peace our own: Victims' perceptions of accountability, reconciliation and transitional justice in Northern Uganda; 14 August 2007 http://reliefweb.int.report/uganda/making-peace-our-own-victims-perceptions-accountability-reconciliation-and (accessed 20 February 2014).

Justice Policy. The workshop built on the findings and recommendations of various JLOS reports, including the National Report on Traditional Justice, Truth-telling and Reconciliation, which found that a reparations policy and programme was needed for Uganda. The workshop followed a February 2012 Reparations Conference hosted by the Uganda Human Rights Commission, OHCHR and UNWomen. Thus, there have been a number of processes and studies focusing on reparations and the needs of victims in Uganda.

6.1 The types of reparations that could be given to victims in Uganda

This section of the article considers the types and kinds of reparations that can, and should be, awarded in the Ugandan context.

The first part of this section considers the categories of reparations, including compensation, guarantees of non-restitution, rehabilitation, restitution and satisfaction. The second part of this section examines urgent/interim reparations, collective and individual, and symbolic and material types of reparations, what they are and why they ought to be granted in Uganda. What has been done in a variety of other countries is also examined, to see what lessons can be learnt and applied in the Ugandan context.

6.2 Categories of reparations

There are various kinds of reparations that ought to be awarded. These include: *Compensation* is often used to describe money that is granted to a victim by a court or other institution for injury that has been caused.[75] Compensation is given for economically-quantifiable impairment brought about by human rights violations, including bodily injury, emotional distress, pain, suffering, lost prospects, that include education, impairment to a person's property or their business. This can include lost profits, injury to reputation, loss or impairment of dignity, reasonable legal fees and other costs associated with getting expert assistance to attain the remedy.[76] Compensation is aimed at ensuring that victims can deal with the financial aspects of their loss.[77] Individual financial allocations assist in bringing speedy financial respite to victims and allow them to obtain their basic needs. In many cases, monetary reparations in the form of monthly payments are essential for the victim's survival. There are various kinds of compensatory damages.

- nominal: a small amount of money awarded to symbolise the vindication of rights;

75 Sarkin (n 11 above) 24.

76 Adopted by the UN General Assembly in December 2005, published on 21 March 2006, A/RES/60/147.

77 R Mani 'Reparation as a component of transitional justice' in De Feyter *et al* (n 15 above) 67.

- pecuniary: amounts aimed at representing the best possible monetary amount that equates best to the loss or harm suffered;
- moral: compensation for dignitary violations, including fear, humiliation, mental distress or harm to a person's status or dignity; and
- punitive: an amount that aims not to punish but to deter others from committing other such acts.

These can be a one-time cash payment or may be several payments over time. It may be an initial cash payment followed by a pension according to fair criteria. This could occur along these lines in Uganda. Obviously, the amount to be given would be determined by the number of victims and the resources available.

Restitution is the return of the situation to what was the case before the harm was caused.[78] It is about returning what has been lost, for instance, documents (identity cards) and land. Restitution is aimed at re-establishing the situation, as best as is possible, to the circumstances that was prevailing before the human rights violations occurred. For this to be done in Uganda, a survey would need to be undertaken of what is needed. Some processes would be easier than others, such as documents that need to be replaced. The land issue would be more complex and be much more costly. However, these should not be barriers to this being done.

Rehabilitation. The right to attain redress also comprises the means to as complete rehabilitation as possible.[79] This includes legal, medical, social, psychological care and other services. It also includes measures to restore the dignity and reputation of victims. A reparation programme should also take into account gender issues and be cognisant of the needs of women.

Guarantees of non-repetition. Reparations are not only about specific transitional justice issues, but also about a broader set of issues, including democracy, good governance, and so on. Reparations are also about building an inclusive political community. It includes recognition, acknowledgment of violations and state responsibility. It can contribute to structural transformation. Reparations are not only financial in nature. States should implement various legislative and other processes to allow victims to claim compensation. The guarantee against non-repetition requires an end of the abuses and violations in order to close the book of the past and to start the healing process. If violence or the threat of violence continues there will be no confidence in the state and its authorities. The concept of a guarantee against repetition can be seen within the values of restorative or transitional justice. Some form of guarantee against the repetition of an offence is necessary before the process of healing for all parties can begin. To ensure non-repetition, a state must implement steps not just to remove the continuing instances of the

78 Sarkin (n 11 above) 24.
79 As above.

human rights violations, but must work to remove the conditions that led to the violations to occur. This will attempt as far as is possible to ensure that similar events do not occur again in the future.

The government should therefore expend significant resources and energy on demilitarisation and reintegration programmes, including for children. This should include both material assistance to help people relocate from place to place and to allow the establishment of homes again, as well as psychological assistance to help the returnees and ex-combatants reintegrate into the daily life of the community and to help the villagers accept the returnee. These programmes will differ, depending on a number of variables: whether there are a significant number of returnees to a particular locale or just a few; whether the returnee was a victim, a perpetrator, or both; whether the village is open or not to the person's return; whether the returnee is a child or an adult; whether there is a family within the village willing to assist in the reintegration process, among other things. The process of non-repetition should also ensure that there is effective oversight of the military and the security forces in general, limiting the jurisdiction of military tribunals at the expense of civil courts, and working to strengthen and capacitate the independence of the courts. It must also mean working to promote and protect the legal profession as well as human rights defenders and ensuring that human rights education and training are provided to the society as a whole, particularly to the forces.

In reality, all issues concerning the prevention and rebuilding are to try and guarantee the non-repetition of human rights violations.

Satisfaction as a human rights remedy includes the stopping of the violence and the halting of continued violations.[80] One possible guarantee against repetition is institutional change. This can take the form of the establishment or restoration of rights, the creation of new types of institutions, the return of land or belongings or the establishment of processes of restitution. Officers of state institutions need to be taught the principles of human rights and their need to desist from torture and cruel, inhumane and degrading treatment. They also need to be shown what the consequences will be should they fail to desist from carrying out such practices. As a means to check impunity, and to safeguard against the possibility that future violations will occur, there is a need to effectively and with vigour prosecute and discipline those perpetrators of human rights abuses in the employ of the state. Even those who have retired ought to be prosecuted. A vetting process also ought to be embarked upon to ensure that that the security forces do not contain individuals who have committed past offences and to ensure suitability for continued service. Various measures to strengthen good governance, anti-corruption and the rule of law ought to be adopted, and methods adopted to ensure the full and effective functioning of all state

80 As above.

institutions. All security forces should have effective and independent civilian oversight. Assistance can include the rebuilding of schools and community centres to training and hiring programmes to provide free psychological counselling and medical assistance.

6.3 Methodology and types of reparations

The process to provide reparations in Uganda should be done in phases and with various types of reparations being provided. Those in dire, urgent, emergency need ought to be assisted as quickly as possible. This is considered below. In the longer term, a combination of individual and collective, material and symbolic is a useful methodology to consider.

The crucial issue is how much will be allocated to each of the various components. How much will be allocated to the loss of livestock, or the restoration of land rights? That needs to be determined in relation to the amount to be allocated to those who suffered mental and physical harm. The question of individual versus collective must also be looked at. A hand-out of $100 might not have long-term benefits, so is there a better way to achieve impact and sustainability? Reparations should be premised on the economic transformation of victims so that they can endure the worst consequences of the violations. For cash, there ought to be an assessment on how much it will have for the victims. Access to land as a form of reparation may be easier and have longer term sustainability. Land reform and reparations could go hand in hand. It is important to remember that land in much of Uganda is customarily owned. Therefore, it would be practical for reparations to take into account these actualities and, therefore, it would be easier to deal with these matters.

Regardless, these issues need to be dealt with in Uganda as there have been land disputes in the war-affected areas which are largely attributed to issues of demarcation of boundaries, ownership and usage.[81] These ought to be dealt with to avoid future conflict.

6.3.1 Urgent or emergency reparation

Urgent or emergency reparations should be paid out quickly and seamlessly to those in desperate situations in Uganda. In South Africa, the reparations process gave interim reparations for emergency medical and psycho-social care.[82] What is most important is that medical rehabilitation is provided and the needs are addressed. It will take much longer for a whole-scale reparations process to be implemented and thus immediate programmes can be implemented. This programme should be developed quickly for individuals in dire

81 J Vaughan & T Stewart *Land disputes in Acholi: A conflict and market assessment* (2011) 4.

82 E Daly 'Reparations in South Africa: A cautionary tale' (2003) 33 *University of Memphis Law Review* 367.

need, to provide them the services and facilities they need as quickly and appropriately as possible. Funding should be made as quickly and fettered by as few bureaucratic obstacles as possible to facilitate easy access. Physical and mental health should be prioritised. Legal aid could also be provided in communities, in particular for land conflicts[83] which are emerging as people return home. It would provide basic legal advice and support to communities on land issues so as to prevent conflict. This process could also include education for young children and community dialogues.

The critical issue is to provide support for those in dire need. Categories of need could be established to determine who is covered. Certainly a range of health needs should be covered as well as categories of persons who need this kind of reparation, such as children, those in critical need of medical attention, the elderly, those severely affected by certain types of trauma, and so on.

6.3.2 Individual reparation grants

It is frequently difficult for the state to provide direct financial compensation to every victim commensurate or proportional to what they suffered. Governments often have limited resources.[84] There are also many competing demands for the resources of the state. However, each individual victim of a gross human rights violation ought to receive a pecuniary amount that is fairly determined on the basis of various published, transparent and credible criteria.

Such criteria should take into account the actual nature and extent of atrocities committed. For example, numerous victims were repeatedly abused.[85] Women and girls were sexually abused in horrific ways which have had a dramatic effect on their lives.

The amount ought to be paid to the person possibly over a period of time, possibly a number of years, either as a grant or a pension. As far as levels of reparations are concerned, the South African Truth and Reconciliation Commission (TRC) proposed a six-yearly grant of US $2 700 per year.[86] However, the state decided to make a once-off payment of about US $4 000. It did this by using the average annual household income in South Africa for a family of five people. The difference between what the TRC had offered and what the government paid caused a great deal of resentment. It should be remembered that in the United States in the 1980s, the state provided US $20 000 per person to the Japanese-Americans who were interned

83 DI Abu-Lughod 'Failed buyout: Land rights for contra veterans in post-war Nicaragua' (2000) 27 *Latin American Perspectives* 32.

84 S Vandeginste 'Legal norms, moral imperatives and pragmatic duties: Reparation as a dilemma of transitional governance' in Doxtader & Villa-Vicencio (n 47 above) 88.

85 T Olsen 'Violence against civilians in civil war: Understanding atrocities by the Lord's Resistance Army in Northern Uganda' Working Paper 8 (2007).

86 Sarkin (n 5 above).

during World War II. Brazil gave US $100 000 to the families of those who had died in police custody. Chile offered a monthly pension. Thus, comparative amounts paid ought to be looked at, but which amounts are seen to be appropriate will have to be domestically assessed. The danger is that the amounts promised are not delivered. Thus, consulting and determining the appropriate amount need to be carefully done.

In many states large amounts have been paid to victims. In Chile, the state has paid thousands of families over US $5 000 per year in reparations;[87] in Argentina, the state committed three billion dollars in such payments.[88] In Czechoslovakia, the government spent US $840 000 000 for reparation programmes;[89] in Hungary, US $10 000 was paid to the victims for loss of life; and in Germany, over $100 billion was paid in cash to victims and to families of those killed in the Holocaust.[90] Germany considered itself liable to provide such assistance even to people mostly no longer living in Germany.[91] It instituted one of the most far-reaching and comprehensive reparations programmes, enacted restitution laws and indemnification laws.

In Ghana, reparation payments ranged from about US $217 to US $3 300 per person. The amount paid by the state depended on the extent of the violation. These were paid after the National Reconciliation Commission (NRC) recommended payments to thousands of Ghanaians who suffered abuse.[92]

In Sierra Leone, over 30 000 victims have been registered for reparations and each victim has received on average about US $80.[93] Hundreds of victims have also received surgery and other types of emergency treatment. Reparations have also been recommended in Kenya by that country's Truth, Justice and Reconciliation Commission (TJRC) in its report of May 2013. Reparations are being discussed in Togo and other African countries that have been dealing with their past as well.

These are important lessons for Uganda. It is clear that Uganda needs to provide reparations, but the types and amounts must be

87 P Hayner *Unspeakable truths: Transitional justice and the challenge of truth commissions* (2010) 180.

88 JM Guembe 'Economic reparations for grave human rights violations: The Argentinean experience' in De Greiff (n 40 above).

89 Law 24, 411, Argentina 7 December 1994.

90 Sarkin (n 10 above).

91 MR Rwelamira & G Werle (eds) *Confronting past injustices: Approaches to amnesty, punishment, reparation and restitution in South Africa and Germany* (1996).

92 UN IRIN Humanitarian News and Analysis GHANA 'Reparations for victims of human rights abuses' 17 October 2006 http://www.irinnews.org/report/61353/ghana-reparations-for-victims-of-human-rights-abuses (accessed 30 September 2014).

93 Reliefweb Sierra Leone 'Victims receive compensation' 26 June 2012 http://reliefweb.int/report/sierra-leone/sierra-leone-victims-receive-compensation (accessed 30 September 2014).

appropriate to the Ugandan context. However, Uganda's lack of resources must not be used as a reason to delay or not implement a reparations process, as can be seen in other African countries where relatively small amounts have at times been paid.

6.3.3 Material and symbolic reparations

While material and symbolic reparations are often seen to be opposite ends of the spectrum with states providing one or the other, it is useful for a comprehensive programme to contain aspects of both. While Uganda may be tempted to provide symbolic reparations as the main vehicle for reparations, material reparations also ought to be provided.

Victims and their families in Uganda should be eligible to receive material compensation for the suffering they have had to endure. Compensation needs to be 'adequate', in other words it should be proportional to the gravity or seriousness of the human rights violation and the suffering that the victims and their families had to endure. The determination of proportionality to the gravity of the violation is, however, extremely complex, taking into account the nature and extent of atrocities committed. For instance, what proportional material compensation should be awarded to children whose parents were killed during the conflict, child soldiers, victims of mutilations, individuals who were sexually abused using objects, and victims of multiple atrocities? Will the determination of such compensation factor in issues of intent, the remorse of the perpetrator, or other issues? It may be more realistic to emphasise that reparations may not necessarily be proportionate to the violations, but they should contribute towards healing and restoration.

Nonetheless, monetary or pecuniary compensation should be provided for any damage that resulted from a violation. The standard for material reparations must ensure that the result is to transmit dignity and inclusion. Measures must be enough to put one in a socio-economic situation which is similar to one's neighbours. It must be specific for victims and not just for everyone.

In Uganda, material support should include, under individual reparations programmes, the setting of a minimum threshold of compensation for victims. A system should be built which addresses more specific situations for people who have medical needs and whose children cannot go to school, have physical deformities, and rehabilitation and psycho-social support.[94] Livestock wealth must, therefore, be taken into account in addition to cash distribution. A committee could be set up at the local level. One person could handle medical treatment, another person the follow-up and settlement, and another psycho-social support.

94 E de Temmerman *Aboke girls: Children abducted in Northern Uganda* (1995).

Symbolic reparations are measures designed to assist communities as a whole to deal with the process of remembering and commemorating the past.[95] It is about establishing things such as national holidays in memory of events and victims, and sending personal letters from the state to as many of the victims as a means of symbolic reflecting on the problems of the past. There can also be the renaming of schools, buildings, streets and airports after events or victims. Memorials, such as monuments and plaques, should be erected. Certain prisons and military bases closely associated with the conflict should also be either renamed or closed. It is also about the issuing of death certificates, expunging criminal records, and expediting outstanding legal matters. In various countries, for example, a number of towns, schools, streets and universities bear the names of political figures that were tortured or killed. Monuments bearing the names of those killed could serve to draw a nation together.[96] Symbolic reparations can include a letter of apology signed by the highest authority in government, supporting families to give proper burials and renaming streets and public spaces in a public and transparent process. Other measures can include erecting museums and other places of memory,[97] and establishing national days commemorating various events. A truth commission can also assist.[98] Public gestures, such as by the President and other state officials endorsing the programme, will make it more legitimate and acceptable. Offering an apology is a vital starting point in achieving long-lasting reconciliation.[99] The apology must entail some expression of sorrow and regret. Dialogue is an important part of this process and, while it does not have to focus solely on the concept of guilt, it does have to include some recognition of past injurious behaviour, acceptance of responsibility and a commitment to the pursuit of justice and truth. To be effective, an apology must be more than a mere political act – it has to be believed to be genuine and sincere. An apology can be given in a public ceremony or by some official declaration. Thus, in Chile, when President Aylwin accepted his country's TRC report, he not only 'offered a formal apology on behalf of the government for the acts of its agents and begged for forgiveness from families of victims', but he also promised 'reparations and special benefits for them'.[100]

95 B Hamber & R Wilson *Symbolic closure through memory, reparation and revenge in post-conflict societies* (1999).

96 L Fernandez 'Possibilities and limitations of reparations for the victims of human rights violations in South Africa' in Rwelamira & Werle (n 90 above) 74.

97 B Hamber *et al* 'Utopian dreams or practical possibilities? The challenges of evaluating the impact of memorialisation in societies in transition' (2010) 4 *International Journal of Transitional Justice* 397.

98 Mutua (n 7 above) 401.

99 S Engerman 'Apologies, regrets, and reparations' (2009) 17 *European Review* 593.

100 Quoted in E Knight 'Facing the past: Retrospective justice as a means to promote democracy in Nigeria' (2003) 35 *Connecticut Law Review* 867.

The fact that a state refuses to apologise can have dramatic effects. This can be seen, for example, in the resulting problems that have been caused between various Asian countries because of Japan's minimalist apology concerning the use of comfort women[101] from countries they occupied during World War II. Their refusal to grant reparations to these women has exacerbated the ill feeling that exists on the matter.

Thus, there is much that Uganda can do. It should embark on a holistic process that contains many such steps and measures. A presidential apology, for example, would be a dramatic and useful step in the process of healing. Embarking on a range of other acts and procedures would help to deal with the past. Entrenching Uganda's democracy is also important. Doing so would similarly be a type of reparation.

7 Collective programmes

Reparations can be used as a means to tackle a range of broader societal aims, such as reconciliation and reconstruction. This is very relevant in the Ugandan context. Reparation processes can assist in rebuilding civic institutions, and in reforming various structures in the country.[102] Thus, adopting rehabilitation programmes and adopting means to achieve satisfaction can be useful devices to achieve transformation and entrench Uganda's democracy as well as assisting in developing a human rights culture in the country. Such a notion of reparations can usefully address various innate restrictions that come with a process that emerges from the courts or even one that sees a society not only as individuals, but also as a collective, particularly in Uganda where the community is a vital part of the way that the society operates. In this way reparations programmes would be future looking, and would contain wider communal goals, including nation building, reconciliation, reconstruction and a range of other broader objectives. Reparations can therefore in Uganda be conceived of more broadly to provide classes of victims with reparation packages. Such a notion of recompense can deal with some of the limitations of an entirely judicial approach to reparations. However, such an approach has drawbacks. It de-emphasises fact finding, there is a lack of effective punishment for perpetrators, and a reduced opportunity for victims to fully and publicly recount their stories. Impunity is

101 See T Yu 'Comment, recent development: Reparations for former comfort women of World War II' (1995) 36 *Harvard International Law Journal* 528; T Tree 'Comment, international law: A solution or a hindrance towards resolving the Asian comfort women controversy?' (2000) 5 *UCLA Journal of International Law and Foreign Affairs* 461 466-468; and K Park 'Comment, the unspeakable experience of Korean women under Japanese rule' (2000) 21 *Whittier Law Review* 567.

102 See further for Uganda JR Quinn 'Social reconstruction in Uganda: The role of informal mechanisms in transitional justice' (2007) 8 *Human Rights Review* 173.

enhanced when such measures become the major process that is pursued. The challenge is therefore on the government of Uganda to develop mechanisms that will actually help individuals recover from the effects of human rights violations but not undermine other efforts to obtain truth, justice and reconciliation.

Thus, the question of individual versus collective reparations in Uganda must also be looked at. Again, it is not an 'either or' situation but, to get the best of a reparations programme, it makes sense to have components of both. Collective reparations are designed to assisted groups who have suffered violations. The group to be considered should be the whole country, the various regions and especially the northern region, and communities all over the country. As has been noted:[103]

> Collective reparations can also be formulated as a way of simplifying delivery of reparations either in the contexts of practical limitations or of concerns about drawing too stark a line between classes of victims or between victims and non-victim groups … Collective reparations avoid the potentially disruptive effect individual payments can have on communities.

Thus, collective reparations could be useful as particular areas and particular groups have suffered. Such processes have occurred in a number of countries. These provide lessons for Uganda.

In Peru, the reparations process provided US $36 000 for each community. This process funded infrastructure projects, providing jobs and expanding education, health and electrification needs. A five-person local committee oversaw projects.

In Aceh, Indonesia, US $5 000 to US $14 000 was given per village. A large percentage was spent on seeds and cattle. It also saw payments that included between US $200 and US $300 a year to families of those who had died or gone missing. Various services were provided, including housing, health and education.

In Morocco, collective reparations programmes focus on regions particularly affected by political repression. The community reparations programme has a developmental aspect to it to assist the affected areas and is designed to redress the harm suffered in those areas and deal with the needs of the people living in those areas. There is also a symbolic aspect to the collective reparations process, by dealing with issues of memorialisation and other such issues.

Various programmes have occurred in Uganda, but more needs to be done. Already, in 2007, the Ugandan government launched a US $606 million Peace, Recovery and Development Plan (PRDP) in the northern parts of the country. It aimed at co-ordinating all post-LRA development initiatives. There could be a range of programmes. Some could, for example, assist former child soldiers who had been

103 L Magarrell *Reparative justice series: Reparations in theory and practice* (2007) 6.

involved in violence,[104] including girls.[105] While there have been difficulties finding funding to date in dealing with these issues,[106] the pasts of these child soldiers[107] continue to affect their futures,[108] and assistance is needed to ensure the reintegration of the thousands affected by the violence.[109]

8 Conclusion

A reparations process ought to be implemented in Uganda in stages, with interim or emergency relief being given to those who need it in the short term. Longer term and full reparations can then be given at a later stage, possibly after a truth and reconciliation process. This process should make full and comprehensive recommendations on a reparations process and its methodology.

A three-step process is thus recommended for Uganda: (i) urgent or interim reparations in the short term; (ii) a truth-seeking mechanism which, in addition, provides recommendations on reparations in the medium term; and (iii) a full and comprehensive reparations process instituted with a diverse and wide set of parameters in the medium and long term.

Various types of reparations ought to be awarded, including urgent/interim reparations, collective and individual, and symbolic and material types of reparations. Within these types, all kinds of different reparations ought to be given to individuals and communities.

These processes should begin as soon as possible. The many victims in Uganda are entitled to such processes and certainly deserve reparations. Uganda's peaceful future is dependent on such processes being done in a democratic and comprehensive way, learning the lessons from other countries that have embarked on similar journeys. The models of other countries should not be merely cut and pasted, but adopted taking due regard to the particularities of the Ugandan situation. Uganda's resource limitations, and its democratic situation, should not be used as a means to avoid tackling these sensitive and

104 H Haider 'DDR and transitional justice' GSDRC Helpdesk Research Report, 2011, Governance and Social Development Resource Centre, Birmingham, UK.

105 On girl child soldiers in Uganda, see S McKay & D Mazurana *Where are the girls? Girls in fighting forces in Northern Uganda, Sierra Leone and Mozambique: Their lives during and after war* (2004).

106 IRIN News 'Uganda: Lack of funding stalls ex-combatants reintegration' 18 June 2012 http://www.irinnews.org/report/95672/uganda-lack-of-funding-stalls-ex-combatants-reintegration (accessed 20 February 2014).

107 P Eichstaedt *First kill your family: Child soldiers of Uganda and the Lord's Resistance Army* (2009).

108 V Achvarina & S Reich 'No place to hide: Refugees, displaced persons and the recruitment of child soldiers' (2006) 31 *International Security* 127.

109 L Hovil & M Chrispus Okello *Only peace can restore the confidence of the displaced* (2006).

politically-powerful issues. Leadership is needed to move these issues forward. All sectors of Ugandan society have key roles to pressurise the state to advance these matters. The international community can and should also play its part.

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Planning law versus the right of the poor to adequate housing: A progressive assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law of 2010

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Summary

The notion of the neutral application of law is the very foundation of liberal societies, in spite of the fact that this notion has been debunked as a myth by a large body of scholarship. This notion continues to pervade liberal societies, operates discriminately against the poor and less privileged members of society and impedes poverty reduction efforts. The article demonstrates the exclusionary and discriminatory operation and impact of the myth of the neutral application of law on the right of the poor to adequate housing through a progressive assessment of the Lagos State of Nigeria's Urban and Regional Planning and Development Law, 2010, a supposedly neutral planning statute. It concludes that, for the fight against poverty to make any headway in Africa, poverty reduction must continually be mainstreamed. There must constantly be a pro-poor approach to laws and policies.

Key words: *Lagos State; planning law; the poor; adequate housing; socio-economic rights*

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1 Introduction

The faith of liberal legal scholars in the neutral principles and application of the law can be referred to as hegemonic,[1] in spite of the fact that this notion has been debunked through a large body of scholarship, including the Critical Legal Studies movement (CLS) and other progressive scholars, whose main focus is the exposure of the extra-legal and political underpinnings and impact of the law. Many of these scholars have shown that this reliance on neutral principles and application of law is in fact false.[2] Despite this, the myth of the neutral and objective nature of legal rules continues to be maintained because it is the very foundation of liberal societies.[3]

Scholars have, however, shown that the unreserved and uncritical reliance on the notion of the neutral application of laws is majorly responsible for the continued perpetuation of poverty and the continued hindrance of socio-economic transformation efforts in Africa and elsewhere. This point is aptly put by Williams:[4]

> The dominant political discourse in Western nations, reinforced by our legal cultures, teaches that poverty arises naturally and that the legal system bears no responsibility for causing it. Private law concepts of family, tort, property, and freedom of contract are made to appear as the necessary and neutral framework of social and economic power relations, arising independently of law. The dominant political culture denies that these background rules privilege any group or have anything to do with allocating wealth or income. The role of law in distributing property, valuing waged labour, and consequently devaluing other forms of 'subsistence work' and 'caregiving work', is almost always invisible. In fact, the stubborn persistence of poverty, in both developed and developing countries, results in significant part from political and legal decisions and institutions that generate and sustain a sharply unequal distribution of wealth and resources.

Therefore, it has become important, in light of the above, for scholars to continue to expose the myth of the neutral application of the law and to continue to demonstrate how the uncritical reliance on such a theory directly and indirectly discriminates against and prejudicially

1 The leading exponent of this viewpoint is Weschler. See H Weschler 'Towards neutral principles of constitutional law' (1959) 73 *Harvard Law Review* 1.

2 See, eg, M Tushnet 'Legal scholarship: Its causes and cure' (1980-1981) 90 *Yale Law Journal* 1205; KE Klare 'The law school curriculum in the 1980s: What's left?' (1982) 32 *Journal of Legal Education* 336 340; MJ Matsuda 'Looking to the bottom: Critical legal studies and reparations' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 323; LA Williams 'The legal construction of poverty: Gender "work" and the "social contract"' (2011) 22 *Stellenbosch Law Review* 463.

3 This point was buttressed by Tushnet, who says: 'The acquiescence of individuals to the liberal rule of law depends upon their continued unshakable faith in its objectivity. Thus the conflict between objectivity and subjectivity cannot readily be confronted within the legal sphere without undermining liberal society itself.' Tushnet (n 2 above) 1207.

4 Williams (n 2 above) 468 (fn omitted).

affects vulnerable members of society. It is important to keep emphasising the fact that, for the fight against poverty[5] to make any headway, poverty reduction must continually be mainstreamed. There must constantly be a pro-poor approach to laws and policies. The foregoing rationale informed the assessment in this article of the prejudicial and exclusionary impact of the Lagos State Urban and Regional Planning and Development Law 2010 (Lagos State Planning Law), a supposedly neutral planning statute, on the right of the poor and vulnerable members of society in the Lagos State of Nigeria to access adequate housing.

There are three reasons for choosing the Lagos State Planning Law to demonstrate the myth of the neutral application of law principles and their exclusionary impact on the poor residents of Lagos State. One, the Law is relatively new and is most likely an example of what is to come in the area of planning law in Nigeria if past experiences are anything to go by. This is because Lagos State is generally regarded as a progressive state by other states in the Nigerian Federation who copy its laws and policies.[6] Two, in its bid to transform the state and make it one of the world's megacities, Lagos State appears to have a penchant to initiate policies and enact laws regarded as capitalist and elitist in nature.[7] Three, the Lagos State Planning Law is a good example of otherwise well-intentioned legislation which, however, neglects to factor in the interest of less privileged members of society.

However, the question has to be answered as to why the rights-based approach to the examination and assessment of the prejudicial impact of this Law on the poor is used in the article, despite the weighty objections that have been raised by scholars against the ability of rights rhetoric to wrought social change. According to Malan, for instance, human rights only serve to entrench the state and perpetuates the *status quo* and is therefore not a suitable tool of

5 There are many ways of defining poverty. The term is, however, generally defined as a lack of or insufficient access to basic socio-economic resources like food, water, housing, basic health care, etc. For a discussion of the various approaches and ways of defining poverty and the deficiencies of some of the approaches, see D Brand *et al* 'Poverty as injustice' (2013) 17 *Law, Democracy and Development* 273. For the purposes of this article, however, I adopt the general approach of defining poverty as a lack of or insufficient access to basic socio-economic resources like food, water, housing, basic health care, etc, as this definition satisfies my rather narrow objective(s) in this article.

6 See also 'Why Lagos will shape Nigeria's future' *Tell Magazine* 7 May 2012 44-49.

7 See, eg, Channels Television 'Lagos traffic law has reduced *okada* accidents by 95% – Kayode Opeifa' http://www.channelstv.com/home/2012/11/10/lagos-traffic-law-has-reduced-okada-accidents-by-95-kayode-opeifa/ (accessed 10 November 2012), a news report where members of civil society refer to the newly-enacted Lagos State Traffic Law, 2012 as tyrannical and a victimisation of the poor. The law recently banned commercial motorcyclists (*okadas*) from plying specified major roads in Lagos without considering the effect this will have on the earning abilities of the teeming majority of Nigerians who rely on this mode of transportation as a source of livelihood.

empowerment for the individual.[8] According to him,[9]

> [h]uman rights in fact do not bear testimony of an empowered individual. On the contrary, human rights rather furnish a catalogued description of individual people's needs, helplessness, powerlessness and dependence on the state.

Many scholars share Malan's view.[10]

There are, however, some scholars who are of the opinion that, skepticism against the ability of rights discourse to wrought social change notwithstanding, rights discourse has a liberating potential that progressive forces and movement cannot afford to ignore. According to Kairys:[11]

> The law [human rights] though indeterminate, political and most often conservative, and though it functions to legitimate existing social and power relations, is a major terrain for political struggle that has, on occasions, yielded or encoded great gains and simply cannot be ignored by any progressive trend or movement.

Many scholars share Kairys's view, as do I.[12] As rightly pointed out by Rabinowitz,[13] the law may not have transformed the capitalist system or abolished poverty, but the law and human rights have brought about many changes and wrought transformation in its long history across the spectrum of human societies. These changes cannot be explained on the basis of the protection of dominant or class interests or the perpetuation of the *status quo* alone, as alleged by some scholars. The human rights approach to the assessment of the prejudicial effect of this Law on the poor is therefore not misplaced.

There are in fact at least three reasons for the use of the rights-based approach to poverty reduction and socio-economic issues generally. The first is that, contrary to the arguments of some scholars, the rights-based approach is in fact capable of empowering the poor and the vulnerable for action.[14] This it does by providing vulnerable groups easier access to centres of power not otherwise provided to

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8 K Malan *Politocracy* trans J Scott (2012) 206.

9 Malan (n 8 above) 219.

10 See, eg, M Tushnet 'An essay on rights' (1983-1984) 62 *Texas Law Review* 1363; P Gabel 'The phenomenology of rights-consciousness and the pact of the withdrawn selves' (1983-1884) 62 *Texas Law Review* 1563; R West 'Rights, capabilities and the good society' (2001) 69 *Fordham Law Review* 1901; K van Marle 'Lives of action, thinking and revolt – A feminist call or politics and becoming in post-apartheid South Africa' (2004) 19 *Southern African Public Law* 605.

11 D Kairys 'Introduction' in D Kairys (ed) *The politics of law. A progressive critique* (1998) 16.

12 See, eg, D Kennedy 'Critical labour law theory: A comment' (1981) 4 *Industrial Relation Law Journal* 503; Matsuda (n 2 above); M Pieterse 'Eating socio-economic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) 29 *Human Rights Quarterly* 796.

13 V Rabinowitz 'The radical tradition in the law' in Kairys (n 11 above) 680.

14 See, eg, K Klare 'Law making as praxis' (1979) 40 *Telos* 123; P Gabel & P Harris 'Building power and breaking images: Critical legal theory and the practice of law' (1982-83) *Review of Law and Social Change* 369; J Dugard 'Urban basic services:

them by mainstream societal institutions.[15] The second is that the rights-based approach takes socio-economic entitlements outside the depredations and vicissitudes of majoritarian and elite politics.[16] This it does by transforming socio-economic entitlements into fundamental rights which serve as limitations on the governmental exercise of power and majoritarian politics. The third reason why the rights-based approach is the preferred approach is that it gives sustained attention to the plight of the poor and the vulnerable.[17] This it does by calling the attention of government and society to the desperate conditions of the poor and the vulnerable. These reasons informed my rights-based approach to the assessment of the legislation that forms the topic of this article.

My critical assessment of the discriminatory and exclusionary impact of the Law on the right of the poor to adequate housing proceeds as follows: First, I consider the content and scope of the right to adequate housing as a norm of international human rights law. This is followed by an examination of the right to access to adequate housing in Nigeria. Thereafter, the level of access to housing in Nigeria and Lagos State in particular is examined, followed by a brief examination of the context of the legislation. This is followed by a discussion of some of the provisions of the Lagos State Planning Law that may impact negatively on the poor. The article concludes with recommendations for reform.

2 Content and scope of the right to adequate housing

The right to adequate housing is pivotal to the enjoyment of not only other economic, social and cultural rights, but civil and political rights as well. For instance, a person with no access to adequate housing is likely to be homeless and wandering, exposed to the vagaries of weather and having his or her rights to dignity, privacy, family life, health, among others, violated. This is aptly described by Leckie:[18]

> Without access to affordable, habitable and secure housing, a wide range of other human rights are sacrificed and consequently reduced in meaning

Rights, reality, and resistance' in M Langford *et al* (eds) *Socio-economic rights in South Africa: Symbols or substance*? (2014) 275.

15 J Raz 'Rights and politics' (1995) 71 *Indiana Law Journal* 27 42-43.

16 E Mureinik 'Beyond a charter of luxuries: Economic rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 468.

17 See generally OHCHR *Principles and guidelines for a human rights approach to poverty reduction strategies* http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf (accessed 24 October 2012); OHCHR 'Human rights, poverty reduction and sustainable development: Health, food and water' A background paper presented at the World Summit on Sustainable Development in Johannesburg, 26 August to 4 September 2002 http://www.ohchr.org/Documents/Publications/ HRPovertyReductionen.pdf (accessed 24 October 2012).

18 S Leckie `The right to housing' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (2001) 167.

> as the struggle to gain housing rights takes on increasing importance to those without a place to live.

The right, therefore, serves as a basis of sorts from which other rights are enjoyed by the individual. The recognition of the importance of the right accounts for its featuring prominently in international,[19] regional[20] and domestic bills of rights.[21] The right to adequate housing is not restricted to access to one's home or shelter. It encompasses the provision of adequate accommodation or shelter to vulnerable groups, such as children and prisoners, and the provision of enabling conditions for citizens to access land on an equitable basis.[22] The focus of this article is, however, restricted to that aspect of the right that deals with access to one's home, shelter or habitation.

When the right to adequate housing as defined above is mentioned, the International Covenant on Economic, Social and Cultural Rights (ICESCR) is invariably the reference point in the category of applicable instruments on the international plane.[23] According to the Committee on Economic Social and Cultural Rights (ESCR Committee),[24] article 11(1) of ICESCR '… is the most comprehensive and perhaps the most important …'[25] of the provisions dealing with the right to adequate housing. Article 11(1) provides:

> The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

The ESCR Committee, the quasi-judicial United Nations (UN) organ entrusted with the interpretation and administration of the provisions of ICESCR, has given content to the provisions of article 11(1) in two

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19 See eg arts 25(1) and 11(1) of the Universal Declaration and ICESCR respectively.

20 Apart from the provisions of art 31 of the Revised European Social Charter, which explicitly provides for the right to housing, the explicit right to housing is conspicuously absent from the provisions of regional human rights treaties. In spite of this, however, the European Commission (before its scrapping in 1998) and the European Court on Human Rights have used the provisions of the European Convention to address housing issues, especially where it concerned forced evictions through expansive readings of the European Convention's privacy, family life and property rights provisions. Both the Commission and the Court have, however, not been forthcoming in using the provisions to impose positive obligations on states to fulfil the right to adequate housing. See Leckie (n 18 above) 159-169 for a discussion of some of the relevant cases.

21 See, eg, sec 28 of the Constitution of the Republic of South Africa, 1996.

22 See P de Vos 'The right to housing' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 85.

23 ICESCR was adopted in 1966 by the United Nations General Assembly to provide for rights regarded as subsistence and essential to the day-to-day survival of man. ICESCR was adopted alongside the International Covenant on Civil and Political Rights (ICCPR), which provides for civil and political rights.

24 The quasi-judicial UN organ saddled with the interpretation and administration of the provisions of ICESCR.

25 ESCR Committee General Comment 4 para 3.

of its General Comments, General Comments 4 and 7. General Comment 4 is the first substantive General Comment on the right to adequate housing, and deals with the particular content of the right to adequate housing. General Comment 7 deals with the ancillary issue of forced evictions. According to the ESCR Committee:[26]

> The right to adequate housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather, *it should be seen as the right to live somewhere in security, peace and dignity.*

The foregoing interpretation is appropriate for two reasons. One:[27]

> The right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant [ICESCR] is premised. Thus, 'the inherent dignity of the human person' from which the rights in the Covenant [ICESCR] are said to derive requires that the term 'housing' be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources.

Two: The right in article 11(1) refers 'not just to housing but to adequate housing'.[28] According to the ESCR Committee, adequate housing or shelter has six important components, which are as follows: 'adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost'.[29]

The interpretation given to article 11(1) of the Covenant by the ESCR Committee has received confirmation from both regional tribunals[30] and domestic courts.[31] For instance, the African Commission on Human and Peoples' Rights (African Commission) in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*[32] read together the provisions of articles 14,[33] 16[34] and 18(1)[35] of the African Charter on Human and Peoples' Rights (African Charter) to imply the right to adequate housing which is not expressly provided for in the Charter. According to the African Commission:[36]

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26 ESCR Committee General Comment 4 para 7 (my emphasis).
27 As above.
28 As above.
29 As above.
30 Such as the African Commission, the quasi-judicial body entrusted with the interpretation and enforcement of the African Charter.
31 Eg, the Constitutional Court of South Africa.
32 (2001) AHRLR 60 (ACHPR 2001).
33 Art 14 of the African Charter guarantees the right to property.
34 Art 16 of the African Charter guarantees the right to enjoy the best attainable state of physical and mental health.
35 Art 18(1) of the African Charter obliges the state to protect the family as the natural unit and basis of society.
36 *SERAC v Nigeria* (n 32 above) para 60.

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

The scope of the right to adequate housing, according to the African Commission, 'goes further than a roof over one's head. It extends to embody the individual's right to be left alone and to live in peace – whether under a roof or not.'[37] As far as the Commission is concerned, following from the foregoing, the right to privacy is implicit in the right to adequate housing.

In addition to this, international human rights law requires that all rights, adequate housing inclusive, are to be enjoyed by all right-bearers without discrimination. This principle of non-discrimination is one of the absolute principles of international human rights law and is entrenched in international,[38] regional[39] and domestic[40] bills of rights. Discrimination has been defined by the ESCR Committee as[41]

> any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.

The prohibited grounds of discrimination listed in ICESCR include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[42]

The ESCR Committee has also correctly recognised that discrimination has many dimensions and operates in both the private and public spheres. The Committee, therefore, distinguishes between formal and substantive discrimination, and direct and indirect discrimination.[43] Formal discrimination refers to a situation where a law or policy of a state discriminates as a matter of law against a person on any of the prohibited grounds. Substantive discrimination is

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37 *SERAC v Nigeria* para 61.

38 Art 2 Universal Declaration; arts 2(1) & 26 ICCPR; art 2(2) ICESCR.

39 See, eg, art 1(1) of the American Convention on Human Rights; art 14 of the European Convention on Human Rights; and art 2 of the African Charter.

40 Eg, sec 42 of the Constitution of the Federal Republic of Nigeria 1999, as amended.

41 ESCR Committee General Comment 20 para 7. The Human Rights Committee, the quasi-judicial body responsible for the interpretation of ICCPR, had earlier adopted a similar definition in relation to the rights contained in ICCPR. See Human Rights Committee General Comment 18 para 7.

42 Art 2(2) ICESCR. The grounds listed above are the ones listed in ICESCR. More recent human rights instruments have added new ones. Eg, disability is now a prohibited ground of discrimination by virtue of the 2006 UN Convention on the Rights of Persons with Disabilities.

43 ESCR Committee General Comment 20 paras 8-10.

a situation of apparent equality as a matter of law, but there is discrimination in practice. Direct discrimination, on the other hand, occurs where an individual is subjected to more unequal or detrimental treatment than another individual who is similarly placed, while indirect discrimination refers to 'laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination'.[44] All these dimensions and manifestations of discrimination are covered and prohibited by the Covenant's non-discrimination clauses.[45]

Human rights regimes in this regard impose four levels of obligation on states.[46] These are the obligation to respect, the obligation to protect, the obligation to promote, and the obligation to fulfil. The obligation to respect imposes on states the duty to refrain from interfering with or impairing the enjoyment of the various rights and freedoms of the right holders. The obligation to protect imposes on states the duty to protect right bearers from the injurious and violating acts of others. The obligation to promote imposes on states the duty to create an enabling environment for the effective enjoyment of rights and freedoms, that is, by promoting tolerance and raising awareness on the import of human rights, among others. The obligation to fulfil requires states to take active measures to ensure the effective realisation of rights and freedoms. These four levels of obligation translate into two types of duties for states: the negative and positive duties.

The negative duty of states requires states to refrain from interfering or impairing the rights and freedom of right-bearers. With regard to socio-economic rights, generally, and the right to adequate housing, in particular, the negative duty incumbent upon the state, at the very minimum, obliges it and all of its organs to[47]

> abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to him or her in a way he or she finds most appropriate to satisfy individual, family or household or community housing needs.

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44 ESCR Committee General Comment 20 para 10(b).

45 ESCR Committee General Comment 20 paras 8-15.

46 Leckie (n 18 above) 155-158; see also *SERAC v Nigeria* (n 32 above) paras 44-47.

47 The African Commission in *SERAC v Nigeria* (n 32 above) para 61, quoting S Leckie 'The right to housing' in A Eide *et al* (eds) *Economic, social and cultural rights: A textbook* (1995) 113-114. The South African Constitutional Court emphatically put the point thus: 'At the very minimum, socio-economic rights [which includes the right to adequate housing] can be negatively protected from improper invasion' *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 para 78. See also *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* 2006 (1) BCLR 78 (CC), where the litigants successfully relied upon the negative duty dimension of the right to have access to adequate housing.

The positive duty of states requires states to ensure the effective realisation of rights and freedoms. With regard to socio-economic rights, particularly the right to adequate housing, the state is required to take steps 'to the maximum of its available resources' to progressively achieve the full realisation of the right.[48] The steps to be taken are inclusive of the adoption of appropriate legislative measures.[49] ICESCR's requirement for state parties to progressively realise rights to the maximum of available resources means, in essence, that states are required 'to move as expeditiously as possible towards the realisation of the rights'[50] through the equitable and effective use of available resources.[51] Inadequate and/or dwindling resources are, without more, not a valid excuse or ground for the non-realisation of the rights in the Covenant.[52]

As can be gathered from the foregoing, the right to adequate housing or the right to have access to adequate housing, howsoever coined, guarantees more than just a right to a dwelling place. It is a right to live in some decent place in peace, security and dignity. This right generates four levels of obligations for a state. First is the negative obligation to refrain from impairing the ability of individuals and communities to house themselves; second is the obligation to protect right-holders from third party interference; third is the obligation to promote the right through education and the promotion of tolerance and awareness of the right(s) in question; and, lastly, the positive obligation to take active and pro-active steps to progressively realise the right to adequate housing. With specific reference to the poor, international human rights law and comparative international law make it clear that the right to adequate housing is to be ensured to all persons at all economic levels of the society, irrespective of income or access to economic resources.

3 Nature of the right to adequate housing in Nigeria

Unlike South Africa, Nigeria does not have a justiciable socio-economic rights regime. Nigeria's socio-economic rights provisions are contained in Fundamental Objectives and Directive Principles, chapter II of the Constitution of the Federal Republic of Nigeria 1999, as amended (Nigerian Constitution). Some provisions of chapter II of the Nigerian Constitution provides for sundry socio-economic entitlements. Although not couched in the traditional language of rights, the framing of the relevant provisions of the chapter,

48 Art 2(1) ICESCR.
49 As above.
50 The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights (1987) 9 *Human Rights Quarterly* 125 para 21.
51 Limburg Principles (n 50 above) 125-126.
52 As above.

nevertheless, indicate that they are substantially socio-economic rights (or at least a good number of them).[53] Thus, the apparent intention behind the relevant directive principles in chapter II is the entrenchment of socio-economic entitlements made contingent upon the happening of another event. This event(s) may be the availability of resources, executive action in terms of policies, or legislative action in terms of the enactment of the requisite enabling laws.

Some of these socio-economic rights that are distillable from the relevant provisions of the Nigerian Constitution are the rights to suitable and adequate shelter, suitable and adequate food, a national minimum wage, old age care and pension, unemployment and sick benefits and the right of welfare for disabled persons;[54] the rights to have an opportunity without discrimination to secure an adequate means of livelihood and suitable employment;[55] the rights to just and humane conditions of work and adequate facilities for leisure, social, religious and cultural life;[56] the right to the health, safety and welfare of all persons in employment;[57] the right to adequate medical and health facilities;[58] the right to equal pay for equal work without discrimination on prohibited grounds;[59] the right of children, young persons and the aged to be protected from exploitation, moral and material neglect;[60] the right to public assistance in deserving cases;[61] and the right to free education at all levels.[62] As can be gathered from the foregoing, the right to adequate housing is one of the socio-economic rights provided for in chapter II of the Nigerian Constitution through the provisions of section 16(2)(d) of the Nigerian Constitution, which provides that suitable and adequate shelter is to be ensured to all.

However, the Achilles heel of the Nigerian socio-economic rights framework is that the Constitution forbids the enforcement before any court of law in Nigeria of the provisions of chapter II, inclusive of the socio-economic rights therein. This is by virtue of section 6(6)(c) of the Nigerian Constitution.[63] Consistent with this constitutional ouster

53 O Fagbohun 'Legal arguments for the non-justiciability of chapter 2 of the 1999 Constitution' in E Azinge & B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010) 150 169.

54 Sec 16(2)(d) Nigerian Constitution.

55 Sec 17(3)(a).

56 Sec 17(3)(b).

57 Sec 17(3)(c).

58 Sec 17(3)(d).

59 Sec 17(3)(e).

60 Sec 17(3)(f).

61 Sec 17(3)(g).

62 Sec 18(3).

63 Sec 6(6)(c) of the Nigerian Constitution provides: 'The judicial powers vested in accordance with the foregoing provisions of this section … shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in chapter II of this Constitution.'

of jurisdiction, Nigerian courts have, since the 1979 Constitution of Nigeria came into force, confirmed the non-justiciability of chapter II in several cases pursuant to section 6(6)(c) of the Constitution. The Nigerian Court of Appeal decision in *Archbishop Okogie v The Attorney-General of Lagos State*[64] presented the first opportunity for Nigerian appellate courts to pronounce upon the provisions of section 6(6)(c) of the 1979 Constitution.[65] The Court held in that case that the provisions of chapter II are, pursuant to section 6(6)(c) of the Constitution, not justiciable and that, where a government is intending to fulfil its obligations under chapter II through laws or policies, such laws or policies must not be in violation of constitutionally-guaranteed rights under chapter IV of the Constitution.

Later cases emanating from Nigerian courts on the justiciability of chapter II of the Nigerian Constitution have generally followed this position. Thus, in the more recent case of *Adebisi Olafisoye v Federal Republic of Nigeria*,[66] the Supreme Court of Nigeria held that chapter II of the Constitution, as it presently stands, is not justiciable by virtue of the provisions of section 6(6)(c) of the Constitution. However, if a matter is justiciable by virtue of other provisions of the Constitution or the government has evinced an intention that a matter be justiciable by virtue of a policy or law, then the particular provision of chapter II dealing with the subject matter of executive or legislative action will cease to be non-justiciable.[67]

The judicial sanction of section 6(6)(c) of the Nigerian Constitution and the consequent non-justiciability of Nigeria's socio-economic rights regime are, however, in sharp contrast to the obligations imposed by the domestication in Nigeria of the African Charter, that did not make the traditional distinction between civil and political rights and socio-economic and cultural rights in its provisions.[68] There is, therefore, controversy regarding whether the African Charter has not in fact rendered sterile the argument that socio-economic rights are not justiciable in Nigeria. The African Charter provides for socio-economic rights alongside civil and political rights. Socio-economic rights provided for in the African Charter alongside the more traditional first generation rights are the right to work,[69] the right to

64 [1981] 2 NCLR 337.

65 Before the *Okogie* case there was the earlier case of *AJA Adewole & Others v Alhaji L Jakande & Others* (1981) 1 NCLR 262 with similar facts and decision in the High Court of Lagos State.

66 (2004) 4 NWLR (Pt 864) 581.

67 *Adebisi Olafisoye* (n 56 above) 659-660. See also *Attorney-General of Ondo State v Attorney-General of the Federation* (2000) 9 NWLR (Pt 772) 222 and *Federal Republic of Nigeria v Anache & Others* (2004) 14 WRN 1.

68 Nigeria ratified and domesticated the African Charter in 1983 via the African Charter (Ratification and Enforcement) Act Cap A9 LFN 2004.

69 Art 15 African Charter.

health,[70] the right to education,[71] and the right to economic, social and cultural development.[72] Although the right of access to adequate housing is not expressly provided for in the African Charter, in *SERAC and Another v Nigeria*,[73] the African Commission has read the right as being implied in the Charter This is through a cumulative reading of the right to property,[74] the right to enjoy the best attainable state of physical and mental health[75] and the obligation of states to protect the family as the natural unit and basis of society.[76]

Nigeria domesticated the African Charter in 1983 via the African Charter (Ratification and Enforcement) Act.[77] The Charter became part and parcel of Nigeria's domestic regime from that time onwards. This state of affairs was confirmed by the Supreme Court of Nigeria in several cases. The *locus classicus* in this area of the law is *Abacha and Others v Fawehinmi,*[78] in which the Supreme Court held that the African Charter was a statute with international flavour in Nigeria; it was superior to other domestic statutes but inferior and subject to the provisions of the Nigerian Constitution. This has since been confirmed by Nigerian courts in many other cases.[79]

However, despite the numerous judicial decisions confirming the African Charter as part and parcel of Nigeria's domestic regime, there is ongoing controversy among scholars as regards the precise impact and implication of the African Charter on Nigeria's socio-economic rights framework. While some argue that the enforcement of socio-economic rights in Nigeria via the provisions of the African Charter is untenable and will be unconstitutional, others hold the view that such a course is legally justifiable and legitimate in view of the domestication of the Charter in Nigeria.[80]

The controversy among scholars regarding the precise impact of the African Charter on Nigeria's socio-economic rights regime appears to be mirrored in the Nigerian lower courts' decisions. Thus, while earlier cases from Nigerian lower courts appear to have taken the position that socio-economic rights are enforceable in Nigeria via the

70 Art 16.
71 Art 17.
72 Art 22.
73 n 32 above.
74 Art 14 African Charter.
75 Art 16(1).
76 Art 18(1).
77 Cap A9 LFN 2004.
78 (2001) AHRLR 172 (NgSC 2000) para 15.
79 See, eg, *Agbakoba v Director of State Security Service & Another* (1999) 1 NWLR (Pt 625) 129 and *Ogugu v State* (1994) 9 NWLR (Pt 366) 1; among many others.
80 See generally E Azinge & B Owasanoye (eds) *Justiciability and constitutionalism: An economic analysis of law* (2010). See also ON Ogbu 'The fundamental objectives and directive principles of state policy as a barometer for appraisal of Nigeria's nascent democracy' (2002) 1 *Journal of Economic, Social and Cultural Rights* 75; UO Umozurike 'The African Charter on Human and Peoples' Rights and economic, social and cultural rights' (2002) 1 *Journal of Economic, Social and Cultural Rights* 101, among others.

African Charter, more recent cases appear to eschew such interpretation. Thus, the Federal High Court of Nigeria, Port Harcourt Division, held that the non-treatment of HIV/AIDS-positive prisoners was a violation of article 16 of the African Charter in *Odafe and Others v Attorney-General of the Federation and Others*,[81] and the Federal High Court of Nigeria, Benin Judicial Division, held that gas flaring in the Niger Delta region of Nigeria was a violation of articles 4,[82] 16[83] and 24[84] of the African Charter in *Gbemre v Shell Petroleum Development Company Nigeria Ltd and Others*.[85] The Federal High Court, Abuja, in the very recent case of *Registered Trustees of the Socio-Economic Rights and Accountability Project and Others v Attorney-General of the Federation and Another*[86] declared unconstitutional the provisions of the new FREP Rules, which include the African Charter as part of the human rights instruments that can be enforced via the more speedy mechanisms of the Rules. This is because, according to the Court, the African Charter contained other categories of rights not included in the fundamental rights provisions of chapter IV of the Nigerian Constitution. The latter category of rights are, therefore, according to the Court, not within the constitutional contemplation of fundamental rights and cannot be enforced via the FREP Rules, as to do so will violate the Constitution.

Nigerian appellate courts have not had the opportunity to pronounce upon the precise impact and implication of the domestication of the African Charter on the justiciability of socio-economic rights in Nigeria, with the result that this area of the law appears still to be in a state of flux. Notwithstanding this, three things at least are clear from the foregoing discussion. The first is that chapter II of the Nigerian Constitution, barring legislative or executive action, is not justiciable. Secondly, it is also clear that, at least with regard to civil and political rights, which has a counterpart in chapter IV of the Nigerian Constitution, the African Charter is part and parcel of Nigeria's domestic law.

Lastly, while Ebobrah has correctly argued, in my view, that a clear reading of the relevant provisions of the Nigerian Constitution shows that section 6(6)(c) of the Constitution does not remove the competence of the legislature to translate the socio-economic rights in chapter II into enforceable rights, nor does the provision prohibit Nigerian courts from entertaining socio-economic rights cases where such rights have been translated into subjective rights by law or

81 (2004) AHRLR 205 (NgHC 2004).
82 Right to life.
83 Right to health.
84 Right to a healthy environment.
85 (2005) AHRLR 151 (NgHC 2005).
86 Suit FHC/ABJ/CS/640/2010, decision of the Federal High Court Abuja, delivered on 29 November 2012.

policy,[87] the African Charter is not one of the laws transforming the socio-economic rights in chapter II into subjective rights. This is because, as can be gathered from the pronouncement of the Supreme Court of Nigeria in *Abacha and Others v Fawehinmi* above, the African Charter, although superior to other local statutes, is inferior to and subject to the Nigerian Constitution. Thus, scholars and courts that have argued that the enforcement of the socio-economic rights provisions in chapter II of the Nigerian Constitution through the African Charter will violate section 6(6)(c) and section 1(1) and (3) of the Nigerian Constitution appear to be correct. I therefore disagree with Ebobrah and others who argue that the African Charter can ground claims for socio-economic rights enforcement in Nigeria,[88] and I agree with Otubu, who is of the opinion that the justiciability of socio-economic rights in Nigeria remains with future legislation.[89] The conclusion flowing from the above is that socio-economic rights, including the right of access to adequate housing, are not yet justiciable in Nigeria.

4 Level of access to housing in Nigeria and Lagos State

Lagos State of Nigeria was created on 27 May 1967 when Nigeria was divided into 12 states out of the then four existing regions of the Federal Republic of Nigeria.[90]

The state is located on the south-western part of Nigeria with the southern boundary of the state framed by about 180 kilometre along the Atlantic coastline while the northern and eastern boundaries are framed by Ogun State. The Republic of Benin formed the western boundary.

Lagos State is the smallest state in Nigeria with an approximate land area of about 358 861 hectares or 3 577 square kilometres, representing about only 0,4 per cent of Nigeria's entire land mass.[91] The state is also the most affluent and the most urbanised because only about 5 per cent of the state's population are in rural areas.[92]

With regard to the level of access to adequate housing in Nigeria, the situation at the national level presents a dismal and critical picture.

87 ST Ebobrah 'The future of economic, social and cultural rights in Nigeria' (2007) 1 *CALS: Review of Nigerian Law and Practice* 117-119.

88 Ebobrah (n 87 above) 120-122.

89 A Otubu 'Fundamental right to property and right to housing in Nigeria: A discourse' (2011) 7 *Acta Universitatis Danubius Juridica* 38.

90 L Oduwaye 'Challenges of sustainable physical planning and development in metropolitan Lagos' (2009) 2 *Journal of Sustainable Development* 161.

91 As above

92 As above.

The population of Nigeria is currently estimated to be between 167 million[93] and 178,5 million people.[94] Although there appears to be no precise data on the number of people with or without access to adequate housing in the country,[95] feelers and reports from governmental and other quarters indicate that Nigeria has a housing deficit of between 17 million housing units in 2012[96] to about 60 million housing units in 2014.[97] The country, therefore, is presumed to require about 720 000 units of housing annually to meet the housing needs of its teeming population.[98] As if the huge gap between available housing and the housing needs of the teeming population of Nigeria are not bad enough, studies also show that about 75 per cent of available housing in Nigeria's urban centres is substandard and sited in slums.[99] Reports indicate that these houses are characterised by natural ageing, poor sanitation, overcrowding, scarcity and high cost, wrong development and use of buildings and increased deterioration of the natural environment, among others.[100]

With specific reference to Lagos State, while access to housing at the national level is gloomy, the situation in Lagos State appears to be even worse. This is both because of the urbanised character of the state, as pointed out earlier, and the continuing increase in the population of the state, fuelled by the continuing influx of rural population from other states of the Federation. Thus, while as at 2006 the population of Lagos State is estimated to be about 17,5 million people, the government of Lagos State is today working with a population estimate of 21 million people.[101] As of 2010, when the national housing deficit is estimated to be about 18 million units of housing, the Lagos State housing deficit alone is estimated at about five million units of housing, representing about 31 per cent of the

93 National Population Commission, Nigeria 'Nigeria over 167 million population: Implications and challenges' http://www.population.gov.ng/index.php/84-news/latest/106-nigeria-over-167-million-population-implications-and-challenges (accessed 5 August 2014).

94 World Population Review 'Nigeria population 2014' http://worldpopulationreview.com/countries/ nigeria-population/ (accessed 5 August 2014).

95 It is, however, reported that 60% of Nigerians were homeless as of 2004 with Nigeria's housing stock put at 23 houses per 1 000 inhabitants in 2007. See E Olugbenga & O Adekemi 'Challenges of housing delivery in metropolitan Lagos' (2013) 3 *Research on Humanities and Social Sciences* 1.

96 'Nigeria requires additional 720 000 housing units annually - Wogu' *The News* http://thenewsnigeria.com.ng/2014/06/26/headline-nigeria-requires-additional-720000-housing-units-annually-wogu/ (accessed 5 August 2014).

97 'Nigeria needs $30m to provide adequate housing – FG' *Vanguard* http://www.vanguardngr.com/2012/02/nigeria-needs-30m-to-provide-adequate-housing-fg/ (accessed 3 July 2014).

98 As above.

99 AF Larenwaju 'Urbanisation, housing quality and environmental degeneration in Nigeria' (2012) 5 *Journal of Geography and Regional Planning* 422.

100 Larenwaju (n 99 above) 425-427. See also AO Olotuah 'Housing development and environmental degeneration in Nigeria' (2010) 3 *The Built and Human Environment Review* 42.

101 Lagos State Government 'Population' http://www.lagosstate.gov.ng/pagelinks.php?p=6 (accessed 10 August 2014).

national housing deficit.[102] As at the national level, as pointed out above, the nature of most of the available housing in Lagos State is also substandard and sited in slums. As aptly summarised by Olugbenga and Adekemi:[103]

> The extent of the housing shortage in Lagos is enormous. The inadequacies are far-reaching and the deficit is both quantitative and qualitative; even those households with shelter are often subjected to inhabiting woefully deficient structures as demonstrated in the multiplication of slums from 42 in 1985 to over 100 as at January 2010.

As a result of the immense pressure for housing in the state, especially the poor's housing, the Lagos urban poor are transforming the state to meet their housing needs according to their income levels, and this most times is in violation of official laws and plans.[104] Thus, although there is no official law or plan structuring Lagos into rich and poor areas, the Lagos urban poor's quest for housing and activities in relation thereto has stratified the state into three types of areas: low-income/high density areas; medium income/medium density areas; and high income/low density areas.[105] While it is not uncommon to see the rich and the poor co-existing in the different areas, the features of the particular areas in question often times predominate. Thus, in addition to the exponential growth of slums from 42 in 1985 to over 100 in January 2010, as pointed out above, Lagos State appears to have been stratified between the rich and poor through usage.

Housing in the urban poor areas of Lagos is majorly the Brazilian 'face me I face you' type of rooms in houses where occupants share kitchens, toilets and other conveniences.[106] While the occupancy rate in high income/low density areas like Victoria Island, Ikoyi, Lekki and Eti-Osa averages 1,4 per room, and 3,6 in the middle income/medium density areas of Surulere and Apapa, the occupancy rate in the low income/high density areas of Mushin, Ketu Ajegunle and Ebutte-Metta, among others, averages 8,0 per room.[107]

To compound issues further, studies reveal that poor residents of Lagos State have to resort to self-help to secure some kind of housing and facilities for themselves. Thus, while the housing supply for the upper classes has never been in short supply, meeting the housing deficit of the poor residents of Lagos State has been a thorny and knotty issue. Several initiatives and programmes to ameliorate the acute housing shortage for the poor in the state has had little or no

102 Olugbenga & Adekemi (n 95 above) 3.
103 As above.
104 As above.
105 OT Lawanson 'Poverty and environmental degradation in the Lagos metropolis' (2007) 11 *Journal of Environmental Science* 36.
106 T Lawanson 'Poverty and environmental conditions in the Lagos megacity: Consequences for environmental health' (2010) 7 *Journal of Environmental Science* 99 101.
107 See Oduwaye (n 90 above) 161; Lawanson (n 106 above).

impact, with the result that over 90 per cent of the housing supply for the poor in the state is from the informal private sector.[108] According to Olugbenga and Adekemi:[109]

> The informal private sector in Lagos comprising people of different income background resorted to self-help housing strategy. This sector has taken the risk of buying untitled land from informal market dominated by cabal popularly referred to as 'Omo-Onile'. After the purchase of the land, the majority of these people will take it upon themselves to construct their own roads, providing water and extending electricity for kilometres to provide a roof over their head. Over 90% of the housing supply in Lagos is from this sector with the resultant effects of lack of standardization and distorted urban planning system.

Ironically, it is this lack of standardisation and the distorted urban planning system resulting from the poor's self-help to secure housing for themselves, coupled with the high cost of building materials, land and expertise to construct proper and housing regulation compliant houses that render the poor more vulnerable to harsh consequences under the new Law than the more affluent. The identification of some of these unpalatable consequences is the focus of this article and will be discussed shortly. First, a brief background to the new Law.

5 Brief background to the Law

The Lagos State Planning Law is aimed at achieving environment-centred development and more. According to its Peamble, the objectives of the Law are 'to provide for the administration of physical planning, urban development, urban regeneration and building control in Lagos State and for connected purposes'.[110] Additionally, as can be gathered from its provisions, the Law is a consolidation of the various laws regulating planning and developments in Lagos State.[111] It, therefore, variously provides for: the review and preparation of development plans in the state,[112] the application for and grant of planning permits,[113] the preservation and planting of trees and greeneries,[114] and the regulation of buildings,[115] among others.

The Lagos State Planning Law established six different agencies: the Lagos State Physical Planning Permit Authority (Planning Permit

108 Olugbenga & Adekemi (n 95 above) 4.
109 As above.
110 Preamble, Lagos State Planning Law.
111 That the Law is a consolidation of several laws regulating planning and development in the state can be gathered from sec 101 of the Law which repealed a number of laws dealing with the subject matters now covered under the new Law.
112 Sec 5 Lagos State Planning Law.
113 Secs 27-39.
114 Sec 40.
115 Sec 47.

Authority); the Lagos State Building Control Agency (Building Control Agency); the Lagos State Urban Renewal Agency (Renewal Agency);[116] the Physical Planning and Building Control Agency Appeals Committee (Appeals Committee);[117] and the Technical Advisory Committee on Physical Planning and Building Control (Advisory Committee),[118] to administer the provisions of the Law. The overall responsibility, control and administration of the Law are vested in the Ministry of Physical Planning and Urban Development (Ministry).[119]

6 Some provisions of the Law that may prejudicially affect the poor

6.1 Powers of the Commissioner for Environment to direct the sealing up or demolition of any structure contravening the Lagos State Planning Law

Sections 3(b) and (c) of the Law authorise the Commissioner for Environment to direct the sealing up or demolition of any unauthorised premises, structure or development in contravention of the Law. The important question here is whose structures or developments are most likely to be affected by the exercise of the powers under these provisions. The obvious answer is that it is those of the poor. They are the ones most likely to be living in areas and in structures and developments authorities are likely to consider unauthorised and not in line with the provisions of the Law. This is because, as pointed out earlier, most of the available housing for the poor in Lagos is sited in slums where the poor engage in self-help to secure some kind of housing for themselves. As pointed out as well, most of the housing in these areas is also substandard and in violation of housing laws because of the poor's lack of requisite wherewithal to build standard and housing regulations-compliant houses. Areas most likely to be affected in this regard are the over 100 slum areas in Lagos State. Some of these are Mushin, Ketu, Ajegunle, Ebutte- Metta, Isale Eko, Makoko, Oshodi, Ojo, Orile, Olusosun, Shitta, Ipodo-Ikeja, Idi-Araba, Yaba and Onipanu, among many others.

There is evidence that the above supposition is not in fact far-fetched. In July 2012, Makoko, a waterfront settlement which has been home to at least 85 000 people for more than a century, was demolished by officials of the Lagos State Ministry of Environment in conjunction with the Nigerian police force without due process, compensation or provision of alternative housing on the ground that the settlement is unauthorised and constitutes a blight on the mega-

116 Secs 1(1)(a)-(c).
117 Secs 79-89.
118 Secs 90-98.
119 Secs 1(2) & (3).

city the government of Lagos State is planning to create.[120] There are reports that thousands of those affected by the demolition have now taken refuge under bridges.[121]

6.2 Procedure for objecting to Draft Development Plans made under the Lagos State Planning Law

Section 5 of the Law provides for the preparation and subsequent implementation of Draft Development Plans for the state. Anybody whose interest or development is to be affected by a Draft Development Plan is authorised to raise an objection thereto under a procedure stipulated in section 8 of the Law: a written statement by the objector or his advocate. The statement must define the nature and reasons for the objection and the suggested alterations and/or amendments that will resolve the objection.[122] This makes literacy and/or the ability to secure the services of a lawyer a requirement for objection. These provisions background the fact that available records reveal that about 42,1 per cent of adults are *not* literate in the English language in Nigeria.[123] While I think that this record is a gross underestimation of the level of English language literacy in Nigeria, even if one is to work with the 42,1 per cent, the act of omission or commission involved in not taking the interests of these 'illiterate' members of society into account in the Law is an indictment on the inclusive and sensitive nature of Nigeria's laws and policies.[124] This is much more so since citizens' participation is one of the new and more contemporary norms of physical planning laws.[125] Provisions such as the provisions of section 8 of the Law are in fact meant to facilitate and concretise citizens' participation, a most important contemporary norm of physical planning in the new Law.[126]

Therefore, to make writing and English language literacy a condition for participation, as the provisions of section 8 of the Law appear to have done, is most likely to exclude poor people who are more likely to be illiterate in the English language and unable to write.

120 C Ezeobi 'Makoko residents to protest loss of king, homeland' http://www.thisdaylive.com/articles/makoko-residents-to-protest-loss-of-king-homeland/120634/ (accessed 20 October 2012).

121 See, eg, K Busari 'Displaced Makoko residents find shelter under 3rd mainland bridge' http://www.punchng.com/feature/displaced-makoko-residents-find-shelter-under-3rd-mainland-bridge/ (accessed 20 October 2012).

122 Secs 8(1)(a) & (b) Lagos State Planning Law.

123 National Bureau of Statistics *The national literacy survey* (2010) 18.

124 Of course, the kind of omission, disregard or commission just discussed is not peculiar to Lagos State or the Law. It is a feature of most laws and policies in Nigeria, as elsewhere.

125 L Oduwaye 'Citizenship participation in sustainable planning and management in Nigeria' (2006) 20 *Journal of Human Ecology* 43; IO Smith 'Evolving strategies for sustainable physical planning and development through legislation: The Lagos State Urban and Regional Planning and Development Law in focus' in IO Smith (ed) *Essays on the Lagos State Urban and Regional Planning and Development Law 2010* (2014) 12-15.

126 Smith (n 125 above) 13.

The poor are also the category of people most likely not to be able to afford the cost of hiring a lawyer to act for them in raising objections, something that a rich but 'illiterate' person can conveniently do. This provision is therefore more likely to operate against the poor and to exclude them from the participation process provided under the Law than the more affluent. Is there a more sensitive and inclusive procedure that could have been adopted by the Law? Yes, the Law could have provided that complaints or objections could to be made orally to the relevant agency that will then reduce it to writing where the objector is illiterate.

6.3 Powers of the Renewal Agency to declare an area an improvement area and to order the demolition of buildings in areas so designated

The Renewal Agency, one of the agencies saddled with the implementation of the Law, is empowered by section 53(1) of the Lagos State Planning Law to, after a Draft Development Plan has been approved in respect of any area, declare any area an improvement area for the purpose of 'rehabilitating, renovating and upgrading the physical environment, social facilities and infrastructure of the area'. Where any area has been declared an improvement area, the Renewal Agency is empowered to demolish or order the demolition of all or part of improvements or buildings in such an area and to recover all or part of the cost of the demolition from the owner(s) of such improvement(s).[127] However, what areas are likely to be declared an improvement area? These will most probably be the over 100 slum areas of the state. It is a notorious fact that poor people are the ones inhabiting areas normally tagged 'slums'. So it is the poor whose buildings or improvements will be more vulnerable to demolition under the Law.

6.4 Section 58(2) powers of the Renewal Agency to pay compensation for demolition

Section 58(1) of the Lagos State Planning Law provides that where the Renewal Agency intends to demolish a building or improvement used for human habitation, the Agency shall make recommendations to the governor of the state through the Commissioner for Environment for the acquisition of the property. Where the property is acquired, the Law provides that compensation shall be payable in line with the provisions of the Nigerian Land Use Act.[128] In order to understand the import of this statutory reference, a brief examination of the relevant provisions of the Land Use Act[129] is necessary.

127 Sec 55(1)(c) Lagos State Planning Law.
128 Sec 58(2).
129 Cap L5 LFN 2004.

Under the Land Use Act, all land in the territory of any state of the Federation of Nigeria is vested in the governor of that state in trust, to be administered for the use and common benefit of all Nigerians in accordance with the provisions of the Land Use Act.[130] The governor of each state is, however, empowered to grant a statutory right of occupancy in respect of land in urban areas,[131] while the local government having jurisdiction over land not in urban areas, is empowered to grant or a customary right of occupancy in respect thereof.[132] A statutory or customary right of occupancy is revocable by the governor or relevant local government on the ground of overriding public interest, which in the instant case would mean the requirement of the land by the government of a state or the local government in the state for public purposes.[133] When a customary or statutory right of occupancy is revoked on the ground of overriding public interest, compensation is payable for the value of the unexhausted improvements on the land at the date of the revocation of the right of occupancy and the acquisition of the land.[134]

Section 51 of the Land Use Act, which is the interpretation section, defines unexhausted improvements as meaning[135]

> [a]nything of any quality permanently attached to the land, directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf, and increasing the productive capacity, the utility or the amenity thereof and includes buildings, plantations of long-lived crops or trees, fencing, wells, roads and irrigation or reclamations works, but does not include the result of ordinary cultivation other than growing produce.

That is, compensation is payable under the provisions of the Land Use Act only for improvements or enhancements of the value of the land which are the result of expenditure of labour or capital improving the quality, utility or productivity of land, the subject matter of acquisition, at the prevailing value of such improvements at the date of revocation. There is no recognition of value or interest in bare land for purposes of compensation.

In *Osho and Another v Foreign Finance Corporation and Others*,[136] the Supreme Court gave judicial sanction to the provisions of section 51(1) of the Land Use Act that compensation under the Act is only payable for the value of unexhausted improvements at the date of the revocation of the right of occupancy and the acquisition of land. In the above-mentioned case, the statutory right of occupancy of the

130 Sec 1 Land Use Act.

131 Sec 5.

132 Sec 6. It should be noted, however, that the Governor can grant statutory right of occupancy over land, whether in urban or non-urban areas, by virtue of the provisions of sec 5(1)(a) of the Land Use Act.

133 Secs 28(2)(b) & 28(3)(a) Land Use Act.

134 Sec 29(1).

135 Sec 51(1).

136 (1991) 4 NWLR (Pt 96) 157.

appellant had been unlawfully revoked by a governor of a state contrary to the relevant provisions of the Land Use Act. Upon the unlawful revocation, the structures of the appellant on the land were destroyed by the respondents. When sued for compensation, the respondents contended that the revocation extinguished all interests of the appellants in the land. The Supreme Court rejected this contention and held that, even where a revocation is validly done under the Land Use Act; it is the right of the citizen whose interest in the land is extinguished to be paid compensation for the value of the unexhausted improvements on the land at the date of revocation.[137]

Recently, in *CSS Bookshop Ltd v RTMCRS*,[138] the Supreme Court expatiated on the meaning of developed land or improvements as used under the Land Use Act. The Court adopted the definition of developed land in section 51(1) of the Land Use Act as the existence of[139]

> any physical improvement in the nature of road development services, water, electricity, drainage, building, structure or such improvement that may enhance the value of the land for industrial, agricultural or residential purposes.

The Court went further to state that the governing criteria of whether or not land is developed within the meaning of the Land Use Act is whether anything has been done to enhance the value of the land. Development is therefore not restricted to those things expressly listed under the provisions of the Land Use Act.[140]

The discriminatory implication or impact of the provisions analysed above for the poor stems from the fact that, even where occupation is not deemed unlawful or in contravention of the Lagos State Planning Law, the poor and the vulnerable are still not likely to have any improvements on the land worthy of substantial compensation under section 58(2) of the Law, or entitled to nominal compensation only, which may not secure them alternative shelter. This is because shelter for the poor, often times, consists mainly of shacks and/or rudimentary items of building. If this situation is contrasted with the situation of the more affluent members of society who will have duplexes and mansions on their land, the discriminatory effect of the supposedly neutral provisions of the Law becomes glaring.

6.5 Retroactive enforcement of the Lagos State Planning Law

Another provision of the Law that may negatively affect the poor is section 60(2), which provides that

> [a]n enforcement notice may be issued under subsection (1) of this section, notwithstanding that the unauthorised development, renovation,

137 *Osho* (n 136 above) 197-198.
138 (2006) 11 NWLR (Pt 992) 530.
139 *CSS Bookshop* (n 138 above) 574.
140 *CSS Bookshop* 574-575.

alteration, repair or addition took place before the commencement of this Law.

This provision appears to criminalise developments that were not unlawful before the commencement of this Law. If that indeed is the intention, it is a violation of section 36(8) of the Nigerian Constitution which prohibits retroactive penal legislation and is for that reason, alone, unconstitutional. Of course, the provision is capable of another more favourable and constitutionally-compliant interpretation, namely, that the provision applies only to developments that were unlawful under previous laws. However, agencies responsible for the issuing of the enforcement notice may not adopt this more favourable interpretation. Out of their ignorance of the law or even by wilful default, officials of state may adopt the more prejudicial interpretation, and the poor, lacking the means to secure competent legal assistance, if any at all, will labour under the injustice occasioned by the misinterpretation without any redress whatsoever. Of course, the situation will be different with more affluent members of the society who possess the wherewithal to challenge unconstitutional laws, policies and administrative practice. In addition to the foregoing, however, the poor are also the ones the provision is much more likely to be applied against as they are the ones that are more than likely to have unauthorised developments.

6.6 Offences and penalties for non-compliance

From the foregoing analysis, it is clear that the poor are more likely than other classes of residents to run afoul of the Lagos State Planning Law. It, therefore, follows that they are the ones also that are most vulnerable to the offences and penalties stipulated for non-compliance. Significant in this respect are the provisions of sections 75(5) and (6) of the Law. Section 75(5) provides that where the relevant agency incurs any cost in the course of demolition, removal or the enforcement of compliance, the cost shall be assessed and served on the owner, developer or occupier of the illegal development(s) for payment. Failure to pay the assessed cost is an offence punishable by a fine of N100 000,00 (about US $637) or one month community service, in addition to the payment of the assessed cost.[141] One can just imagine how difficult it will ordinarily be for anybody to pay for the cost of demolishing his or her house under pains of punishment, not to talk of the poor who can hardly find the means to survive from day to day.

6.7 Proliferation of enforcement agencies

Another defect noticeable about the Lagos State Planning Law is the proliferation of agencies established to administer it. As stated earlier, six different agencies are established to implement the provisions of

141 Sec 75(6) Lagos State Planning Law.

the Law. The powers of some of these agencies overlap and some of their functions are duplicated. The proliferation of agencies and the duplication of functions and powers in the administration of the Law will hinder the access and ability of citizens, the poor in particular, to comply with the Law and to fulfil their housing needs. This hindrance will occur in two main ways. First, it makes compliance with the Law cumbersome and difficult. Prospective builders and developers will have to run from pillar to post and from one agency to another to comply, piecemeal, with the requirements of the Law. This will in turn occasion undue delay and will increase the cost of access to adequate housing. These effects run counter to the negative obligation of the state not to, through the application of any law, policy or practice impede or impair individuals' ability to access adequate housing.

The assessment done in this section shows that the Lagos State Planning Law unfairly discriminates against and disproportionately affects the rights of the poor to adequate housing much more than less vulnerable residents of Lagos State. This is a violation of the non-discrimination principle of international and regional human rights laws, as contained in the international bills of rights[142] and article 2 of the African Charter. It also violates section 42 of the Nigerian Constitution, which expressly prohibits discrimination against any citizen of Nigeria on grounds of ethnic group, place of origin, sex, religion or political opinion.[143] Second, it is a violation of the state's negative obligation not to by law or policies impair access or the efforts of the poor to secure adequate housing. It is also a violation of the state's positive obligation to promote and fulfil the right.

7 Conclusions and recommendations

This article examined the exclusionary and discriminatory impact of the Lagos State Planning Law, a supposedly neutral planning statute, on the poor's right to adequate housing. The point is made that the main purport and objective of the Lagos State Planning Law is the balancing of physical development on land and environmental protection, but that the application of the Law in practice will impact disproportionately the right to adequate housing of the poor and the vulnerable more than affluent members of the Lagos State residents where the Law is applicable.

In light of the foregoing, the following recommendations are made. On a more general level, laws and policies should mainstream poverty for a more effective response to the vulnerability and disadvantage of poverty. If poverty is mainstreamed, this will mean that before any law is enacted or policies fashioned out, the consideration of how such laws or policies will affect the interests and coping ability of the poor

142 That is art 2 of the Universal Declaration, art 2(1) of ICCPR and art 2(2) of ICESCR.
143 Secs 42(1) & (2) Nigerian Constitution.

will become part and parcel of the preparation and planning processes of such laws and policies. The implication of this is that the interest of the poor will be prioritised, and indirect or not so apparent prejudicial effects of laws and policies on the poor will be much more likely to be paid attention to and interrogated. This approach may operate to ameliorate some of the more damaging implications of assumptions like the liberal-legal notions of the neutral application of laws on the materially less privileged.

The justification for this kind of approach lies first in the fact that several studies have shown that laws and policies are in fact complicit, to a very high degree, in the inability of the poor to work their way out of poverty through inadvertent stumbling blocks that are thrown in the way of their access to the basic necessities of life and the ability to surmount poverty.[144] Second is the fact that the socio-economic development of as many members of society as possible is a condition precedent for the robust, even and lasting economic development of any country. This is a fact that various studies have confirmed.[145] Mainstreaming poverty in laws and policies will serve to ensure that as many people as possible are empowered to get out of poverty, either through direct or indirect efforts of the state. Perhaps the most important justification for the recommendation suggested here is that a society where the gap between the poor and the rich is too wide and where there are too many poor people and very few very rich people, is a recipe for disaster. A case in point is the raging insurgency in the northern part of Nigeria, which has majorly been blamed on extreme poverty which provided fertile ground for the insurgency to thrive, as is the case with most such civil unrest in other parts of the world.

On a more specific level, the Lagos State Planning Law should establish a one-shop/stop institution or agency to implement the provisions of the Law. There are at least two reasons for this recommendation. The first is that the Law as it presently stands is beset with duplications. As correctly observed by Oni, the duties imposed by the Law on the Ministry itself are what agencies established under the Law are set up to implement, and a closer look at the functions to be performed by the Ministry and those to be performed by the agencies shows a clear duplication of functions and a lack of independence of action on the agencies' part, as they are subject to directions and control of the Ministry.[146] This is probably a pointer to the fact that there are no compelling reasons under the

144 R Hale 'Coercion and distribution in a supposedly non-coercive state' (1923) 38 *Political Science Quarterly* 470; MR Cohen 'Property and sovereignty' (1927-1928) *Cornell Law Quarterly* 8; R Hale 'Bargaining, duress and economic liberty' (1943) 43 *Columbia Law Review* 603; Williams 'Welfare and legal entitlements: The social roots of poverty' in Kairys (n 11 above) 569, among many others.

145 See, eg, M Nussbaum *Women and human development: The capabilities approach* (2000); A Sen *Development as freedom* (2001), among others.

146 BA Oni 'The Lagos State Urban and Regional Planning and Development Law 2010: Prospects and challenges' in Smith (n 125 above) 30.

Law to break down physical planning into six different sub-categories with six agencies to administer.

The second reason for the recommendation here is that to require six different agencies to relate with a barely literate public on a subject matter that a one stop/shop will probably take care of, will create unnecessary bottlenecks, delays, wastage of resources and precious time. It may also give rise to conflicting directions and regulations in view of the duplication of functions discussed earlier. The resultant effect of this can only be chaos and confusion and the creation of further avenues for unscrupulous civil servants to exploit and fleece members of the public, something for which some governmental institutions and agencies are notorious. The establishment of a one-shop/stop institution or agency to implement the provisions of the Law is most likely, therefore, to make for easier and cost-effective compliance with the requirements of the Law.

Secondly, compensation for the deprivation of interest in land should recognise value beyond developments on land, especially in cases where the land in question is being used for accommodation by the poor and the more vulnerable members of society. This is because the poor can hardly be expected to have developments on land that will qualify for substantial compensation that will be able to secure alternative accommodation or housing, unlike the case of the more affluent members of society. Recognition of the poor's occupancy or housing rights on land *simpliciter* will reduce this discriminatory impact of the Law on the poor's right to adequate housing.

Lastly, efforts should henceforth be made by all persons and authorities in Nigeria to fulfil not only the country's negative duty to refrain from impairing the ability of citizens to adequate housing, but her positive duty to provide housing for the indigent members of society who cannot afford the cost of housing for themselves as well. This is currently missing under Nigeria's human rights framework, as discussed above. Its inclusion will go a long way towards extending the frontiers of the fight against poverty in the country.

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Protecting the right to personal liberty in Namibia: Constitutional, delictual and comparative perspectives

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Summary

Although the recent Supreme Court of Namibia cases of Alexander v Minister of Home Affairs & Others and Gawanas v Government of the Republic of Namibia *were not merely decided under the Criminal Procedure Act 1977 (Namibia), but in terms of special statutes, namely, the Extradition Act 11 of 1996 and the Mental Health Act 18 of 1973 respectively, they nonetheless involved the determination by the Court of the individual right to personal liberty in terms of article 7 of the Constitution of Namibia of 1990, thus bringing the Court face to face with balancing the right to personal liberty against the public interest in the enforcement of the law.* Alexander *could properly be described as consisting of two parts: the trial judge's treatment of the limitation clause in the Namibian Constitution, which survived on appeal, and the Supreme Court judgment which turned on the problem of granting bail in the circumstances of extradition proceedings. While* Gawanas *is a classic illustration of bureaucratic negligence, both cases involve the protection of personal liberty of the individual as against legislative interference and infringement by the agents of state. The lesson emerging therefrom is that the protection of personal liberty under the Namibian Constitution extends to persons, to citizens, foreigners within Namibia and to someone with some form of disability. The other lesson emanating from this study is that a person whose right to personal liberty or dignity has been infringed can ventilate that breach by way of judicial review, contesting the legality of the law or under the principles of administrative justice in the Constitution or the law of delict, alleging wrongfulness, fault and damage.*

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Key words: *right to personal liberty; constitutional protection; ventilation through the law of delict; protection afforded to foreigners and persons with disabilities; bail in circumstances of arrest pending deportation; bureaucratic delay in releasing the President's patient from detention*

1 Introduction

Right from the advent of Namibia's independence 24 years ago, the courts appreciated their role as the interpreter and guardian of the Constitution. They understood their interpretive role as one which must be exercised against the backdrop of the values enshrined in the Constitution – the supreme law[1] – which was founded upon the principles of democracy, the rule of law and justice for all.[2] They had embraced that function with a liberal and purposive spirit such that the words of the Constitution, especially its fundamental rights provisions, should be given the widest possible meaning in order to protect the greatest number of those rights.[3] In particular, the courts were quick to discern the insistence of the founders of the Constitution upon the protection of personal liberty in article 7;[4] respect for human dignity in article 8;[5] the right of an accused person to be brought to trial within a reasonable time in article 12(1)(b);[6] and the presumption of innocence in article 12(1)(d).[7]

The two recent judgments of the Supreme Court of Namibia focused on in this article do not only maintain that liberal spirit in the interpretation of the provisions relating to fundamental rights and freedoms entrenched in the Constitution, but they also uphold in that same spirit the personal liberty rights of the individuals involved. In *Alexander v Minister of Home Affairs & Others*,[8] the plaintiff sought to enforce his right to liberty through a declaration of the unconstitutionality of section 21 of the Extradition Act 11 of 1996. *Gawanas v Government of the Republic of Namibia*,[9] as well, was contested on the basis of an action in delict to enforce the plaintiff's

1 Art 1(6) Constitution of Namibia 1990.
2 Art 1(1) Constitution of Namibia 1990.
3 *Namunjepo v Commanding Officer, Windhoek Prison* 2000 (6) BCLR 671 (NmS).
4 *S v Timotheus* 1995 NR 109; *Amakali v Minister of Prisons and Correctional Services* 2000 NR 221 (HC).
5 *Ex Parte Attorney-General: In re Corporal Punishment by Organs of State* 1991 NR 178 (SC); *S v Sipula* 1994 NR 41 (HC); *S v Vries* 1998 NR 244 (HC); *Namunjepo* (n 3 above).
6 *S v Amujekela* 1991 NR 303 (HC); *S v Heidenreich* 1995 NR 234 (HC); 1998 NR 229 (HC); *S v Uahanga* 1998 NR 160 (HC); *Van As v Prosecutor-General* 2000 NR 271 (HC); *Malama-Kean v Magistrate for District of Oshakati NO* 2001 NR 268 (HC); 2002 NR 413 (SC).
7 *Per* Mahomed AJ, *S v Acheson* 1991 NR 1 (HC) 10B-C. See also *S v Pineiro* 1991 NR 424 (HC); *S v Van der Berg* 1995 NR 23 (HC); *AG of Namibia v Minister of Justice* 2013 (3) NR 806 (SC).
8 2010 (1) NR 328 (SC).
9 2012 (2) NR 401 (SC).

rights to personal liberty and dignity, thus bringing to this discussion the delictual dimension to the thriving personal liberties jurisprudence in the Namibian jurisdiction. This investigation is, therefore, structured around these two broad but overlapping divides: the constitutional and the delictual perspectives of a personal liberties[10] debate. The universal nature of the problem of the interference by organs of state with the rights to personal liberty and their protection by law compels the introduction of international and comparative dimensions to the discussion. Meanwhile, none of the two cases chosen for analysis involved the more familiar issues of arrest with[11] or without a warrant[12] under the Criminal Procedure Act 51 of 1977; rather, they concern issues arising from special legislative measures where public officials, not necessarily the police, are empowered to exercise powers of arrest or detention capable of impinging upon the liberty of the individual, such as arrest for the purposes of extradition in *Alexander*, and detention in a mental hospital of a mental patient as in *Gawanas*.

2 Constitutional guarantees

The Constitution stipulates, prescribes and protects the individual's rights to personal liberty and security of the person, while statute confers the power of law enforcement, crime prevention, suppression and investigation on the police force, or other relevant agents of the national executive. By their nature, the powers so conferred inherently impinge upon the very rights guaranteed. In the face of the delicate balance and apparent difficult situation, the Constitution tends to provide the way forward by indicating how a court should approach the matter of interpretation and the manner of reconciling or balancing the conflict, having regard to the public interest, public objective, public safety and public morality.[13] Suffice it to state at this stage, first, that both the Constitution and statute are important

10 'Liberty', when used in its broad sense, tends to encompass what is commonly and generally referred to as 'civil and political rights'. But, when qualified with 'personal', it somewhat narrows its scope and involves concerns primarily physical liberty. In this context, it 'consists of in the power of locomotion without imprisonment or restraint unless by due course of law, except those restraints imposed to prevent commission of threatened crime or in punishment of crime committed, those in punishment of contempt of courts or legislative bodies or to render their jurisdiction effectual, and those necessary to enforce the duty citizens owe in defence of the state to protect community against acts of those who by reason of mental infirmity are incapable of self-control'. *Ex parte Hudgins* 86 W Va 526, 103 SE 327 329.

11 Secs 43 & 44 Criminal Procedure Act 51 of 1977.

12 Secs 40(1)(a) & (b) Criminal Procedure Act 51 of 1977: *De Jager v Government of the Republic of Namibia* 2006 (1) NR 198 (HC) (arrest on reasonable suspicion).

13 Take the Constitution of the Republic of Trinidad and Tobago 1976, which is worded somewhat differently from most of the typical Westminster-model constitutions of the 1960s (except sec 4 of the Lesotho Constitution 1993, which is similarly closely worded). Sec 4 of that Constitution provides: 'It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion

sources of individual protection in addition to the delict cause of action. Secondly, there is a considerable overlap between the constitutional guarantees of individual liberties and security of the person, on the one hand, and the common law cause of action, on the other, since the underlying constitutional infringement forms the basis for the wrongfulness and fault requirements for proving delictual liability in this era of constitutional-delict.[14] In the absence of a constitutional or statutory bill of rights in a given jurisdiction, the litigants' recourse to legal remedies is ostensibly confined to the common law claim for wrongful arrest, false imprisonment and malicious prosecution, and the action will be brought under the law of tort under the English common law[15] or delict in a Roman-Dutch legal system. However, where constitutional guarantees exist or a bill of rights statute operates, actions can be brought under the constitutional cause of action or the common law and relevant statutory instrument(s). Quite apart from bringing the action under the relevant constitutional or statutory instrument, the complainant can plead a breach of the entrenched or statutory right(s), even where the primary cause of action is the common law. Experience shows that litigants allege breaches of constitutional or statutory rights as the

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or sex, the following fundamental human rights and freedoms, namely:- (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law; (b) the right of the individual to equality before the law and the protection of the law; (c) the right of the individual to respect for his private and family life.' Sec 5 then proceeds: '(1) Except as is otherwise expressly provided in this chapter and in s 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedom hereinbefore recognised and declared. (2) Without prejudice to subsection (1), but subject to this chapter and to s 54, Parliament may not … (a) authorise or effect the arbitrary detention, imprisonment or exile of any person; (b) impose or authorise the imposition of cruel and unusual treatment or punishment; (8) deprive a person who has been arrested or detained (i) of the right to be informed promptly and with sufficient particularity of the reason for his arrest or detention; (ii) of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him …; (iii) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms.'

14 See eg C Okpaluba 'State liability for acts and omissions of police and prison officers: Recent developments in Namibia' (2013) 46 *Comparative and International Law Journal of Southern Africa* 184 197.

15 The action in *Lumba v Secretary of State for the Home Department* [2011] 4 All ER 1 (SC) was filed purely on the tort of false imprisonment without reference to the Human Rights Act 1998 (UK). It was a case where the Secretary of State was empowered by the 1971 Immigration Act to detain foreign national prisoners after serving their sentence for the purposes of deportation. The majority of their Lordships held that the policy under which the applicants were held did not only lack transparency, but was unlawful; hence, they were unlawfully detained and their claims for false imprisonment succeeded. See also *Langley v Liverpool City Council* [2006] 2 All ER 202; *Roberts v CC of Cheshire Constabulary* [1999] 2 All ER 326; *Holgate-Mohammed v Duke* [1984] 1 All ER 1054; *Christie v Leachisky* [1947] 1 All ER 567.

basis for launching the action at common law.[16] In any case, where the bill of rights exists as an entrenched constitutional provision or is enacted in a statutory form, the individual's rights and freedoms are thereby incorporated. What remains of the common law in such a situation is the cause of action, since the substantive rights have been duly guaranteed or enacted.

Whereas the validity of an arrest, detention or search and seizure can successfully be challenged at common law,[17] or on the ground that it contravenes the statutory authority upon which power rests, as in Australia,[18] it is even stronger that the legality of the actions of the executive in the administration of criminal justice under a bill of rights regime must constantly be tested against the supreme law under which the source of both executive and legislative authorities emanates. It is this same supreme instrument that guarantees the aggrieved individual the civil or political right in the first place. The Constitution of Namibia, like most written constitutions, except the Australian,[19] enshrines the right to freedom and security of the person, encapsulated in the right not to be deprived of personal liberty other than in accordance with procedures established by law.[20] In particular, the 1990 Constitution of Namibia provides that the right

16 See eg *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC); *Minister of Safety and Security v De Lima* 2005 (5) SA 575 (SCA); *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA); *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA); *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* 2003 (1) SA 389 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA). See also C Okpaluba 'The tension between constitutional and delictual damages in ventilating breaches of fundamental rights' (forthcoming).

17 *Money v Leach* [1746] 96 ER 320, *Wilkes v Wood* [1763] 98 ER 489, *Entick v Carrington* [1765] EWHC J98, 95 ER 807.

18 *New South Wales v Corbett* (2007) 81 ALJR 1368 (HCA). McHugh J spoke in *Al-Kateb v Godwin* (2004) 219 CLR 562 para 73 of the absence of a bill of rights in Australia. See also G Williams *The case for an Australian bill of rights* (2004).

19 The absence of a bill of rights in the 114 year-old Constitution of the Commonwealth of Australia does not appear to inhibit activist judges such as Kirby J in interpreting Australian statutes bearing in mind constitutional values such as the protection of personal liberties, even if it entails attributing the origin of the protection to the common law and international instruments. Eg, in *Al-Kateb v Godwin* (2004) 219 CLR 562 para 150 he held: 'The common law has a strong presumption in favour of liberty, and against indefinite detention. That presumption informs the way provisions of an Australian statute, such as ss 196 and 198 of the Act, are to be construed by an Australian court. It also informs this Court's approach to elucidating the meaning of the Constitution necessary to support the validity of such provisions.' Citing eg *Whittaker v The King* (1928) 41 CLR 230 248; *Trobridge v Hardy* (1955) 94 CLR 147 152; *Watson v Marshall and Cade* (1971) 124 CLR 621 632; *Williams v The Queen* (1986) 161 CLR 278 292; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 532; *McGarry v The Queen* (2001) 207 CLR 121 paras 59-61. See *Lawrence v Texas* 539 US 558 562, 567 (2003) *per* Kennedy J. See the analysis of Michael Kirby in 'Protecting human rights in Australia without a charter' (2011) 37 *Commonwealth Law Bulletin* 255-280.

20 Art 7 Constitution of the Republic of Namibia; sec 12(1) Constitution of the Republic of South Africa, 1996. It was held in the South African case of *Silva v Minister of Safety and Security* 1997 (4) SA 657 (W) 661H-I that a detained person had an absolute right not to be deprived of his liberty for one second longer than necessary by an official who could not justify the detention. This is because the

to life shall be respected and, following the prevailing international trends,[21] it abolished the death sentence.[22] In affirmation of a vital aspect of its Preamble, article 8 of the Constitution entrenches the inviolability of human dignity, which must be respected in any judicial or other proceedings before any organ of state.[23] Essentially, no person shall be subjected to 'torture or to cruel, inhuman or

importance of the right to personal liberty 'can never be overstated'; *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) para 36. That is why enactments purporting to interfere with this elementary right of the common law are always restrictively construed; *Arse v Minister of Home Affairs* 2012 (4) SA 544 (SCA) para 10; *R v Sachs* 1953 (1) SA 392 (A); *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 352; *Johnson v Minister of Home Affairs* 1997 (2) SA 432 (C) 434J-435A. A boost to the common law interpretative approach of an attempt by any enactment to restrict this right, as Malan J pointed out in *Arse* para 10, is that sec 39(2) of the Constitution requires courts, when interpreting a statute that is reasonably capable of two interpretations, to avoid an interpretation that would render the statute unconstitutional and to adopt the interpretation that would better promote the spirit, purport and objects of the Bill of Rights, even if neither interpretation would render the statute unconstitutional; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) v Smit NO* 2001 (1) SA 545 (CC) paras 22-26; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) par 107; *Fraser v Absa Bank Ltd* 2007 (3) SA 484 (CC) para 47. Accordingly, the Supreme Court of Appeal held in *Arse* para 10 that the safeguards and limitations on the deportation and detention of illegal foreigners in sec 34(1) of the Immigration Act 13 of 2002 justify its limitation of the right to freedom and the right not to be detained without trial (see also *Lawyers for Human Rights* para 43). It was further held that the detention of the appellant in that case was clearly in breach of the express provisions of sec 34(1)(d) of the Immigration Act and therefore unlawful.

21 See HJ Steiner *et al International human rights in context: Law, politics and morals* (2008) 18-41.

22 Art 6 Namibian 1990 Constitution. The Supreme Court held in *S v Tcoeib* 1996 (7) BCLR 996 (NmS) that a sentence of life imprisonment did not constitute a sentence of death and that the Namibian Constitution had distinguished between the protection of life in art 6 and liberty in art 7. However, life imprisonment could not be constitutionally sustainable if it meant effectively locking away a prisoner for the rest of his or her natural life as though the prisoner were a 'thing' instead of a person without any continuing duty to respect the prisoner's dignity, which would include a recognition of his or her right not to live in despair and helplessness without any hope of release, regardless of circumstances. In South Africa, the death penalty was abolished by dint of judicial activism in the interpretation of the Constitution by which the new Constitutional Court ushered in a progressive constitutional jurisprudence heralding the emergence of the era of constitutional democracy; *S v Makwanyane* 1995 (3) SA 391 (CC).

23 The Supreme Court of Namibia held in *Ex parte Attorney-General: In Re Corporal Punishment by Organs of State* 1991 NR 178 (SC) that the imposition of any sentence by any judicial or quasi-judicial authority, or directing any corporal punishment upon any person, is unlawful and in conflict with art 8 of the Constitution of Namibia. The infliction of corporal punishment in government schools pursuant to the existing code formulated by the Ministry of Education, Culture and Sport or any other direction by the said Ministry or any other organ of government is likewise unconstitutional and unlawful and in conflict with the respect for human dignity in art 8. See also *S v Sipula* 1994 NR 41 (HC); *S v Ncube; S v Tshuma; S v Ndhlovu* 1988 (2) SA 702 (SZ); *S v A Juvenile* 1990 (4) SA 151 (ZS); *Tyrer v UK* [1978] 2 EHRR 1.

degrading treatment or punishment'.[24]

In further affirmation of the well-known common law principle that any interference with physical liberty is *prima facie* unlawful,[25] the 1990 Constitution does not only prohibit 'arbitrary arrest and detention',[26] but it goes further to provide, in article 11, fundamental safeguards for the arrested, detained and accused person. Incidentally, none of the articles in chapter 3 of the Constitution, dealing with fundamental rights and freedoms, stipulates in any detail as to how, why and when an arrest should be made. All that is left principally to the Criminal Procedure Act 51 of 1977. However, article 11 specifies the rights of a person upon arrest and, if detained, what his or her remedies are. For instance, in terms of article 11(3), an arrested and detained person must be brought before the nearest magistrate or other judicial officer within 48 hours of his or her arrest. Not only has this provision been held to be peremptory, but it has also been emphasised that its object is to ensure the prompt exhibition of the arrested person before a magistrate or other judicial officer 'so as to prevent the detention of a person incommunicado which is itself an affront to our constitutionalism, democracy and respect for basic human rights'.[27] Further, that[28]

> the 48 hour rule is … one of the most important reassuring avenues for the practical realisation of the protection and promotion of the basic human

24 Art 8(2)(b) 1990 Constitution. See also secs 7(1), 10 & 12(1)(d) & (e) of the South African Constitution. The question before the Supreme Court of Namibia in *Namunjepo* (n 3 above) 683D-J was whether the Constitution of Namibia could sanction the use of irons and chains in regard to prisoners under any circumstances. In answering that question in the negative for, whatever the circumstances, the use of leg irons and chains on human beings was a humiliating experience which reduced the person subjected to it to the level of a 'hobbled animal whose mobility is limited so that it cannot stray'. It was held that the practice, for whatever reason, was an impermissible invasion of art 8(1) and contrary to art 8(2)(b) as it, at least, constitutes degrading treatment and is thus unconstitutional. Strydom CJ had earlier observed (680D): 'To imprison a person would in many respects invade his or her right and also the right to dignity but these inroads are the necessary result of the incarceration and are sanctioned by the Constitution, article 7. That does not mean that a prisoner can be regarded as a person without dignity.' So, when Manyarara J was faced with similar facts in *Engelbrecht v Minister of Prisons and Correctional Services* 2000 NR 230 (HC), where the plaintiff, an awaiting-trial prisoner, was placed in chains for 16 days, he held that he was bound by the Supreme Court judgment in *Namunjepo*, hence the issue for determination turned on the assessment of *quantum* of damages to be awarded the plaintiff.

25 *Per* Langa CJ, *Zealand v Minister of Justice and Constitutional Development & Another* 2008 (4) SA 458 (CC) 468 para 25. See also *Bentley & Another v McPherson* 1999 (3) SA 854 (E) 857; *Robbertse v Minister van Veiligheid en Sekuriteit* 1997 (4) SA 168 (T) 172, *Moses v Minister of Law and Order* 1995 (2) SA 518 (C) 520; *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 153; *Masawi v Chabata* 1991 (4) SA 764 (ZH) 771-772; *During NO v Boesak & Another* 1990 (3) SA 661 (A) 673-674.

26 Art 11(1) 1990 Constitution.

27 *Per* Parker AJ, *Sheehama v Minister of Safety and Security* 2011 (1) NR 294 (HC) para 5.

28 As above.

> right to freedom of movement guaranteed to individuals by the Namibian Constitution.

Shivute CJ endorsed the foregoing views of Parker AJ and held in *Minister of Safety and Security v Kabotana*[29] that article 11(3) is an aspect of the fundamental right to liberty guaranteed by article 7 and that the 48-hour requirement[30]

> is undoubtedly an important constitutional right accorded to arrested persons which, in the light of our pre-independence history of detention without trial and other related injustices, should be guarded jealously.

This article finds its place in the Constitution 'solely for the benefit of arrested persons and not for the benefit of the state'.[31] The Chief Justice emphasised that[32]

> [t]he 48-hour requirement must act as a flashing red light in the minds of the officers processing suspects for onward transmission to court. This is the vigilance with which we must guard this fundamental right to appear in court within 48 hours after being arrested unless it is not reasonably practicable to do so.

The state was therefore held liable for its failure to have brought the respondent to court within 48 hours, whereas it was reasonably possible to do so in the circumstances of the case. As much as the plaintiff was awarded damages for wrongful arrest and detention beyond the 48-hour period in *Iyambo v Minister of Safety and Security*,[33] no such award was made for further detention which was ordered by the magistrate after the plaintiff had been brought to court.[34]

In addition to the foregoing rights, the Constitution of Namibia guarantees the individual the right to equality before the law and freedom from discrimination,[35] the right to privacy,[36] and the prohibition of slavery, servitude and forced labour.[37] While the different guarantees highlighted above are of equal relevance in a constitutional state, it is important to bear in mind that the scenario postulated for our present purposes is the protection against arbitrary

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29 2014 (2) NR 305 (SC).

30 *Kabotana* (n 29 above) para 16.

31 *Per* Shivute CJ in *Kabotana* (n 29 above) para 18.

32 *Kabotana* (n 29 above) para 31.

33 2013 (2) NR 562 (HC).

34 *Iyambo* (n 33 above) paras 4-7.

35 Art 10 1990 Constitution; sec 9 South African Constitution. See *Council of the Municipality of Windhoek v Petersen* 1998 NR 8 (HC); *Muller v President, Republic of Namibia* 1999 NR 190 (SC); *Nanditume v Minister of Defence* 2000 NR 103 (LC); *Frans v Paschke* 2007 (2) NR 520 (HC).

36 Art 13 1990 Constitution; sec 14 South African Constitution. See eg *Ferreira v Levin NO & Others: Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC); *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 (CC); *NM & Others v Smith & Others (Freedom of Expression Institute as amicus curiae)* 2007 (5) SA 250 (CC).

37 Art 9 1990 Constitution; sec 13 South African Constitution.

arrest and detention and, to an extent, the inhuman and degrading treatment flowing therefrom and impinging upon the individual's right to human dignity. The next section attempts to provide a statement of the general principles of the law of arbitrary arrest and detention in some common law countries, while in section 3 I deal specifically with the application of these principles in the interpretation of the constitutional and statutory provisions relating to the subject in Namibian law.

2.1 Protection against arbitrary arrest and detention

The term 'arbitrary',[38] qualifying arrest or detention, appears in most human rights instruments: international,[39] regional[40] and domestic

38 According to *Black's law dictionary* (1990) 104, 'arbitrary' means acting 'in an unreasonable manner, as fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; non-rational; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic; *Corneil v Swisher County* Tex.Civ.App 78 SW2d 1072 1074; without fair, solid and substantial cause; that is, without cause based upon the law, *US v Lotempio*, DC NY, 58 F2d 358, 359; not governed by any fixed rules or standard'. It is a wilful and unreasoned action without consideration and regard for facts and circumstances presented; *In re West Laramie*, Wyo, 457 P2d 498, 502. 'Ordinarily, "arbitrary" is synonymous with bad faith or failure to exercise honest judgment and an arbitrary act would be performed without adequate determination of principle and one not founded in nature of things.' See *Huey v Davis* Tex.Civ.App 556 SW2d 860 865.

39 Art 9(1) International Covenant on Civil and Political Rights (ICCPR). General Comment 8 (30 June 1982) concerning art 9(1) of ICCPR clarifies that it 'is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc'. In the same para 1, the Comment describes the right of access in art 9(4) to relate to 'the right to control by a court of the legality of the detention, [which] applies to all persons deprived of their liberty by arrest and or detention'. The UN Human Rights Committee, commenting on art 9(1) in *Van Alphen v The Netherlands* Communication 305/1988 (UN Doc CCPR/C/39/D/305/1988 (23 July 1990) para 5.8, observed: 'The drafting history of article 9, para 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remanding in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. The state party has not shown that these factors were present in the instant case ... The Committee therefore finds that the facts as submitted disclose a violation of article 9, paragraph 1, of the Covenant.'

40 Article 5(1), European Convention on Human Rights (European Convention). The European Court of Human Rights in *Engel v The Netherlands (No 1)* [1976] ECHR 3 held that the right to personal liberty in art 5(1) contemplates 'individual liberty in its classic sense'; it does not concern 'mere restrictions upon liberty of movement'. In other words, it contemplates the physical liberty of the person. 'Its aim', held the European Court in *Guzzardi v Italy* [1980] ECHR 5 paras 92-93 and 95, 'is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion … the paragraph is not concerned with mere restrictions on liberty of movement … In order to determine whether someone has been "deprived of his liberty" within the meaning of article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.' See the

alike.[41] In handing down judgment on the interpretation and application of section 22 of the New Zealand Bill of Rights Act 1990 in *Neilsen v Attorney-General*,[42] Richardson J considered that the question whether an arrest or detention is arbitrary turns on the nature and extent of any departure from the substantive and procedural standards involved. To that extent, 'an arrest or detention is arbitrary if it is capricious, unreasoned, without reasonable cause: if it is made without reference to an adequate determining principle or without following proper procedures'.[43]

In effect, the touchstones of arbitrariness are 'inappropriateness, injustice and lack of predictability'.[44] Or, as Hammond J put it in an earlier case, 'lawful detentions may also be arbitrary if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality'.[45] Thus, detention under Part 4A of the New Zealand Immigration Act 1987, where national security is involved, 'would be both arbitrary and unlawful … if the purpose of detention could not be fulfilled and the detention was therefore otherwise indefinite or permanent'.[46] This conforms to the approach adopted by Gummow J

following English cases: *Secretary of State for the Home Department v Mental Health Review Tribunal and 'PH'* [2002] EWCA Civ 1868*; R(H) v Secretary of State for the Home Department* [2004] 2 AC 253 (HL); *Johnson v UK* [1997] ECHR 88; *R v (Gillian) v Commissioner of Police for the Metropolis* [2006] 2 AC 307 (HL); *Secretary of State for the Home Department v JJ* [2008] 1AC 385 (HL); *Austin v Commissioner of Police for the Metropolis* [2009] 2 WLR 372 (HL).

41 See art 11(1) of the 1990 Constitution of Namibia; sec 9 Canadian Charter of Rights and Freedoms 1982; *McCorkell v Director of Riverview Hospital Review Panel* (1993) 104 DLR (4th) 391 paras 38-40; *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606 at 643. See also sec 21(2) of the Charter of Human Rights and Responsibilities Act 2006 (Victoria); *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009); sec 22 New Zealand Bill of Rights Act 1990.

42 [2001] 3 NZLR 433 (NZCA) (*Neilsen*).

43 *Neilsen* (n 42 above) para 34.

44 *Per* McGrath J in *Zaoui v Attorney-General & Others* [2004] NZCA 228 para 85. See also *Van Alphen v The Netherlands* [1990-1992] 3 NZBOR R326 para 5.8; *Fok Lai Ying v Governor in Council* [1997] 3 LRC 101.

45 *Manga v Attorney-General* [2002] NZLR 65 para 44.

46 *Per* McGrath J in *Zaoui v Attorney-General & Others* [2004] NZCA 228 para 88. The majority held in this case that there was no basis for challenging the validity of the arrest of the immigrant on national security grounds. In any event, whether detention will be permitted is for the executive and not for the courts to decide. Thus, the detention in prison of the immigrant on grounds of national security pending deportation was valid. Hammond J, dissenting, held (paras 201-202 and 221) that there was a systemic failure in the entire process which caused the delay in this case. The prolonged periods of detention would only be justified by the need to conduct a careful investigation of what are usually complex and competing claims. *Chahal & Others v United Kingdom* (1996) 1 BHRC 405. It was never the intention of parliament that the Part 4A process would take as long as it did in this case. This was an appropriate case to grant the immigrant bail. The judge was therefore prepared to issue a declaration that the detention in prison was arbitrary and in contravention of his rights under sec 22 of NZBORA 1990.

of the High Court of Australia in *Al-Kateb v Godwin*,[47] to the following effect:

> If the stage has been reached that the appellant cannot be removed from Australia and as a matter of reasonable practicability is unlikely to be removed, there is a significant constraint for the continued operation of s 198. In such a case, s 198 no longer retains a present purpose of facilitating removal from Australia which is reasonably in prospect and to that extent the operation of s 198 is spent. If that be the situation respecting s 198, then the temporal imperative imposed by the word 'until' in s 196(1) loses a necessary assumption for its continued operation. That assumption is that s 198 still operates to provide for removal *under* that section.

In any consideration of the question of the constitutionality of a breach of these rights, the first thing to ascertain is whether the complainant has been deprived of his or her liberty. The second stage of the enquiry is to determine whether the deprivation was arbitrary or without just cause. In this regard, the court recognises that the right of the individual not to be deprived of his or her liberty arbitrarily or without just cause has both substantive and procedural protective angles.[48]

2.2 Detention beyond the constitutional limit

The appellant in *Zealand v Minister of Justice and Constitutional Development and Another*[49] was treated as a sentenced prisoner when he was in fact an awaiting-trial prisoner. Yet, he was remanded in maximum security when he had no conviction of any serious criminal wrongdoing. The only possible legal basis on which to justify any deprivation of the applicant's freedom at all was the fact that he was awaiting trial in the first case, having been acquitted in the second. That, however, was insufficient to justify treating the appellant as if he were convicted and sentenced. This additional encroachment on the appellant's liberty was undoubtedly greater than was necessary to secure his attendance at trial. Moreover, other prisoners of his class – those awaiting trial in detention at the same prison – were not

47 (2004) 219 CLR 562 para 122. The High Court was construing secs 196 and 198 of the Migration Act 1958 (Cth). The majority led by Gleeson CJ held (para 74) that, under the aliens power, parliament was entitled to protect the nation against unwanted entrants by detaining them in custody. As long as the detention was for the purpose of deportation or preventing aliens from entering Australia or the Australian community, the justice or wisdom of the course taken by parliament was not examinable in any domestic court. It was not for the courts, exercising federal jurisdiction, to determine whether the course taken by parliament was unjust or contrary to basic human rights. 'The function of the courts in this context is simply to determine whether the law of the parliament is within the powers conferred on it by the Constitution. The doctrine of separation of powers does more than prohibit the parliament and the executive from exercising the judicial power of the Commonwealth. It prohibits the ch III courts from amending the Constitution under the guise of interpretation.'

48 *S v Coetzee & Others* 1997 (3) SA 527 (CC) para 158 *per* O'Regan J.

49 2008 (4) SA 458 (CC).

subjected to the same treatment. This harsher, differential treatment may therefore properly be described as a form of 'punishment'.[50]

The Constitutional Court, affirming the Supreme Court of Appeal, held that the appellant's detention as a sentenced offender in maximum security, after his successful appeal until his further charge was withdrawn, was unlawful. It followed that the state thereby failed to comply with the substantive component of the section 12(1)(a) right by depriving the appellant of his freedom 'without just cause'.[51] Furthermore, the fact that the deprivation was in no way rationally connected to an objectively-determinable purpose[52] must mean that it was also 'arbitrary' within the meaning of that provision.[53] Given this jurisprudence and the facts before the Constitutional Court, Langa CJ held that in detaining the appellant as a sentenced prisoner in maximum security, the state failed to comply with the substantive component of the section 12(1)(a) right. Accordingly, the breach of section 12(1)(a) was held to be sufficient in the circumstances of this case to render the applicant's detention unlawful for the purposes of a delictual claim for damages.[54]

A typical example of the police trampling upon the liberty of a citizen is illustrated by the case of *Nyamhoka and Others v Officer Commanding, Zimbabwe Republic Police and Others*.[55] The four applicants were arrested and detained in excess of the statutory 48-hour limit. Soon after the arrest, the first applicant was subjected to torture, beatings and other abuses. He was interrogated for long hours without any rest or break. He was induced to sign a prepared affidavit implicating the fourth applicant on the pretext that he would be released on bail. The applicants were subsequently brought to court and charged with offences under the Public Order Act chapter 11:17.[56] The applicants sought urgent relief to have the detention declared wrongful and unlawful. Under section 13(1) of the Constitution of Zimbabwe of 1980, no person shall be deprived of his or her liberty except as may be authorised by the law. Subsection (2) then lists nine instances where the law would authorise deprivations of liberty and, in a pattern consistent with constitutional guarantees of

50 *Whittaker v Roos and Bateman, Morant v Roos and Bateman* 1912 AD 92 121 *per* Innes JA.

51 *Zealand v Minister of Justice and Constitutional Development & Another* 2008 (4) SA 458 (CC) para 34. In terms of this subsection, '[e]veryone has the right to freedom and security of the person, which includes the right (a) not to be deprived of freedom arbitrarily or without just cause'. The courts in South Africa have since held that the right not to be detained without trial guaranteed in sec 12(1)(b) of the South African Constitution belongs to both citizens and foreigners; *Lawyers for Human Rights* para 27; *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA) para 26; *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA).

52 See *De Lange v Smuts NO & Others* 1998 (7) BCLR 779 (CC) para 23.

53 *Per* Langa CJ, *Zealand* (n 52 above) para 34.

54 *Zealand* (n 52 above) paras 52 & 53.

55 2007 (2) SACR 16 (ZHC) (*Nyamhoka*).

56 Acts 1/2002 & 6/2005.

fair process upon arrest, detention and trial,[57] section 13(3) provides that any person arrested or detained shall be informed as soon as reasonably practicable, in a language he or she understands, of the reasons for his or her arrest or detention. Further, the arrested or detained person must be permitted access to a legal representative of his or her choice and to hold communication with such a legal representative.

Hungwe J held that it was a violation of the applicants' constitutional right to personal liberty, first, by holding the applicants for over 48 hours without bringing them before a court of law, and subjecting them to varying periods of detention before they were brought to court, rendering their detentions illegal. Second, it was a serious violation of the applicants' constitutional rights to deny them access to counsel of their choice. This is a well-recognised constitutional right in Zimbabwe as established in earlier constitutional decisions.[58] The trial judge granted the orders sought and held that the behaviour of the police could bring the administration of justice into disrepute and would simply not be condoned. It deserved 'the highest possible censure' and 'cannot be justified in a democratic society'.[59]

In addition to the cases of *Sheehama, Kabotana* and *Iyambo* already mentioned,[60] it is also important to consider the Supreme Court of Namibia's judgment in *Ayoub v Minister of Justice*,[61] where the question was whether the exercise of the minister's discretion to issue an authority to proceed pursuant to section 10(1) of the Extradition Act 11 of 1996 was subject to judicial review. The appellant had challenged his arrest and detention pending deportation on the basis that his detention was – and any extradition that might follow would be – contrary to the provisions of sections 5(1)(e) and (2)(a) of the Extradition Act, on contended grounds that the offence for which extradition was being sought had become prescribed through the lapse of time and, because the appellant's conviction had been obtained in his absence, his extradition was precluded by the Act. If the answer to the question posed were in the affirmative, the further issue was whether the Minister was required to have regard to the restrictions for extradition in section 5 of the Act and, if so, whether the restriction in section 5(2)(a) precluded the Minister from authorising the magistrate to proceed with the extradition enquiry in terms of section 12 of the Act.

The Supreme Court held that, if the respondents were correct in their contention that the restrictions on extradition in part II of the

57 Sec 35 South African Constitution.

58 See eg *S v Wood* 1993 (2) ZLR 258 (S); *S v Sibanda* 1989 (2) ZLR 329 (S); *Minister of Home Affairs & Others v Dabengwa & Another* 1982 (1) ZLR 236 (S).

59 *Nyamhoka* (n 45 above) 22g-h.

60 See nn 28-35 above.

61 2013 (2) NR 301 (SC).

Act, which should have informed the Minister's decision, could only be enquired into once the hearing before the Magistrate had started or, worse, only be decided 'after hearing the evidence tendered at such enquiry', it would mean that the person whose extradition was being sought would have to remain in custody until then – unless he or she was released earlier on bail – even in the circumstances where the detention was in violation of the person's constitutional right to personal liberty. Such an interpretation of the Act was not supported by the language used and would be against the letter and spirit of the provisions of article 7 of the Namibian Constitution which, as the Supreme Court held in *Alexander*,[62] contained a substantive right to personal liberty. Accordingly, the appellant was entitled to challenge the decision of the Minister at this stage and did not have to wait for the enquiry proceedings to commence before he or she could raise the issues that adversely affect his or her liberty. Further, the issuing and execution of a warrant of arrest made severe inroads on the liberty of an individual and was only constitutionally permissible if it was both substantively and procedurally in accordance with the law. If an authority to proceed which, in turn, had triggered the endorsement of the external warrant and ultimately the arrest of the person whose extradition was being sought, was not considered and issued in accordance with the law, it violated the person's constitutional right to personal liberty and he or she should be entitled to challenge the validity of the Minister's decision and conduct in a competent court.[63]

3 Declarator in *Alexander*

It is important to point out that 'liberty ends where the power of arrest begins'.[64] Thus, when Parker J of the High Court of Namibia commented on the necessary intendments of article 7 of the Constitution of the Republic of Namibia 1990, the judge was making a statement of universal application. Parker J was correct when he held that article 7 did not pronounce that a person could not be deprived of his liberty. Rather, it provides that a person can be deprived of his or her liberty in terms of the Constitution, that is, insofar as the deprivation is done 'according to procedures established by law'.[65] The fact that the right to liberty 'is one of the most important fundamental rights of an individual'[66] does not detract from the view that this human right is not absolute; it has never been

62 Discussed in para 3.1 below.
63 *Ayoub* (n 62 above) para 40.
64 *Per* Brennan J in *Webster v McIntosh* (1980) 32 ALR 603 (FCAFC) 607.
65 *Alexander v Minister of Justice & Others* 2008 (2) NR 712 (HC) paras 62 & 63.
66 *Amakali v Minister of Prisons and Correctional Services* 2000 NR 221 223J.

expressed in absolute terms; it is a derogable right.[67] By parity of that reasoning, the trial judge held in *Alexander v Minister of Justice and Others*[68] that the applicant's right to freedom from arbitrary arrest or detention was also derogable; it was not absolute. Again, like article 7,[69] article 11(1)[70] of the Namibian Constitution does not say that no person shall be subjected to arrest or detention, but that, like article 9(1) of the International Covenant on Civil and Political Rights

67 In some constitutions, the right to personal liberty may be derogated from in given circumstances on the grounds of public order, public safety or public health. See eg art 12 of ICCPR; art 5(1)(e) of the European Convention on Human Rights 1950. In the South African Constitution, sec 36, the limitation clause, does not specifically mention public order, health or safety, but it does exempt limitations that are in terms of a law of general application to the extent that the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. The question which Griesel and Yekiso JJ was faced with in *Minister of Health, Western Cape v Goliath & Others* 2009 (2) SA 248 (CPD) paras 19 & 21 was whether the confinement at a hospital of drug-resistant tuberculosis patients pursuant to sec 7 of the National Health Act 61 of 2003 was inconsistent with their right to freedom in sec 12 of the South African Constitution. The court had no doubt that compulsory isolation in a hospital was a deprivation of freedom, but that it was not without just cause nor was it arbitrary. Isolation of patients with infectious diseases was universally recognised in open and democratic societies as justifiable to protect and preserve the health of citizens. Accordingly, sec 7 of the Act was wide enough to encompass the involuntary isolation of patients with infectious diseases. See, to the same effect, the Ontario Health Protection and Promotion Act 1990 on the basis of which *Toronto (City Medical Office of Health) v Deakin* [2002] OJ 2777 (Ont Ct Just) was decided.

68 *Alexander (*n 65 above).

69 In terms of this article, it is provided that '[n]o persons shall be deprived of personal liberty except according to procedures established by law'. See to the same effect art 21 of the Constitution of India as interpreted and applied in *Maneka Gandhi v India* AIR 1978 SC 597 674 (overruling the earlier case of *AK Goplan v Madras* 1950 SCR 88), to the effect that '[t]he passage of reasonableness which, legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades article 14 (the equality clause) like a brooding omnipresence and the procedure contemplated by article 21 must answer the best of reasonableness in order to be in conformity with article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of article 21 would not be satisfied.' See further *Jolly George Verghese & Another v Bank of Cochin* [1980] INSC 19, 1980 SCR (2) 913. See also art 40.4.1 of the Irish Constitution; *King v Attorney-General* (1981) IR 233; *McCann v Judges of Monahan District Court & Others* [2009] EIHC 276.

70 Art 11(1) of the Constitution of Namibia 1990 provides: '(1) No persons shall be subject to arbitrary arrest or detention. (2) No persons who are arrested shall be detained in custody without being informed promptly in language they understand of the grounds of such arrest.' Parker J explained these provisions in *Lielezo v Minister of Home Affairs & Another* [2010] NAHC 1 para 10: 'According to article 11 of the Namibian Constitution arrest is unlawful if it is arbitrary (sub-article (1); and detention is unlawful if the arrestee who is detained in custody is not informed promptly in a language the arrestee understands the grounds for such arrest (sub-article (2). The requirements in sub-article (1) and (2) of article 11 converge on one single onus (as Mr Coleman submitted) that the arrester must discharge; that is to say, the arrester must show that he or she had a good reason to arrest and detain the arrestee and he or she promptly informed the arrestee in a language the arrestee understood of the grounds for the arrest.'

(ICCPR)[71] and article 6 of the African Charter on Human and Peoples' Rights (African Charter),[72] it outlaws 'arbitrary'[73] arrest or detention '*per se* and *simpliciter*'. The correct statement of the law emanating from this case and other judgments from Commonwealth jurisdictions is that to arrest or detain an individual arbitrarily means that the arrest or detention has been carried out without lawful excuse, that is, a derogatory authority based on statutory mandate.[74]

At the other end of the spectrum, an arrest or detention can be lawful within the meaning of the derogation clause under the Constitution, such as that of Namibia and the aforementioned international instruments, if the arrest or detention is carried out with 'due process of law', which simply means within the framework of a law made by the due process of making law in a polity.[75] Simply put, a detention is arbitrary if it is not authorised by law.[76] Parker J's judgment in *Alexander* is sufficiently explicit:[77]

71 Art 9(1) of ICCPR provides that '[e]veryone has the right to liberty of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' It was held in *Van Alphen v The Netherlands*, Human Rights Committee Communication 305/1988, 23 July 1990 para 5.8, where the Committee found that the facts as alleged disclosed a violation of art 9 of the Covenant and went further to hold that the drafting history of art 9 para 1 confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remanding in custody must be necessary in all the circumstances, eg to prevent flight, interference with evidence or the recurrence of crime. The state party has not shown that these factors were present in the instant case. See also *Mukong v Cameroon* Human Rights Committee Communication 458/1991, 21 July 1994 para 9.8; *Kracke v Mental Health Review Board & Others (General)* [2009] VCAT 646 paras 621-666, where the Victorian Civil and Administrative Tribunal was dealing with equivalent provisions in the Charter of Human Rights and Responsibilities Act 2006 of the State of Victoria.

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

73 'Arbitrary', as Tindall J once described it, means 'capricious or proceeding merely from the will and not based on reason or principle'. *Beckengham v Bopksbury Licensing Board* 1931 TPD 280 282. Again, as Muller AJ said in *Djama v Government of Namibia & Others* 1993 (1) SA 387 (NmH) 394H: 'It will be arbitrary to detain a person if such detention is not authorised by law.' Thus, finding no arbitrariness in the arrest of the plaintiff by the agents of the state in *Lielezo v Minister of Home Affairs & Another* [2010] NAHC 1 para 9, Parker J held that they had a good reason for the arrest of the plaintiff. Furthermore, the arresting officer informed the plaintiff promptly in the language he understands the grounds for the arrest within the meaning of arts 11(1) and (2) of the Constitution of Namibia 1990.

74 L Baxter *Administrative law* (1984) 521-522.

75 W Wade & C Forsyth *Administrative Law* (2014) 22.

76 *Per* Muller AJ *Djama v Government of the Republic of Namibia & Others* 1993 (1) SA 387 (NmH).

77 *Alexander* (n 65 above) para 69.

> In terms of Namibia's constitutional jurisprudence as regards article 7 of the Constitution, an individual may be deprived of his or her right to liberty, including his or her freedom of movement, which is relevant in the present matter, but it must be done according to procedures established by law, eg the Criminal Procedure Act 1977,[78] the Extradition Act 1996,[79] and the Immigration Control Act 1993.[80] Such a law, for example, the Criminal Procedure Act or the Immigration Control Act, decides on what grounds and in what manner the deprivation under the particular Act may take place. On that score, I accept Mr Chaskalson's submission that articles 7 and 11(1) rights have both substantive and procedural elements in their contents.[81]

The principles outlined in the foregoing trial judgment were not interfered with on appeal to the Supreme Court of Namibia in *Alexander v Minister of Justice and Others*,[82] except that the latter judgment dealt with the question whether the constitutional right to liberty of a person arrested and detained under section 21 of the Extradition Act 1996[83] was threatened by the lack of a right to apply for bail, which was an issue which the trial judge did not decide because it was not ripe for adjudication. The Supreme Court, therefore, had to decide whether article 7 of the Constitution of Namibia provided substantive protection to the right of liberty of an individual, and whether the provisions of section 21 of the Extradition Act infringed or abridged that right. Strydom AJA entertained no doubt that[84]

> the right to liberty is one of the cornerstones on which a democratic society is built. Without such right there is no protection for the individual against arbitrary arrest and detention.[85] The importance of the right to liberty was acknowledged in decisions in Namibia and also in decisions prior to independence.[86]

The Supreme Court[87] took cognisance of the fact that the right to liberty was at stake in extradition matters such as in the present case. The reason is that, once a request for extradition made by one state to another is acted upon, the individual involved is arrested and, if not granted bail, is kept in detention until he or she is surrendered to the requesting state. If bail is granted at an earlier stage, arrest and

78 Act 51 of 1977.
79 Act 11 of 1996.
80 Act 7 of 1993.
81 *Per* Langa CJ in *Zealand* (n 52 above) para 33; *S v Coetzee & Others* 1997 (3) SA 527 (CC) para 158 *per* O'Regan J; *De Lange v Smuts NO & Others* 1998 (3) SA 787 (CC) para 18 *per* Ackermann J.
82 *Alexander* (n 8 above).
83 Act 11 of 1996.
84 Maritz JA and Damaseb AJA concurring.
85 *S v Acheson* 1991 NR 1 (HC) 10A-C; *Djama v Government of the Republic of Namibia* 1992 NR 37 (HC) 44F-J; *Julius & Another v Commanding Officer, Windhoek Prison & Others* 1996 NR 390 (HC).
86 *Alexander* (n 8 above) para 118. See eg *Katofa v Administrator-General for SWA & Others* 1985 (4) SA 211 (SWA) 220I-221D.
87 *Alexander* (n 8 above) para 117. See also *per* Lord Hope *In re Hilali* [2008] UKHL 3 para 30.

detention will follow once a committal is made. In practical terms, such detention was of an indeterminate period and could continue for years.[88]

It was held that, where an act of parliament encroaches upon a fundamental right, the question whether such encroachment was at all permissible must be answered as to whether such limitation was authorised by the particular article and on article 22 of the Constitution. Where the article does not permit any limitation, it is said that the protection is absolute. Unlike the protection for human dignity in article 8, which the Supreme Court has held imposed an obligation on the state which was 'absolute and unqualified',[89] article 7 is, as Parker J rightly held, not absolute. This is because it authorises the deprivation of liberty 'according to procedures established by law'. However, where such limitation is authorized, it should not go further than what is necessary to achieve the object for which it was enacted. This conclusion can easily be garnered from the wording of article 22, which prohibits a limitation which negates the essential content of the right.[90]

Strydom AJA further held that the test whether such limitation is permissible in terms of the Constitution is whether it constitutes a disproportionate interference, in this instance, with the right to liberty, as guaranteed by article 7.[91] Although its application as to what must be considered was not always similarly worded, the effect of what is to be considered is clear. In *Heaney v Ireland*,[92] an Irish court referred to and approved the test as applied in Canada[93] and the European Court of Human Rights,[94] and held:

> The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test.

In order to pass the proportionality test, the provisions must:

- be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- impair the right as little as possible; and
- be such that their effects on rights are proportional to the objective.

88 See eg *S v Koch* 2006 (2) NR 513 (SC).

89 Eg in *Ex Parte Attorney-General: In re Corporal Punishment* 1991 (3) SA 76 (NmS), 1991 NR 178 (SC) 187I-188B.

90 *Alexander* (n 8 above) para 121.

91 *Alexander* (n 8 above) para 120. See also *S v Vries* 1998 NR 316 (HC); *African Personnel Services (Pty) Ltd v Government of the Republic of Namibia & Others* 2009 (2) NR 596 (SC).

92 [1994] 3 IR 593 607 *per* Costello J. See also *McCann v The Judge of Managhan District Court* [2009] IEHC 276.

93 See eg *Re BC Motor Vehicle Act* [1985] 2 SCR 486; *R v Hess* [1990] 2 SCR 906; *R v Brown* [2002] 2 SCR 185; *Levis v Tetrault* [2006] 1 SCR 420.

94 *Alexander* (n 8 above) para 121. See eg *Winterwerp v The Netherlands* [1979] 2 EHHR 387; *Bozano v France* (1986) 9 297; *Conka v Belgium* (2002) 34 EHHR 54.

Again, speaking of the proportionality test under the UK Human[95] Rights Act 1998, Lord Hope stated in *AS (Somalia) (FC) and Another v Secretary of State for the Home Department*[96] that three principles must be borne in mind:

- whether the objective which is sought to be achieved is sufficiently important to justify limiting the fundamental right;
- whether the means chosen to limit that right are rational, fair and not arbitrary; and
- whether the means used impair the right as minimally as is reasonably possible.

In this regard, held Strydom AJA, the onus rests on the person complaining to prove that his or her constitutional freedom has been breached or threatened with breach. Once this onus is discharged, it is for the party relying on a permissible limitation to prove that the limitation falls within the scope of what is permitted in terms of the Constitution.[97] It is clear that the right of a person to be extradited to apply for bail extends to the time when he or she is surrendered to the requesting state. In terms of the Namibian Extradition Act, the person whose extradition is requested is entitled to apply for bail at all stages of the proceedings up and until a committal order is made. It follows also as a matter of logic that the deprivation of that right impacts on the right to liberty of the person committed who, as far as section 21 goes, is now deprived of liberty until he or she is surrendered to the requesting state. The appellant in this case has established that section 21 of the Extradition Act constitutes a breach of his constitutional right to liberty and that he is an aggrieved person within the contemplation of article 25 of the Constitution.[98]

Where the Constitution allows a limitation of a constitutional right, as is the case in this instance, such limitation must be proportional. The state's duty to surrender a person to a requesting state, after his or her committal, is sufficiently important for the state to take measures which will enable it to fulfil that duty. This duty operates on the international plain and is an undertaking to surrender a requested

95 *Alexander* (n 8 above) paras 120-121.

96 [2009] UKHL 32 paras 16-18. It was also held in this context by Lord Hope that there is a general international understanding as to the matters which should be considered where a question is raised as to whether an interference with the fundamental right is proportionate. These matters were identified in the Privy Council case of *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 by Lord Clyde. He offered the above-mentioned three-stage test which is to be found in the analysis of Gubbay CJ in *Nyambirai v National Social Security Authority* [1996] LRC 64, where the Chief Justice drew on the jurisprudence from South Africa and Canada. See further *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 547B *per* Lord Steyn. In *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 para 26, Lord Bingham summed the matter up succinctly when he said that 'the limitational interference must be directed to a legitimate purpose and must be proportionate in scope and effect'.

97 *Alexander* (n 8 above) para 122. See also *African Personnel Services (*n 92 above) para 65.

98 *Alexander* (n 8 above) para 123.

person to the requesting state once a committal has been achieved. One such measure to ensure compliance with the government's duty is, in appropriate instances, to deprive the person of his or her liberty. Therefore, it also follows that such a measure would serve a legitimate objective which is rationally connected to the purpose of the limitation.[99]

However, in order to pass the proportionality test, the limitation of the constitutional right must also be fair and not arbitrary and the means used must impair the right as minimally as is reasonably possible. It is in this regard that the absolute prohibition on the application and granting of bail after committal of a person, provided for in section 21, falls short and cannot be said to be constitutional. The provision is unfair and arbitrary because it does not distinguish between instances where there is little or no fear that the person to be extradited may flee and so will be unavailable for the state to comply with its duty to surrender him or her, and instances where there is a legitimate fear that this may happen and where the only way to secure his or her presence would be to deprive him or her of the right to personal liberty. The denial of a right to apply for bail would be particularly harsh on Namibian citizens. This denial of the right to apply for bail, and to be granted bail in appropriate circumstances, must further be seen against the fact that detention after committal may be for an indefinite period and may, in certain circumstances, continue for years rather than weeks or months. This delay may be caused by administrative problems and is inevitable where the person to be extradited avails himself or herself of the right to appeal to the High Court and further to the Supreme Court. Section 3(1) of the Extradition Act prescribes that an extraditable offence is one which constitutes, under the laws of the requesting country, an offence which is punishable with imprisonment for a period of 12 months or more. It is not far-fetched to see that an unconvicted person may, as a result of the provisions of section 21, be held in prison for periods far longer than the actual imprisonment he or she may receive if convicted in the requesting country.[100] In the light of these reasons, the Supreme Court held that section 21 of the Extradition Act was unconstitutional and must be struck down.

An analogy can be taken of the case of *Kracke v Mental Health Review Board*[101] where, although the facts were different, the court had to grapple with the proportionality analysis. The question was whether the limitations on the liberty of the applicant by the Mental Health Act 1986 of the State of Victoria were 'under law' in terms of the limitation provision in section 7(2) of the Victoria Charter. Justice Kevin Bell, the President of the Appeal Tribunal, undertook an exhaustive proportionality analysis involving the nature of the rights;

99 *Alexander* para 124.
100 *Alexander* para 125.
101 [2009] VCAT 646 (23 April 2009) paras 748-784.

the importance and purpose of the right; the nature and extent of the limitation; the relationship between the limitation and its purpose; the less-restrictive means reasonably available; and the overall proportionality assessment. He held that the limitations on the applicant's human rights imposed by the operation of the provisions of the Mental Health Act for making, maintaining and reviewing involuntary and community treatment orders and made under law, were reasonably and demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Therefore, the provisions satisfy the general limitations of section 7(2) of the Charter. Unreviewed orders were not incompatible with human rights because the system contains a range of safeguards and checks and balances of which reviews, although of considerable importance, were only one part. Thus, the proportionality of the limitations in treatment orders did not depend on board review alone.

4 Some European case law on detention of mentally-ill patients

This brief discussion of some European case law is intended to introduce the deliberations upon the Namibian case involving the negligence of the hospital authorities in detaining a mental patient literally arbitrarily. It has been observed that in both the United Nations (UN) Covenant and the European Convention, the confinement of a person of 'unsound mind' is permissible insofar as it is in accordance with procedure prescribed by law. Thus, in *Ashingdane v United Kingdom*,[102] the European Court stated three minimum standards for determining whether detention was warranted in terms of article 5(1(e) of the European Convention, namely:

- Except in emergency cases, a true mental disorder must be established before a competent authority on the basis of objective medical evidence.
- The mental disorder must be of a kind or degree warranting compulsory confinement.
- The validity or continued confinement depends upon the persistence of such a disorder.

The Court had no reason to doubt the objectivity and reliability of the unanimous[103] opinions of the medical authorities in this case.[104] The argument that, by keeping the applicant at different institutions instead of one that was liberal, not strict, the authorities were making arbitrary choices, that he was not lawfully detained, the Court answered, having regard to well-established principles of the court in

102 (1985) 7 EHRR 528.
103 *Ashingdane* (n 103 above) para 37, following *Winterwerp* (n 95 above) 4.
104 (1985) 7 EHRR 528 para 38.

Guzzardi v Italy,[105] the applicant was not detained.[106] Again, in *Megyeri v Germany,*[107] the applicant was placed in criminal detention in a psychiatric hospital in terms of the mental health legislation in Germany. He challenged the detention in court but was not allocated a public lawyer. He claimed a breach of the right to access a court in article 5(4) of the Convention. The court held that the domestic scheme would be compatible with that right if it had four attributes:

- Detained persons must be entitled to take proceedings at reasonable intervals before a court to test the continuing lawfulness of their detention, at least where this does not happen automatically.
- The procedure in the court must be of a judicial character, with guarantees appropriate to the kind of deprivation of liberty, and particular circumstances, in question.
- The detained person must have a right to be heard in person or, where necessary, by some form of representation, and a special procedure may be called for to protect the interests of people with mental disabilities who cannot fully represent themselves.
- Persons detained for being of unsound mind should not have to take the initiative to obtain legal representation.

In addition to the foregoing, there are further instances where the European Court found no deprivation of liberty.[108] For instance:

- It was held in *Neilsen v Denmark*[109] that restrictions on the child applicant's freedom of movement and contacts were no different from restrictions which might be imposed on a child 'in ordinary hospital', the conditions being 'as similar as possible to a real home'.
- In *HM v Switzerland,*[110]it was relevant that, though 'not able to go home', the applicant had freedom of movement, was able to maintain social contact with the outside world and hardly felt the effects of her stay.
- In *Haidn v Germany,*[111]following his release from detention on probation, the applicant was required by the court to live in an old people's home, which he could not leave without his custodian's permission. The court expressed 'serious doubts' as to whether there was a deprivation of liberty, although it did not decide the point.

There is the Grand Chamber decision in *Stanev v Bulgaria*,[112] where the applicant spent several years in a social care institution where conditions were very unfavourable. He needed permission to go out to the nearest village and leave of absence to visit his home. All these were entirely at the discretion of the home's management which kept his identity papers and finances. It was held that the objective requirements of deprivation of liberty as well as the subjective element were met because he could understand his situation and had

105 [1980] ECHR 5.
106 See also *HM v Switzerland* [2003] ECHR 196; *Nielsen v Denmark* [1988] ECHR 23; *Secretary of State for the Home Department v Mental Health Review Tribunal and PH* [2002] EWCA Civ 1868.
107 [1992] ECHR 49 paras 22 & 27.
108 See the summary in *P v Cheshire and Chester Council* [2014] UKSC 19 para 97.
109 (1988) 11 EHRR 175 para 70.
110 (2002) 38 EHRR 314 paras 32, 45-46 & 48.
111 (2011) ECHR 39 para 82.
112 (2012) 55 EHRR 696.

expressed his wish to leave, as against the circumstances of *HM v Switzerland*,[113] where the applicant had agreed to stay.[114] It was held that the fact that a person lacks capacity does not necessarily mean that he is unable to comprehend his situation. Prior to *Stanev*, the court has held that there was a deprivation of liberty in the following circumstances: (i) where the applicant who had been declared legally incapable and admitted to a psychiatric hospital at his legal representative's request, had unsuccessfully attempted to leave the hospital;[115] (ii) where the applicant had initially consented to her admission to a clinic but had subsequently attempted to escape;[116] and (c) where the applicant was an adult incapable of giving his consent to admission to a psychiatric institution which, nonetheless, he had never attempted to leave.[117] The case of *HM* was distinguished on the grounds that the nursing home in that case was an 'open institution which allowed freedom of movement and encouraged contact with the outside world' and offered a regime 'entirely different' from that in *HL*.[118]

5 Delictual angle to personal liberty deprivation

5.1 Delictual elements

The consideration of liability in the law of delict in Namibia commences as in South African law,[119] with the element of wrongfulness, a recognition that a person's omission to prevent harm to another is not unlawful unless the former is under a legal duty to act positively to prevent the harm and fails to do so.[120] Whether a legal duty to act exists falls to be objectively assessed in the circumstances of each case, with reference to the contemporaneous legal convictions of the community concerned including, but not limited to, the expression they find in prevailing legal principles, instruments, pronouncements and policies.[121] Indeed, Brand JA held

113 n 107 above.
114 (2012) 55 EHRR 696 paras 128 & 131.
115 *Shtukaturov v Russia* (2008) 54 EHRR 962 para 108.
116 *Storck v Germany* (2005) 43 EHRR 96 para 76.
117 *HL v United Kingdom* (2004) 40 EHRR 761.
118 Paras 89-94.
119 See eg *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as amicus curiae*) 2003 (1) SA 389 (SCA).
120 See eg *Dresselhaus Transport CC v Government of the Republic of Namibia* 2005 NR 214 (SC). See, generally, Okpaluba (n 14 above) 184.
121 *Minister of Basic Education, Sport and Culture v Vivier NO* 2012 (2) NR 613 (SC) para 10.

in *Hawekwa Youth Camp v Byrne*[122] that:[123]

> The principles regarding wrongful omissions have been formulated by this court on a number of occasions in the recent past. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is *prima facie* wrongful. By contrast, negligent conduct in the form of omission is not regarded as *prima facie* wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination, involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages.

Again, Namibian courts similarly adopt the test for negligence, as formulated by Holmes JA in *Kruger v Coetzee*,[124] to the effect that liability will only arise if a *diligens paterfamilias* in the position of the defendant (a) would have foreseen the reasonable possibility of his or her conduct causing injury to the plaintiff; and (b) should have taken reasonable steps to guard against such an occurrence. Foresight as to the exact nature and extent of the damage was not required and it would suffice if the general manner of its occurrence was reasonably foreseeable.[125]

The courts also consider both the factual and legal aspects of causation,[126] the theories of adequate causation and reasonable foreseeability developed to define the ambit of ensuing legal liability and the more recent flexible approach to the limitation of liability informed by policy considerations, and the notions of reasonableness, fairness and justice.[127] Thus, in applying the above factors to the facts of the *Minister of Basic Education* case, where a vulnerable mentally-retarded child who needed special care but which the superintendent

122 2010 (6) SA 83 (SCA) para 22, cited with approval in *Minister of Basic Education* (n 122 above) para 10 n 5.

123 See also *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of SA* 2006 (1) SA 461 (SCA) para 14; *LTC of Delmas v Boshoff* 2005 (5) SA 514 (SCA) paras 19-20; *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12.

124 1966 (2) SA 428 (A) 430E-G.

125 *Minister of Basic Education* (n 122 above) para 11.

126 See also *Shaanika v Ministry of Safety and Security* [2009] NASC 11 (23 July 2009) where, applying both tests, Strydom AJA held that the admissions by the defendants constituted negligence on their part and that such negligence materially contributed to the deceased's death, which gave rise to the claim by the dependants. Taking into consideration the whole tenor of the admissions made, it was intended to be a complete admission that the harm caused wrongfully by the custody officer was causally linked to the damages suffered by the dependants.

127 *Minister of Basic Education* (n 122 above) para 12; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) 764; *Road Accident Fund v Russell* 2001 (2) SA 34 (SCA) 39; *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) 215-217; *Ebrahim v Minister of Law and Order* 1993 (2) SA 559 (T) 564-566; *Gibson v Berkovitz* 1996 (4) SA 1029 (W) 1040-1041.

of the hostel where she was failed to exercise, it was held that the superintendent was negligent to have allowed her to be taken away to an environment the superintendent did not know. The court concluded that on the application of either the reasonable foreseeability test or the adequate causation test, it remained inescapable that the damages suffered by the child and her guardian were causally linked to the superintendent's decision to permit 'a mentally-retarded child to accompany an unauthorised adult to stay in an unknown environment where the child might come into contact with unknown characters'.[128]

5.2 Undue delay in releasing a President's patient

The appellant in *Gawanas v Government of the Republic of Namibia*[129] had been detained as a President's patient in terms of section 77(6) of the Criminal Procedure Act 51 of 1977, read with chapter 3 of the Mental Health Act 18 of 1973. In 2002, the hospital board where she was detained recommended that she be released on leave for three months in order to see if she would be able to cope on her own. She was temporarily released. On her return from leave, her condition had deteriorated from what it was when she left the hospital. Later during 2002, she was again temporarily released. She returned in January 2003 and the resident psychiatrist recommended her release. The hospital board made a recommendation which eventually reached the Minister of Justice on 24 June 2003. The Minister averred that it was only the President who could order the release of the appellant, since that power had not been delegated to the Minister. The appellant's release was eventually ordered in December 2003. In her action for damages, the appellant alleged that she had been wrongfully and unlawfully detained in the Mental Health Centre, Windhoek Central Hospital, for the period 13 January 2003 to 15 December 2003. Her claim was based on the *lex Aquilia,* as well as certain provisions of the Constitution: the right to liberty, human dignity and fair administrative justice.

Her claim was dismissed at the High Court, ostensibly because the protection afforded by articles 7 and 8 was not designed to include unlawful detention in terms of the Mental Health Act. They were framed and meant to deal with unlawful arrests of a particular type. The Supreme Court rejected this 'too narrow an interpretation' of such important provisions of the Constitution,[130] whereas[131]

> our case law suggests that, in the absence of other considerations, the provisions contained in chapter 3 of our Constitution should be interpreted

128 *Minister of Basic Education* (n 122 above) para 12.

129 n 9 above.

130 *Gawanas* (n 9 above) para 27.

131 *Per* Lord Wilberforce, *Minister of Home Affairs v Fisher* [1980] AC 319 (HL) 329. See also *Minister of Defence v Mwandinghi* 1993 NR 63 (SC) 70G.

> widely so as to give to individuals the full measure of the fundamental rights and freedoms referred to.

It is not the legality of the detention order that was in question here, but the non-release of the patient in accordance with the doctors' recommendations about her fitness to be released. It was held that a person compulsorily detained in a mental institution was physically restrained and his or her right to freedom and movement had been taken away. He or she was subject to certain discipline enforced by the institution.[132] Accordingly, compulsory incarceration in a mental institution when a person was mentally fit did impair the liberty and dignity of that person, hence article 7, which protected individual liberty, had to be broadly interpreted.[133] Again, there was a statutory duty upon the board and its personnel and the Minister of Justice and the personnel of the Ministry to act reasonably. In determining what is 'reasonable' in the circumstances, a court would take into consideration the provisions of articles 7 and 8 and, in particular, bear in mind that the compulsory detention of a person in a mental institution where a person was mentally fit, would be a limitation of that person's liberty and dignity.[134] As Strydom AJA further explained:[135]

> Detention seems to be in a niche of its own as far as foreseeability is concerned. Where a person is unlawfully detained the person causing that can hardly be heard to say that harm was not foreseeable. The liberty of an individual and protection against arbitrary arrest and detention form the cornerstones of any constitution based on human rights and respect for the individual. In regard to Namibia, this Court has found[136] that the right to liberty, set out in article 7, gives rise to a substantive right which guarantees personal liberty.

The court rejected as incorrect the state's defence that, insofar as the appellant's detention was in terms of a court order, it was lawful. That argument failed because it meant that a person could be detained for as long as the order subsisted. It also meant that the order authorised the institutions of the state to interfere with the rights of a person so certified, but that was not a *carte blanche* to such institutions to act as they pleased.[137] The fact was that the Mental Health Act provided in detail the steps to be taken to obtain the release of a person detained in terms of an order by a magistrate and, once a person so detained was fit for release, a decision left to the health authorities and the court, the steps prescribed by the Mental Health Act had to be complied with reasonably. Those authorities that were mandated to

132 *Gawanas* (n 9 above) para 19. See also *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A).

133 *Gawanas* (n 9 above) para 19.

134 *Gawanas* para 26.

135 *Gawanas per* Strydom AJA, para 43.

136 *Alexander* (n 8 above).

137 *Gawanas* (n 9 above) paras 23-24. See also *Simon's Town Municipality v Dew* 1993 (1) SA 191 (A).

obtain the release of a patient were under a duty to act cautiously and reasonably in order to minimise or avoid further injury to such a patient and, where this was not done, they would have overstepped their authority[138] and a valid court order would not assist them.[139]

The absence of any reasonable explanation for the delay to act in order to discharge the appellant, which was a necessary step in the process before a judge could order her release, clearly showed that the state was negligent. A *diligens paterfamilias* would have, in these circumstances, foreseen the possibility of his conduct causing loss to another person and would have taken reasonable steps to avoid such possibility.[140] It was thus held that the respondents owed a legal duty to take reasonable steps to secure the appellant's release once her medical condition improved to the point that her doctors considered her continued detention in an institution unnecessary.[141] The respondent was held liable to compensate the appellant for damages under the *lex Aquilia*.[142]

Gawanas can be likened to the UK Supreme Court judgment in *R (Kambadzi) v Secretary of State for the Home Department*[143] which, however, differed on the facts because it was concerned with detention pending deportation after the immigrant had completed a term of imprisonment consequent upon a criminal conviction, and had the common denominator of detention beyond the permissible limit. The Department had a policy which involved review at regular, specified intervals. The question was whether compliance with the procedural requirement to hold those reviews was essential to the legality of the appellant's continued detention. Previously, the Supreme Court had held in *Lumba*[144] that the question was whether each relevant breach of the review requirement was material in public law terms in that it bore on, and was relevant to, the decision to detain. The majority of the Supreme Court held in *Kambadzi* that the Secretary of State was under a public law duty to comply with his own published policy. So, it was an abuse of power for the detainee to remain in detention in the absence of regular reviews at intervals which were fundamental to the propriety of continued detention. It was no defence for the Secretary of State to say that there were good grounds for detaining the appellant anyway. Unless the authority to detain was renewed under the powers conferred by the statute, the

138 *Gawanas* (n 9 above) para 21, citing *per* Corbett CJ, *Simon's Town Municipality* 196; JC van der Walt in WA Joubert (ed) *Law of South Africa* vol 8 para 30; J Neethling *et al The law of delict* (2010) 112-113; PQR Boberg *The law of delict* (1984) 771-773.

139 *Per* Strydom AJA, *Gawanas* (n 130 above) para 24.

140 *Gawanas* (n 9 above) para 42. See also *Kruger v Coetzee* 1996 (2) SA 428 (A) 430E-F.

141 *Gawanas* (n 9 above) para 44.

142 *Gawanas* paras 33 & 44.

143 [2011] 4 All ER 975 (SC).

144 n 15 above.

appellant was entitled to his liberty and to the common law damages he sought.[145]

6 Conclusion

As much as *Alexander* came to court as a judicial review matter and *Gawanas* was a delictual action, both cases revolved around the protection of the personal liberties of a foreigner in Namibia, on the one hand, and a mentally-ill person, on the other. In *Alexander*, the High Court upheld the constitutional right to personal liberty of the foreigner because the limitation placed on the right by section 21 of the Extradition Act was an unwarranted limitation of such a right in terms of section 22 of the Constitution. Parker J acknowledged the three universally-recognised understandings of the right to liberty, namely, (a) that it is one of the most important rights of the individual; (b) that that fact notwithstanding, the right to liberty is never expressed in absolute terms in the Constitution; and (c) that an arrest or detention is arbitrary if not carried out according to law, or it is not authorised by law. Upholding these aphorisms, and emphasising that the right to liberty 'is one of the cornerstones on which a democratic society is built',[146] the Supreme Court held that, although the right to liberty under article 7 may be derogable, unlike article 8 (human dignity), which is absolute because it permits of no limitation,[147] 'the test whether such limitation is permissible in terms of the Constitution is whether the limitation constitutes a disproportionate interference'[148] with the right in question. The onus is on the person who alleges a breach of his or her right to liberty.

In *Gawanas,* the Supreme Court held that compulsory incarceration in a mental institution where a person is mentally fit does impair the liberty and dignity of that person.[149] In light of the fact that all the ingredients of an action in delict were successfully established, the respondents were held to have owed the appellant a legal duty to take reasonable steps to secure her release soon after the doctors had certified that she was fit to be released. Her further detention in the institution became unnecessary. The matter was remitted to the High Court to determine the *quantum* of damages due to her. It is clear from these cases that in personal liberty adjudication, the courts find

145 See also *R v Governor of Durham Prison, ex parte Singh* [1984] 1 All ER 983; *Tan Te Lam v Superintend of Tai A Chau Detention Centre* [1996] 4 All ER 256; *Roberts v Chief Constable of Cheshire Constabulary* [1999] 2 All ER 326; *R v Governor of Brockhill Prison, ex parte Evans (No 2)* [2000] 4 All ER 15; *R (on application of Saadi) v Secretary of State for the Home Department* [2001] 4 All ER 961; *Nadarajah v Secretary of State for the Home Department* [2004] INLR 139.

146 *Alexander* (n 8 above) para 116.

147 *Alexander* para 117. See also *Ex parte Attorney-General: In re Corporal Punishment by Organs of the State* 1991 NR 178 (SC) 187I-188B.

148 *Alexander* (n 8 above) para 120.

149 *Gawanas* (n 9 above) para 19.

themselves in the middle of a dilemma: balancing the rights of the individual as against those of the public in whose favour the constitutional, statutory and common law powers of law enforcement are exercised by the police and other agents of the state. All in all, both *Alexander* and *Gawanas* were decided on the side of the protection of individual liberty. They were correctly decided in line with existing Namibian constitutional jurisprudence and prevailing international standards and common law norms whose favour the constitutional, statutory and common law powers of law enforcement are exercised by the police and other agents of the state. All in all, both *Alexander* and *Gawanas* were decided on the side of the protection of individual liberty. They were correctly decided in line with existing Namibian constitutional jurisprudence and prevailing international standards and common law norms.

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Equality constitutional adjudication in South Africa

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Summary

This article focuses on the South African judiciary and, in particular, the South African Constitutional Court's approach to the adjudication of the equality right in the Bill of Rights during the 20-year period since the official end of apartheid. The article does this by evaluating a necessarily select number of cases dealing with equality that have come before the Constitutional Court to find out whether the Court has consistently adopted a substantive notion of equality in its deliberations, an approach encouraged by the equality clause itself. The article offers some suggestions for both the South African Constitutional and others courts when engaging in equality rights adjudication. The article is a clarion call for the judiciary to adopt a contextual, robust and vigilant approach to equality and other rights adjudication.

Key words: *human rights adjudication; right to equality; substantive equality; equality adjudication; South African Constitution*

1 Introduction

As South Africa celebrates 20 years of constitutionalism, it is timely to examine critically the South African Constitutional Court's approach to one of the central pillars in pursuit of a non-racial and non-sexist South Africa: the interpretation, adjudication and implementation of the right to equality. The reasons why this article focuses on the right to equality are the following: Firstly, in pre-democratic South Africa, inequality and systemic discrimination were faultlines in violent conflict. During apartheid, South Africa was described as one of most

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unequal societies in the world,[1] a 'rights pariah',[2] with a 'wicked system of law'.[3] Such wickedness controlled where South Africans were born,[4] where they lived,[5] where they were educated,[6] who they married,[7] with whom they socialised[8] and what jobs they did.[9]

Arguably, as a result of South Africa's 'great experience in constitutionalising inequality',[10] the equality right provision and other interrelated rights, such as dignity and socio-economic rights, occupy key positions in the South African Bill of Rights and have rightly been described as being truly 'revolutionary'.[11] Due to limited space and bearing in mind the focus for the 20 years of democracy special edition, this article primarily focuses on how the apex court in the country has dealt with equality rights cases. The article does this by focusing on a necessarily select number of equality cases, namely, *Prince,*[12] *Du Toit,*[13] *Jordan,*[14] *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others,*[15] and *MEC for Education: KwaZulu-Natal and Others v Pillay*.[16] These cases have been selected to determine whether the Court has consistently adopted a substantive notion of equality in its deliberations, an approach encouraged by the equality clause itself (see below). Furthermore, the Constitutional

1 A Chaskalson 'From wickedness to equality: The moral transformation of South African law' (2003) 1 *International Journal of Constitutional Law* 590.

2 V Hart 'The contagion of rights: Constitutions as carriers' in P Hanafin & M Williams (eds) *Identity, rights and constitutional transformation* (1999) 40.

3 Chaskalson (n 1 above) 590.

4 Population Registration Act 30 of 1950.

5 The Group Areas Act of 1950 provided for the segregation of different racial groups in different areas and resulted in a number of forced removals. One source estimates that in the period 1960 to 1983, over three-and-a-half million people were forcibly removed under one or other apartheid law. L Platzky & C Walker *The surplus people: Forced removals in South Africa* (1985) 10.

6 The Bantu Education Act of 1953 transferred responsibility for the administration of black education to the Department of Native Affairs. Under this Act, separate education systems for whites and blacks were established.

7 The Immorality Act of 1950 and Prohibition of Mixed Marriages Act of 1949 proscribed interracial sex, marriage and other forms of contact.

8 Separation was also extended to public facilities such as parks, beaches, schools and public transportation by measures such as the Reservation of Separate Amenities Act of 1953.

9 Mines and Works Act 1911 which institutionalised discrimination in the workplace as it reserved certain jobs for whites only in the workplace. See also the Mines and Works Amendment Act 25 of 1926 which provided that certificates of competence in skilled trades were only to be granted to whites and coloureds.

10 *Prinsloo v Van Der Linde & Another* 1997 (6) BCLR 756 (CC) para 20.

11 J de Waal *et al The Bill of Rights handbook* (2001) 2.

12 *Prince v President, Cape Law Society* 2002 (3) BCLR 231 (CC); 2002 (2) SA 794 (CC).

13 *Du Toit* & A*nother v Minister of Welfare and Population Development & Others* 2003 (2) SA 198 (CC).

14 *Jordan & Others v S* 2002 (6) SA 642 (CC).

15 *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC) (*National Coalition*).

16 *MEC for Education: KwaZulu-Natal & Others v Pillay* Case CCT 51/06 [2007] ZACC 21 (*Pillay*).

Court's approach to the adjudication of the right to equality is a 'focal point'[17] for other jurisdictions contemplating the constitutionalisation of rights as South Africa has been adjudicating on this right since 1994. South Africa has therefore a corpus of comprehensive equality jurisprudence and is 'uniquely situated to provide insight and permit assessment'[18] on what type of approach is needed to help ensure that an equality right contributes to creating a more equal society. Commenting on South Africa, Kalula states:[19]

> [T]he success or failure of the South Africa transformation will stand as an example to the region and the rest of the world, given the immensity of the division … and the systematic discrimination and disregard for human rights.

Before examining the Constitutional Court's approach in the above cases, for conceptual clarity and coherence of argumentation, the following section will consider briefly what equality means. Having analysed the cases in section three, section four draws conclusions and recommendations on lessons to be learnt for both South Africa and other jurisdictions involved in constitutional equality adjudication.

2 Defining equality

Equality has perplexed writers and thinkers for well over two millennia.[20] To this day, there is no consensus on the exact meaning of equality. As Fredman states:[21]

> We all have an intuitive grasp of the meaning of equality and what it entails, yet the more closely we examine it, the more its meaning shifts.

Broadly speaking, a distinction is frequently drawn between formal and substantive concepts of equality.

2.1 Formal equality

Formal equality or equality as consistency requires that all persons who are in the same situation be accorded the same treatment and that people should not be treated differently because of arbitrary characteristics such as religion, race or gender. This formulation resonates with the original Aristotelian conception of equality, that like cases should be treated alike. It is the most widespread and least

17 A Pillay 'Economic and social rights adjudication: Developing principles of judicial restraint in South Africa and the United Kingdom' (2013) July *Public Law* 599. Although Pillay is talking about economic and social rights jurisprudence, the same premise can apply to equality cases.

18 E Christiansen 'Using adjudication to remedy socio-economic injustice: Comparative lessons from South Africa' (2008) 13 *University of California, Los Angeles Journal of International Law and Foreign Affairs* 369 376.

19 E Kalula 'Editorial' (2001) 5 *International Journal of Discrimination and the Law* 99.

20 For a philosophical and historical account, see S Fredman *Discrimination law* (2011) ch 1.

21 Fredman (n 20 above) 1.

contentious understanding of equality and forms the conceptual basis of the legal concept, direct discrimination.[22] Under this formal notion of discrimination, as long as there is consistency in treatment, there will be no discrimination. A formal approach to equality therefore only requires equal application of the law without further examination of the particular circumstances or context of the individual or group and, consequently, the content and the potential discriminatory impact of the law and/or policy under review. In other words, it is a symmetrical concept. Direct discrimination also requires a comparator. The comparator in proving direct discrimination tends to be the 'dominant norm': white, male, able-bodied, and heterosexual.[23] Such a limited notion disregards all aspects of group membership, and tends to individualise everything so that patterns of group-based oppression and subordination are rendered invisible.

This is not the way forward, especially in light of the growth of different cultures, religions and traditions in societies throughout the world. As Fraser notes, by abstracting individuals from their social and cultural context, they become by default conceptualised and treated as being in the same position as those in the privileged groups.[24] Fredman describes this as 'being clothed in the attributes of the dominant culture, religion or ethnicity'.[25] Thus, stressing sameness undermines the more important norm and value of diversity.[26] This is also echoed by Finley, who states that formal equality 'marginalizes, disempowers, and renders invisible those such as women, who have seemed most unlikely to ever melt into the white male model of homogeneity'.[27] On this view, 'difference' is considered as having a stigmatising effect as the 'assimilationist' idea underlying the conception of consistency as equality presumes sameness.[28] Given these limitations of formal equality, the author's preferred concept of equality is one which is concerned with making sure that laws or policies do not impose subordinating treatment on those already suffering social, political or economic disadvantage.

2.2 Substantive equality

The preferred notion of equality is substantive equality. A substantive approach to equality orients the right to equality from a negatively-oriented right of non-discrimination to a positively-oriented right to

22 Direct discrimination occurs, eg, where a person is disadvantaged simply on the ground of his or her race, sex, gender or some other criterion.

23 Fredman (n 20 above) 9.

24 N Fraser 'From individual to group' in B Hepple & E Szyszczak (eds) *Discrimination: The limits of the law* (1992) 102-103.

25 S Fredman 'Equality: A new generation' (2001) 30 *Industrial Law Journal* 145 154.

26 J Flax 'Beyond equality: Gender, justice and difference' in G Block & S James (eds) *Beyond equality and difference: Citizenship, feminist politics and female subjectivity* (1992).

27 LM Finley 'Transcending equality theory: A way out of the maternity and the workplace debate' (1986) 86 *Columbia Law Review* 1118 1153.

28 Finley (n 27 above) 1154.

substantive equality.[29] It does this by ensuring that laws or policies do not reinforce the subordination of groups already suffering social, political or economic disadvantage and requires that laws treat individuals as substantive equals, recognising and accommodating peoples' differences. Analysing the effects of laws, policies and practices on a disadvantaged individual or group, substantive equality is concerned with eliminating barriers which exclude certain groups from participation in the workplace or celebrating their different cultures and practices. With the emphasis on the impact of laws or policies and the move beyond consistency to substance, the substantive equality approach incorporates indirect discrimination in its analysis. The problem of indirect discrimination is rife in societies for those who were discriminated under the past undemocratic regime as they would not have had equal access to education, jobs, housing and medical care. Indirect discrimination is therefore important to incorporate in equality rights adjudication as it gives recognition to the reality that not all people are on the same playing field. As a former justice of the Constitutional Court stated:[30]

> Although the long term goal of our constitutional order [the South African Constitution] is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality.

Substantive equality, therefore, requires an asymmetrical approach and facilitating or helping to create 'equality of opportunity' (eliminating barriers which exclude certain groups from participation in the workplace or public office) and 'equality of results or outcomes' (seeking to achieve an equal distribution of social goods).[31] This concept of equality is manifested through legal mechanisms such as affirmative action. Originating in the United States, affirmative action refers to provisions and programmes giving preferential treatment to members of certain groups considered to be in a disadvantaged position. As the author has argued elsewhere, affirmative action requires government to take positive measures so that they can enjoy full and equal advantage of particular opportunities. Thus, what may have been deemed directly discriminatory, measures which favour relatively disadvantaged groups at the expense of those who are relatively well off, will not constitute discrimination as the consequences of such measures are, in the end, a more equal society.

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29 For further information, see A Smith 'Constitutionalising equality: The South African experience' (2008) 9 *International Journal of Discrimination and the Law* 201.

30 *President of the Republic of South Africa v Hugo* 1997 (4) SALR 1 (CC) 41 para 112 (*per* Justice O'Regan).

31 For further discussion on these and other tenets of substantive equality, see C McCrudden 'Theorising European equality law' in C Costello & E Barry (eds) *Equality in diversity* (2003) 19-33.

In short, affirmative action is therefore viewed as a manifestation, not a limitation of equality.[32]

Furthermore, substantive equality emphasises the importance of recognising the cultural, political and legal choices of social groups.[33] The emphasis is on affirming and recognising diversity and difference. For political minorities, equality of recognition/identity is vital as it helps to secure 'a desire for equality [which] is not [based] on a hope for the elimination of all differences',[34] but one based on 'equal concern and respect across difference'.[35] Adopting such a notion of equality helps to fulfil four central aims identified by Fredman. These are: breaking the cycle of disadvantage associated with membership of a particular group; promoting respect for equal respect and dignity, thereby reducing stereotypical representation of their own culture; providing positive measures of individuals as members of the group; and facilitating integration and full participation in society.[36] Has the Constitutional Court been consistent in adopting this notion of equality in its deliberations?[37]

3 The South African Constitutional Court's approach to equality

Before answering this question, it is necessary to set out the equality right. The equality provision is found in section 9 of the final Constitution of 1996. Section 9 provides:[38]

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and

32 Smith (n 29 above).

33 The author does not engage in the contentious issue surrounding group/minority rights which was debated and explicitly rejected by the drafters of the South African Constitution. Indeed, some formerly exclusive Afrikaner schools, under the auspices of pursuing group (linguistic and cultural) rights, have sought to exclude black students from their schools. Thanks to an anonymous referee for bringing this point to the author's attention.

34 *National Coalition* (n 15 above) para 22.

35 *National Coalition* para 132.

36 These aims are borrowed from S Fredman *Human rights transformed: Positive rights and positive duties* (2008) 179.

37 In the first equality case, adjudicated under the interim Constitution, the *Brink* case, the Court committed itself to adopting a substantive notion of equality. Sec 8 (the equality clause) was adopted ... in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: It builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of sec 8. *Brink v Kitshoff* 1996 (6) BCLR 752 (CC) para 42.

38 For a discussion on the differences between secs 8 and 9 and the drafting of the equality provisions, see Smith (n 29 above) 201.

other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 9 does not, in the words of the Constitutional Court, 'envisage a passive or purely negative concept of equality; quite the contrary'.[39] The equality clause incorporates a substantive notion of equality as it recognises the need to provide redress for past disadvantages. The Constitutional Court has coined this 'remedial or restitutionary equality':[40]

> Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.

Has equality been 'delayed and denied' for vulnerable and political minorities who are[41]

> not able on their own to use political power to secure favourable legislation for themselves [and] are accordingly almost exclusively reliant on the Bill of Rights for their protection?

Unfortunately, the Constitutional Court's approach in cases such as *Prince* and *Jordan* has resulted in the denial and delay of equality for some vulnerable minorities such as the black community, children, women, gays and lesbians.

Before examining these and other cases, it is important to briefly set out how the Constitutional Court deals with cases of equality. If an applicant is alleging discrimination on the listed grounds,[42] the onus is on the respondent to prove that the discrimination was fair. If discrimination is not based on the listed grounds, a claimant relying on an unlisted classification is unaided by the wording of section 9(5) as he or she is required to prove that they were adversely affected by the particular distinction and the distinction is unfair. The claimant will

39 *National Coalition* (n 15 above) para 16.
40 As above. *National Coalition* para 60.
41 *National Coalition* para 25.
42 Sec 9(3).

have to show that the differentiation has the potential to impair his or her fundamental dignity, a burden which, as some of the cases below illustrate, is not easy to prove.[43] Similar to other rights, section 9 is not an absolute right as it is subject to a general limitation provision, section 36.[44] Therefore, if discrimination is found to be unfair, it is then subject to the section 36 test, where the respondent has the burden of justifying any limitation of an individual's right. If discrimination is held to be fair, then section 36 is superfluous.

That said, while the intention of the drafters was to subject the equality provision to a general limitation clause, following the case of *Harksen v Lane NO*,[45] the Constitutional Court adopts the following stages of enquiry that apply to the equality provision. Firstly, it will seek if the legislative provision or Act differentiates between people or categories of people. If not, there is no violation of section 9; if yes, the Court will ask if the differentiation has a rational connection to a legitimate governmental objective. If there is no rational objective, the legislative provision or Act is unconstitutional. If there is a rational connection, the Court will then ask whether the differentiation amounts to unfair discrimination. This requires a two-stage analysis. Firstly, does the differentiation amount to discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then, whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. Secondly, if the differentiation amounts to discrimination, does it amount to unfair discrimination? If the differentiation is based on one of the specified grounds listed in section 9(3), unfairness will be presumed. If the discrimination is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitation clause (section 36). If the differentiation is on an unspecified

43 *Jordan & Others v S* 2002 (6) SA 642 (CC); *Volks NO v Robinson & Others* 2005 Case CCT12/04. For an excellent discussion on the Court's approach to human dignity, see C McConnachie 'Human dignity, 'Unfair discrimination' and guidance' (2014) 1 *Oxford Journal of Legal Studies* 1. In his article, McConnachie criticises Justice Laurie Ackermann's assumption in his book, *Human dignity: Lodestar for equality in South Africa* (2012) that a deeper understanding of human dignity can provide South African courts in indentifying what constitutes unfair discrimination. Following his convincing critique, McConnachie then provides a 'surer route' that provides clearer guidance in identifying unfair discrimination. See also R O'Connell 'The role of dignity in equality law: Lessons from Canada and South Africa' (2008) 6 *International Journal of Constitutional Law* 267.

44 Sec 36 provides that the rights in the Bill of Rights 'may be limited only in terms of law of general application to the extent that the limitation is reasonable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose'.

45 1998 (1) SA 300 (CC) para 53.

or analogous ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If at the end of this stage of enquiry the differentiation is found not to be unfair, then there will be no violation of section 9(2).

Thus, for equality cases, as some of the cases below will show, the analysis is more difficult than with other rights, as some of the cases only require the two-stage analysis: Claimants alleging a violation of the right to equality have to go through the section 9 internal test and, only if the discrimination is not internally justified, the Constitutional Court will then proceed to the section 36 limitation clause enquiry.

The rationale for selecting these cases and the order in which they are presented show the oscillatory approach of the Constitutional Court. At times, the Constitutional Court has granted an order favourable to the minority person or persons seeking recognition or redress for discrimination whereas, at other times, the Constitutional Court has been inconsistent in their deliberations in equality rights cases and in determining whether the differentiation in treatment constitutes unfair and indirect discrimination. The *Prince* case is illustrative of these difficulties.

3.1 The *Prince* case

The *Prince* case concerned a law graduate (Gareth Prince) who had fulfilled all academic requirements for becoming an attorney in South Africa. In addition to academic qualifications, under the Attorney's Act 53 of 1979, future attorneys have to apply to the Law Society to register to do one year's community service. Following the disclosure of two convictions of a statutory offence of possessing cannabis and Prince's declaration that he would continue to use cannabis for religious purposes (he was a Rastafarian and argued that the use of the drug was required by his religion), the Law Society refused his registration. Prince unsuccessfully argued before the Constitutional Court that the Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) and section 22A(10) of the Medicines and Related Substances Control Act 101 of 1965 (Medicines Act) were incompatible with the South African Bill of Rights as they should have included a religious exemption allowing Rastafarians to use cannabis for religious purposes.[46] The case has been referred to as the 'Prince saga'[47] as the Constitutional Court delivered two judgments.

46 Prince argued that his rights to freedom of religion (secs 15(1) & 31(1)), dignity (sec 10), to pursue the profession of his choice (sec 22) and not to be subjected to unfair discrimination (sec 9) were infringed.

47 L du Plessis 'Religious freedom and equality as celebration of difference: A significant development in recent South African constitutional law' (2009) 12 *Potchefstroom Electronic Law Journal* 10 18.

In the first case (*Prince I*), the Constitutional Court issued an interim judgment as both parties were requested to provide additional evidence.[48] The Court explained that this case was one of the rare cases where parties were allowed to provide additional evidence on appeal:[49]

> [T]he appellant belongs to a minority group. The constitutional right asserted by the appellant goes beyond his own interest – it affects the Rastafari community. The Rastafari community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority. The very fact that Rastafari use cannabis exposes them to social stigmatisation … Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views.

However, notwithstanding the Constitutional Court's attempt to protect this vulnerable minority, in the second judgment by a slim majority (5:4), Prince's arguments were rejected.[50] If such religious exemptions were to be granted, the majority argued, it would be difficult to police such exemptions.[51] Although the majority recognised that Rastafarians are a small, vulnerable and marginalised group and, therefore, protection afforded by the South African Bill of Rights is particularly important for them,[52] the failure to provide such exemptions was reasonable and justified.[53] In doing so, such laws, although not directed nor intended expressly to interfere with Rastafari religious practices, did just that with unfortunate consequences, not just for the appellant in this case but for all Rastafarians. The majority judgment's refusal to allow limited exemptions which existed for research or analytical purposes resulted in the criminalisation and stigmatisation of Rastafarians. The majority's failure to appreciate the indirect impact of these statutes on this vulnerable minority is disappointing and 'regrettable',[54] as the judgment could be interpreted by Rastafarians that they are not deserving of equal concern, respect and consideration. Furthermore, the practical implications of the judgment are severe: It means that, as well as having the stigma of a criminal conviction, the appellant and other Rastafarians who would like to become attorneys are prevented from doing so. In this context, the majority's decision is 'profound

48 *Prince* (n 12 above).

49 *Prince* para 26.

50 As above.

51 *Prince* (n 12 above) para 130.

52 *Prince* para 112.

53 *Prince* para 139. The majority judgment also referred to international law which required a ban on the use of cannabis to be uniformly enforced. In this context, the majority opined that while 'the provision of medical exemptions from the prohibition against the possession and use of harmful drugs is necessary for health purposes and is sanctioned by the international conventions … Such exemptions are amenable to control in ways in which a general exemption for religious purposes such as that proposed by the appellant would not be' (para 127).

54 P Lenta 'Cultural and religious accommodations to school uniform regulations' (2008) 1 *Constitutional Court Review* 259 267.

indeed'.[55] The negative profoundness of the decision is echoed by Lenta:[56]

> The burden imposed by the relevant legislation on Rastafarians is severe: Sacramental and liturgical practices are at the core of religion and forbidding these practices forces Rastafarians either to violate the tenets of their religion or become outlaws. This appears discriminatory since it is unthinkable that major faiths should have to face this choice. The use of wine in the Catholic Mass is unlikely ever to be forbidden.

The narrow judgment in this case shows the importance in the difference of adopting a substantive versus formal approach in constitutional equality adjudication. Had the minority judgment been adopted, Prince and other Rastafarians in the same position would have been able to continue to practise their religion, culture and choice of their profession without fear of a criminal conviction. The minority judgment delivered by Justices Ngcobo and Sachs were caustic of the majority's approach and the impugned provisions. They argued that a partial exemption (as sought by Prince) should have been granted. Focusing on the indirect impact of the laws, the justices stated that, although the statutes were not directed at Rastafarians and appear to be neutral, nor intended to interfere with their religious practices,[57]

> [t]hey [the laws] impact severely, though incidentally, on Rastafari religious practices. Their effect is accordingly said to be the same as if central Rastafari practices were singled out for prohibition.

Commenting on the discriminatory impact of such laws, Justice Ngcobo noted:[58]

> The impugned provisions do not distinguish between the Rastafari who use cannabis for religious purposes and drug abusers. The effect of the prohibition is to state that in the eyes of the legal system all Rastafari are criminals. The stigma thus attached is manifest ... There can be no doubt that the existence of the law which effectively punishes the practice of the Rastafari religion degrades and devalues the followers of the Rastafari religion in our society. It is a palpable invasion of their dignity.

Rejecting the majority's reasoning that such exemptions would be difficult to police, administer and regulate, Justice Ngcobo stated that a permit system in conjunction with administrative procedures and guidelines could have addressed practical problems.[59] While the majority's concerns about the dangers of drug abuse and the importance of protecting the public interest are valid, focusing on the precarious position of Rastafarians, Justice Sachs stated:[60]

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55 *Prince* (n 12 above) para 3(a) (*per* Justice Ngcobo).
56 Lenta (n 54 above) 267.
57 *Prince* (n 12 above) para 88 (*per* Justice Sachs).
58 *Prince* para 3(a).
59 As above.
60 *Prince* (n 12 above) 147.

> Exemptions from general laws always impose some cost on the state, yet practical inconvenience and disturbance of established majoritarian mind sets are the price that constitutionalism exacts from government.

Emphasising the values which underlie the South African Constitution, namely, tolerance, respect for diversity, fairness, equality and dignity, Justice Sachs continued to state:[61]

> The test of tolerance as envisaged by the Bill of Rights comes not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is unusual, bizarre or even threatening.

The same justice talked about the importance of 'reasonable accommodation of difference'[62] and called for the state to 'walk the extra mile'[63] to accommodate the Rastafari community. However, as Pillay argues, the Constitutional Court was not 'willing … to walk the extra mile to grant the appellants relief'.[64] Not only was the Constitutional Court reluctant 'to walk the extra mile', but Pillay goes further in her critique by concluding that the 'current position in South Africa is that some religions are more equal than others',[65] a conclusion which is hard not to disagree with.

3.2 The *Pillay* case

In contrast to the *Prince* case, the *Pillay* case is an example where the Constitutional Court passed the 'test of tolerance',[66] as the Court adopted a substantive approach to equality as they recognised and addressed indirect discrimination. The respondent successfully instituted a law suit against the school's Code of Conduct (Code) and the Department of Education (who supported the school's approach) not to allow her daughter to wear a nose stud at school as an expression of her Hindu religion and South Indian culture as it conflicted with the Code. Upholding the High Court's decision, the Constitutional Court held that the Code conflicted with respondent's daughter's religious and cultural rights and also violated her right to freedom of expression. In particular, for the purposes of this article, Chief Justice Langa, writing for the majority,[67] held that the

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61 *Prince* para 115. Prince then took his case before the African Commission on Human and Peoples' Rights and the Human Rights Committee. Both the African Commission and the Committee rejected his appeal. *Prince v South Africa (*2004) AHRLR 105 (ACHPR 2004); Communication 1474/2006, *Mr Gareth Anver Prince v South Africa,* UNHR Committee (14 November 2007) UN Doc CCPR/C/91/D/1474 (2006).

62 *Prince* (n 12 above) para 171.

63 *Prince* para 149.

64 A Pillay '*Prince v President of the Law Society of the Cape of Good Hope*' (2003) 1 *International Journal of Constitutional Law* 152 156.

65 Pillay (n 64 above) 156.

66 *Prince* (n 12 above) para 115.

67 Justice O'Regan issued a minority judgment, not because she disagreed with the majority judgment, but because she dissented in part from the order issued by the majority. As noted in the main text, Justice O'Regan also used a different comparator from that used by Chief Justice Langa.

prohibition of wearing jewellery had the potential for indirect discrimination because it allowed certain groups of learners to express their religious and cultural identity freely, while denying that right to others:[68]

> [T]he failure to treat her [respondent's daughter, Sunali] differently from her peers amounted to withholding from her 'the benefit, opportunity and advantage of enjoying fully [her] culture and/or of practising [her] religion' and therefore constituted indirect discrimination.[69]

The Chief Justice thus compared those learners whose religious or cultural beliefs or practices were not affected by the school's Code with those pupils who were affected by the Code.[70] On this matter, Justice O'Regan argued that those pupils who had previously been granted an exemption, such as Hindu pupils who were allowed to wear 'Lakshmi strings' in honour of the Goddess Lakshmi, and pupils who had been allowed to wear hide bracelets as a mark of respect when a close relative died, would have been a better comparator.[71] This raises two interesting questions. Firstly, which approach is preferable in advancing substantive equality? Secondly, as both judges found discrimination, is the choice of a comparator important or academic? Paradoxically, arguably both approaches are preferable. Chief Justice Langa's approach endorses substantive equality when he stated that when a code imposes 'a disparate impact on certain religion and cultures'[72] and not others, such a code is 'not neutral but enforces mainstream and historically-privileged forms of adornment ... at the expense of minority and historically-excluded forms'.[73] At the same time, Justice O'Regan's comparator (those pupils who had been granted exemptions previously and those who had not) also advanced substantive equality.

In relation to the second question, to avoid the denial and delay of equality, the choice of a comparator does matter. Fortunately, in this case, both comparators were apt and were easily identified. Had the comparators been difficult to find such as comparing like with like (pregnant women with pregnant men),[74] such an approach would

68 The arguments regarding unfair discrimination were brought under the Equality and Prevention of Unfair Discrimination Act 4 of 2000 and not under the equality provision (sec 9) of the South African Bill of Rights. However, this did not affect the argument based on indirect discrimination as it was looking at a rule which appeared to be neutral but had a marginalising impact.

69 *Pillay* (n 16 above) para 15.

70 *Pillay* para 44.

71 *Pillay* para 130.

72 *Pillay* para 44.

73 As above.

74 Such a scenario arose in the infamous *Bliss v Attorney-General of Canada* [1979] 1 SCR 183. Stella Bliss, the claimant, had worked long enough to claim ordinary unemployment insurance benefits, but not long enough to claim the special maternity benefits. When she applied for the ordinary benefits shortly after the birth of her child, she was turned down despite the fact that she had paid the premiums and was available for and capable of employment according to her

have ensured the denial of the 'constitutional goal of equality'.[75] That said, if the school had not afforded the pupil an exemption, there would have been no discrimination under Justice O'Regan's approach, as the judge held that the Code was neutral. However, Chief Justice Langa rightly, in the author's opinion, found that the Code had an 'underlying indirect impact' on a minority:[76]

> The norm embodied by the Code is not neutral, but enforces mainstream and historically-privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically-excluded forms. Accordingly a burden is placed on learners who are unable to express themselves fully and must attend school in an environment that did not completely accept them.

When people are not able to express their own culture and are forced to assimilate to the dominant norm, such injunction 'falls short of [the South African] constitutional project which not only affirms diversity, but promotes and celebrates it'.[77] Had the Constitutional Court not examined the wider impact and effect of the school's refusal to allow an exemption to the school's Code, it is likely that equality in this instance would have been denied. Fortunately for Sunali (the respondent's daughter) and for other learners who 'hitherto were afraid to express their religions or cultures',[78] the Constitutional Court's purposive interpretation of the equality provision resulted in the school, in consultation with others (parents, staff and learners), being required to amend the Code to ensure reasonable accommodation of religious and cultural practices. Even though this may result in 'additional hardship or expense',[79] such positive measures are necessary 'to allow all people to participate and enjoy all their rights equally'.[80] In doing so, this prevents the relegation of people 'to the margins of society because they do not or cannot conform to certain social norms'.[81] The Constitutional Court's approach fits in well with a notion of equality as recognition or identity discussed earlier. By prohibiting indirect discrimination and granting the exemption, rights in this case were made real as people of different cultures and identities were recognised 'as being worthy

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doctor. A section of the Unemployment Insurance Act said that pregnant and recently-delivered women could not receive the ordinary benefits. Bliss argued that she was discriminated against because she was pregnant and that this constituted sex discrimination. The Supreme Court held that Stella Bliss had not been discriminated against because of her sex but because she was pregnant. The Court held that 'any inequality between two the sexes in this area is not created by legislation but by nature'. This case was overturned ten years later in *Brooks v Canada Safeway Ltd* [1989] 1 SCR 1219, a case where the court ruled that discrimination on the basis of pregnancy was sex discrimination.

75 *National Coalition* (n 15 above) para 61.

76 As above.

77 *Pillay* (n 16 above) para 65.

78 *Pillay* para 107.

79 As above.

80 *Pillay* (n 16 above) para 73.

81 As above.

of equal respect'.[82] In this context, Du Plessis neatly sums up the *Pillay* case, that '[it] is about constitutional substantiation for the affirmation and celebration of identity … and especially the identity of the *Other* …'[83]

3.3 The *Du Toit* case

The importance of recognising 'the other' is an important theme in the *Du Toit* case. In this case, the Constitutional Court, with relative ease, was able to find a violation of the right to equality due to a finding of direct discrimination. The Constitutional Court unanimously held that certain provisions of the Child Care Act 1983 and the Guardianship Act 1993, which prevented a lesbian couple in a permanent relationship from jointly adopting children, violated the equality provision on two grounds: sexual orientation and marital status. The latter was violated as the legislation confined the right to adopt children jointly to married couples. By recognising that the definition of 'family life' in the South African Constitution needs to reflect societal attitudes,[84] the Constitutional Court's approach in this case helped to widen the meaning of concepts such as 'family', 'spouse' and domestic relationships.[85]

The manner in which the Constitutional Court approached this case is a stellar example of how the Constitutional Court and other courts should always deal with the equality right. The Constitutional Court adopted a substantive notion of equality, as it embraced the notion of equality of recognition emphasising the importance of accepting people for what they are and not based on stereotypical prejudices which prohibits people from enjoying and exercising their rights and fundamental freedoms simply because they are 'different' from the rest of society. Furthermore, the advancement of equality was brought one step forward as the Constitutional Court read in words to the impugned provisions to ensure that they cover the rights of same-sex life partners to jointly adopt children. In this way, the Constitutional Court in this case and in other same-sex rights cases[86] adopted a substantive approach to equality.

82 *Pillay* (n 16 above) para 185.

83 Du Plessis (n 47 above) 25.

84 *Du Toit* (n 13 above) para 19.

85 The Constitutional Court has recently affirmed this approach: 'Family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change.' *Hattingh & Others v Juta* (CCT 50/12) 2013 ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC).

86 *Minister of Home Affairs & Another v Fourie & Another/Lesbian and Gay Equality Project & Eighteen Others* 2006 (1) SA 524 (CC); *National Coalition* (n 15 above); *Satchwell v President of the Republic of SA & Another* 2002 (9) BCLR 986

86 (CC); *J & B v Director-General, Department of Home Affairs & Others* 2003 (5) (SA) 621 (CC).

3.4 The *National Coalition* case

In one of the earlier same-sex rights landmark cases (the *National Coalition* case), the Constitutional Court held that sodomy laws that criminalised sexual activity between consenting males violated the equality right.[87] Justice Ackermann (as he then was), who delivered the majority judgment, carried out a comprehensive and detailed analysis of comparative and international law to substantiate his finding.[88] Using these sources, the justice emphasised the importance of recognising 'the other':[89]

> The desire for equality is not a hope for the elimination of all differences – the experience of subordination of personal subordination, above all – lies behind the vision of equality. To understand 'the other' one must try, as far as is humanly possible, to place oneself in the position of 'the other'. It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any … group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of … society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.

The justice continued to state that sometimes treating people identically does not foster equality, but inequality:[90]

> We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

In so doing, to quote Justice Ackermann, 'it is in this latter way that we [the Constitutional Court] have encapsulated the notion of substantive as opposed to formal equality'.[91] Adopting a similar approach, Justice Sachs's separate concurring speech discussed at length the importance of recognising diversity and examining rights

87 *National Coalition* (n 15 above).

88 The former justice specifically referred to the laws of England, Wales, Scotland, Ireland, member states of the Council of Europe, Germany, Australia, New Zealand and Canada and art 17 of the International Covenant on Civil and Political Rights. Art 17 states: '(1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.'

89 Quoted by Ackermann J in the *National Coalition* case (n 15 above) para 22, citing Per Cory J, delivering part of the joint judgment of the Canadian Supreme Court in *Vriend v Alberta* [1998] 1 SCR 493 para 69.

90 *National Coalition* (n 15 above) para 66.

91 *National Coalition* para 61.

contextually rather than abstractly. Quoting a former justice of the Supreme Court of Canada, Claire L'Heureux Dubé, in the case of *Egan v Canada*,[92] Justice Sachs talked about the advantages of such an approach:[93]

> One consequence of an approach based on context and impact would be the acknowledgment that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is, globally and contextually, not separately and abstractly.

Looking at the historical and social context of gay men in South Africa, Justice Sachs took into consideration disadvantage and difference (two core characteristics of substantive equality) of gay men and lesbians in society and the discriminatory effect of legislation on this vulnerable group. Talking about disadvantage, Justice Sachs stated that 'gays constitute a distinct though invisible section of the community' and have been treated 'not only with disrespect or condescension but with disapproval and revulsion' and have been 'pressurised by society and the law to remain invisible'.[94] On difference, Justice Sachs eloquently talked about equality as not[95]

> pre-suppos[ing] the elimination or suppression of difference [and] imply[ing] a levelling or homogenisation of behaviour [but rather equality is] about [the] acknowledgment and [the] acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.

This approach resulted in 'emphasis being placed simultaneously on context, impact and the point of view of the affected persons'.[96] Adopting such a focus is 'the guarantor of substantive as opposed to formal equality'[97] and in this case, and in the *Du Toit* case and other same-sex rights cases referred to earlier, the Constitutional Court was the 'leader of opinion',[98] creating an environment where lesbians and gay men are treated equally, and helping to ease the 'sting of the past and continuing discrimination against both gays and lesbians'[99] which was rife during and after the apartheid era.

The above judicial excerpts are stellar examples of how the Constitutional Court and other courts should be interpreting the equality clause in helping to build a democratic and tolerant society. They show how the Court signals its intention to embrace a substantive notion of equality and to move beyond the narrow and formalistic understanding of equality. As a result of the Constitutional

92 (1995) 29 SCR 79.
93 *National Coalition* (n 15 above) para 113.
94 *National Coalition* para 128.
95 *National Coalition* para 132.
96 *National Coalition* para 126.
97 As above.
98 A Bickel *The least dangerous branch* (1962) 239.
99 *Minister of Home Affairs & Another v Fourie* (n 86 above) para 31.

Court's approach in these same-sex rights cases, South Africa has passed various pieces of legislation committing government to promote equality irrespective of sexual orientation and marital status and to allow same-sex couples to marry.[100]

3.5 The *Jordan* case

In stark contrast, the *Jordan* case is a more jarring case, as the majority of the Constitutional Court adopted a focus which guaranteed a formal rather than a substantive approach to equality as they failed to address the impact of the legislation in question. In other words, they failed to address indirect discrimination. At issue in this case was the constitutionality of sections of the Sexual Offences Act which criminalised the 'sex worker' for prostitution, but not the 'client' or the keeping or managing of a brothel.[101] While the Constitutional Court unanimously upheld the constitutionality of the brothel provisions,[102] there was a split of six to five with respect to whether the criminalisation of the 'sex worker' but not the 'client' amounted to unfair discrimination against women. Justice Ngcobo, writing for the majority, found that the provision was constitutional as section 20(1)(a) was gender-neutral and differentiating between the dealer and the customer was a common distinction made by statutes.[103]

Justices Sachs and O'Regan, writing for the minority, found that the section constituted unfair discrimination based on sex as it applied only to the conduct of the prostitutes[104]

> (who are overwhelmingly female, and patrons [who] are overwhelmingly (though not exclusively) male [and are] relatively more powerful and socio-economically privileged).

On a technical point, the majority was correct in holding that the impugned provision did not constitute direct discrimination as it was gender-neutral. However, given the legacies of gender inequality under the previous apartheid regime, a technical approach was not enough. What was needed (and this was reflected in the minority judgment) was a contextual approach, one that took into consideration the effects of the legislation and the unique history of South Africa. In a scholarly and extensively researched judgment which drew upon a number of foreign and local sources,[105] the

100 Promotion of Equality and Prevention of Unfair Discrimination Act of 2000; Domestic Violence Act of 1999; Rental Housing Act of 1999; Employment Equity Act of 1998; Medical Schemes Act of 1998; and Labour Relations Act of 1995.

101 *Jordan* (n 14 above) para 58, *per* O'Regan J and Sachs J.

102 The purpose of the Act was to outlaw commercial sex. All the judges unanimously held that the right to human dignity was not violated.

103 *Jordan* (n 14 above) para 10.

104 *Jordan* paras 59 & 68.

105 They drew upon jurisprudence from the European Court of Human Rights and the Canadian Supreme Court. They also paid particular regard to submissions by the Gender Commission and acknowledged their special constitutional role and expertise in the field of gender equality.

minority approached the issue as to whether such differentiation was unfair by viewing the relevant legislation within the social reality of South Africa. Such an approach, which has been described as a 'contextual' or 'super context' approach,[106] has the hallmarks of substantive equality. As Albertyn and Goldbatt state:[107]

> Contextual analysis [shifts] the legal enquiry from an abstract comparison of 'similarly situated' individuals to an exploration of the actual impact of an alleged rights violation within the existing socio-economic circumstances.

Unfortunately for both the claimant in the *Jordan* case and for the agenda of advancing gender equality in South Africa, the majority judgment adopted an abstract approach which resulted in a 'missed opportunity to make a difference in the lives of women'.[108] It was a 'missed opportunity' as the majority ignored the social reality which is that sex workers tend to be primarily uneducated women from poor socio-economic backgrounds. These women engage in prostitution knowingly accepting the risk of demeaning their dignity, a point noted by the minority but ignored by the majority, and which reflects the reality that many female prostitutes become involved in prostitution because they have few or no alternatives.[109] Not only did the majority judgment foster gender inequality but, as Simpson argues, it has the potential to impair the dignity of women:[110]

> [A] system where only the sex worker, and not the customer, is liable to criminal sanction is one that reinforces harmful stereotypes and creates stigma that prevent sex workers from participating fully in their communities, makes them vulnerable to abuse and exploitation, suppresses their ability to access social benefits, and limits sexual self-expression of men and women. The legal environment described here is hostile to the values of gender equality.

In stark contrast, the minority's 'contextual' or 'super context' approach allowed for the broader social context to be taken into consideration and showed how the impugned law portrayed the

106 P de Vos 'A bridge too far? History as context in the interpretation of the South African Constitution' (2001) 17 *South African Journal on Human Rights* 1 7-8.

107 C Albertyn & B Goldbatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248 260.

108 MJ Maluleke & T Madonsela 'Gender equality jurisprudence in landmark court decisions' Department of Justice and Constitutional Development 2004 1 6 http://www.justice.gov.za/docs/other-docs/2009_Women_law_court-decisions.pdf (accessed 26 June 2014).

109 *Jordan* (n 14 above) para 66, *per* O'Regan J and Sachs J. It is worth noting here that in feminism there is a division between feminists who believe sex work demeans dignity and those who think it does not. Thanks to an anonymous referee for pointing this out.

110 J Simpson 'Stereotyping sex workers: *S v Jordan & Others*' paper submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women's Human Rights, Faculty of Law, University of Toronto, 6 March 2009, http://www.law-lib.utoronto.ca/diana/2009_symposium_papers/simpson_paper.pdf (accessed 15 January 2014).

female prostitute as the 'social outcast'[111] and the male client as 'having done the sort of thing that men do'.[112] The minority judgment is an exemplar of how courts should approach indirect discrimination. This approach requires examining the effects of what appears to be facially-neutral criteria and looking at the disproportionate effect it may have on vulnerable groups.

The composition of the Constitutional Court at that time is also important, highlighting the need for a representative judiciary. There were only two female judges (Justices Mokgoro and O'Regan) on the Constitutional Court at the time of the case and it was Justice O'Regan who dissented from the majority judgment delivered by Justice Ngcobo.[113] The six male majority judges could not see how equality could be violated by making a distinction between the 'sex worker' for prostitution, but not the 'client'.[114] They were unable to 'see' the issue as they failed to contextualise their judgment; they did not examine the individual within and outside of different social groups and the nature of the group discriminated against – all the hallmarks of substantive equality.

The failure of the majority judgment, in upholding the constitutionality of criminalising the prostitute but not the client, 'reinforces and perpetuates sexual stereotypes which degrades the prostitute but does not equally stigmatise the client, if it does at all'.[115] In so doing, this and the other cases illustrate a simple trend. The delay and denial of equality will be guaranteed if a formal approach is continually adopted in equality rights adjudication.

To avoid denying the political minority and the most vulnerable in society the constitutional goal of equality, which is after all the *raison d'être* of the South African Constitution, the Constitutional Court and other courts need to ensure that they encapsulate the notion of substantive equality. In short, they need to avoid insisting upon identical treatment in all circumstances, to embrace and affirm diversity and difference, to analyse and understand the overall impact of any action, law or policy to ensure that there is no discriminatory impact, to espouse a 'contextual' or 'super context' approach,[116] and to adopt, where necessary, positive measures to address the disparities and inequalities for the political minority who do not have the political voice to ensure that their needs are secured.

That said, some scholars have suggested that in a country like South Africa, the substantive approach to equality, while more

111 *Jordan* (n 14 above) para 64.
112 As above.
113 Justice Sachs concurred with the dissenting judgment of O'Regan J. Chaskalson CJ, Kriegler J, Madala J, Du Plessis AJ and Skweyiya AJ concurred with the judgment of Ngcobo J.
114 *Jordan* (n 14 above) para 58, *per* O'Regan J and Sachs J.
115 *Jordan* para 72.
116 De Vos (n 106 above) 7 8.

transformative than a formalistic approach, is not radical enough to dismantle white supremacy in South Africa and that, even if courts adopt a substantive approach, it will not quite 'walk the extra mile'.[117] In this context, Roithmayr warns 'activists who are committed to dismantling persistent racial and class inequality'[118] about the benefits of using a rights-based approach 'as a strategy to advance their interests'.[119] Instead, Roithmayr advocates an alternative approach, an approach which is a 'decisive shift'[120] from rights-based litigation to a 'sustained political conversation about the commons'.[121] Roithmayr explains the 'commons' as a[122]

> [f]ramework that emphasises common interests and networks of relationship that connect wealthy whites and poor blacks in South Africa ... The commons reinforces the notion that people collaboratively create neighbourhoods, cities and countries, often for reasons other than market motivation, and that no group should have unfairly-privileged access to the best that these common spaces have to offer.

In circumstances where inequalities are deeply entrenched due to the 'injustice[s] and inequit[ies]'[123] of apartheid and when the substantive approach does not 'walk the extra mile',[124] Roithmayr's 'common-based approach'[125] may be more beneficial than a rights-based approach if the 'deep scars'[126] of the legacy of apartheid are to be adequately addressed.

4 Conclusion

The adoption of a South African Bill of Rights has been described as a 'monumental achievement'.[127] Can we say the same about the Constitutional Court's approach in these select cases? On the one hand, when the Constitutional Court adopts a 'formal, abstract and categorical'[128] approach as they did in the *Jordan* and *Prince* cases, these cases were far from 'monumental achievement[s]'. One could

117 C Barclay 'Toward substantive equality: A feminist critique on the notion of difference in the Canadian and South African equality tests' (2001) 5 *International Journal of Discrimination and the Law* 167; *Prince* (n above 12) para 149.

118 D Roithmayr 'Lessons from Mazibuko: Persistent inequality and the commons' (2010) 3 *Constitutional Court Review* 317.

119 As above.

120 Roithmayr (n 118 above) 319.

121 As above.

122 As above.

123 *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1696 (CC) para 38.

124 *Prince* (n 12 above) para 149.

125 Roithmayr (n 118 above) 345.

126 *Brink* (n 37 above) para 40.

127 H Webb 'The Constitutional Court of South Africa: Rights interpretation and comparative constitutional law' (1998-1999) 1 *University of Pennsylvania Journal of Constitutional Law* 205.

128 A Sachs 'Social and economic rights: Can they be made justiciable?' (2000) 53 *Southern Methodist University Law Review* 1381 1388.

go so far and say that there were monumental failures. When the Constitutional Court or any court adopts such an approach, they should be respectively criticised. Indeed, it was the dissenters in these cases that had the better of the argument and, had their approach been followed, these cases would have been 'monumental achievement[s]'. This approach requires judges to embrace a thick, substantive, 'holistic [and] value-based' thinking to equality rights adjudication as the Constitutional Court did in the *Pillay, National Coalition* and *Du Toit* cases.[129] When they do so, judges should be applauded and commended as champions of achieving the constitutional goal of equality.

These cases also provide a further insight, namely, where equality cases involve direct discrimination (such as in the *National Coalition* and *Du Toit* cases), in *most* cases the Constitutional Court is more willing to find a violation than in indirect discrimination cases. Indeed, the very first equality case – adjudicated under the interim Constitution, the *Brink* case[130] – was a factually extremely straightforward direct discrimination case. This case dealt with the issue of institutionalised inequality in the guise of section 44 of the Insurance Act 27 of 1943, which deprived married women, in certain circumstances, of some or all of the benefits of life insurance policies. However, married men did not lose the benefits of insurance policies ceded to them or made in their favour by their wives. The Constitutional Court subsequently held that section 44 was unconstitutional as it violated the equality clause. The case did not raise any problematic issues as it was basically a claim for formal equality, in the sense that it was based on statutory provisions that treated women and men differently.[131] That said, at times the Constitutional Court has shown that indirect discrimination is not beyond judicial oversight. The *Pillay* case is one example where the Constitutional Court granted an exemption to what appeared to be facially-neutral regulations serving a valuable purpose but which had a marginalising effect. In this context, the *Pillay* case is an exception where indirect discrimination was condemned and which can be categorised as 'jurisprudence of difference'.[132] Due to the Constitutional Court's willingness to address indirect discrimination, the Court permitted the accommodation and recognition of 'the other',[133] a valuable lesson for other courts to do the same.

In stark contrast, despite Justice Sachs's plea for tolerance in his dissenting judgment in the *Prince* case, the majority judgment in

129 *Coetzee v Government of the Republic of South Africa* 1995 (10) BCLR 1382 (CC) para 46.

130 *Brink* (n 37 above).

131 In this regard, the case has been described as a 'bit of a damp squib'. See G Carpenter 'Motifs inscribed on our social fabric: Equality in *Brink v Kitshoff*' (1997) 13 *South African Journal on Human Rights* 304.

132 Du Plessis (n 47 above) 26.

133 *Pillay* (n 16 above) para 65.

Prince failed to recognise the 'other' and can be categorised as jurisprudence of indifference. This raises interesting questions: Why did the Constitutional Court successfully address indirect discrimination and grant an exemption in the *Pillay* case but failed to do the same in the *Prince* case? Two possible reasons can explain the Constitutional Court's approach. The first is to do with the 'nuanced and context-sensitive form'[134] approach the Constitutional Court adopted in the *Pillay* case. This is in contrast to the myopic and formal approach in the *Prince* case where the majority approach favoured the 'legal authoritative reason' over the 'substantive reason'.[135] Secondly, in the *Prince* case, the Constitutional Court was dealing with legislation serving an important governmental purpose in the 'war against drugs'[136] and the Court seriously thought what the possible implications would be of allowing the use of cannabis which was conventionally regarded as illegal for religious purposes. In the *Pillay* case, although the Constitutional Court had to deal with a similar question about exemptions, the context and the community were different. The exemption related to school uniforms and the community was more limited (applied to a school). In this context, the Constitutional Court was able to hand down a judgment allowing exemptions for religious and cultural purposes as they would not undermine, unlike the *Prince* case, the objectives of the school's Code regarding school uniform.[137]

This leads to a third point. The different outcomes in the *Prince* and *Pillay* and other cases show the pendulum characteristic of bills of rights. At times they can swing in one direction where rights are made real, and at other times they can swing in the opposite direction where rights remain on the periphery for some, particularly the marginalised and those 'living on the outer reaches rather than in the mainstream of public life'.[138] Due to the vulnerability and 'politically powerless [ness]'[139] of groups such as Rastafarians, it is these groups that bills of rights ought and should be protecting. To achieve this requires[140]

> [t]he maximum harmonisation of all the competing considerations, on a principled yet nuanced and flexible case-by-case basis, located in South African reality yet guided by international experience, articulated with appropriate candour and accomplished without losing sight of the ultimate values highlighted by our Constitution.

134 *Prince* (n 12 above) para 28.

135 Z Eloff 'The significance of a philosophical approach in constitutional adjudication with reference to the *Prince* case' (2003) 6 *Potchefstroom Electronic Law Journal* 47 48.

136 *Prince* (n 12 above) para 114.

137 *Pillay* (n 16 above) para 101.

138 *Prince* (n 12 above) para 157.

139 As above.

140 *Prince* (n 12 above) para 100.

This is an important lesson for all judges to ensure that courts can play a pivotal role in social transformation. However, it is important to note that judicial enforcement is rarely the sole mechanism for the recognition and protection of human rights. On the contrary, this requires the following: people being aware of their rights, access to independent and effective institutions of governance responsible for implementing and enforcing the rights (most notably the judicial and political institutions and national human rights bodies), strong human rights activists and groups and, above all, a commitment from everyone to respect, protect and to fulfil the rights and values in bills of rights. Roithmayr's 'common-based approach'[141] referred to earlier can also potentially play an important role, given the emphasis on collectivity and participation among groups or communities. Indeed, the judiciary itself has acknowledged that they are only but one of the institutions sharing the responsibility for the realisation of rights: 'The judiciary cannot of itself correct all the systematic unfairness to be found in our [South African] society.'[142] However, for the specific purposes of this article, when talking about judicial enforcement, this article is a clarion call for the judiciary to adopt a contextual, robust and vigilant approach to equality and other rights adjudication. If such an approach is adopted, it will help mitigate against missed opportunities and contribute to helping to achieve the constitutional goal of equality which will 'allow all people to participate and enjoy all their rights equally'.[143]

141 Roithmayr (n 118 above) 345.
142 *Port Elizabeth Municipality* (n 123 above) para 38.
143 *Pillay* (n 16 above) para 73.

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Reform of the customary law of inheritance in Nigeria: Lessons from South Africa

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Summary

Apart from preserving bloodlines, the male primogeniture rule of inheritance is aimed at providing material support to deceased persons' dependants. This 'inheritance-with-responsibilities' principle is being eroded by socio-economic changes, such as urbanisation, labour migration and the diffusion of extended families, thereby causing hardship to widows, girls and younger male children. So, to what extent has Nigeria reformed customary law inheritance rules in order to reconcile them with changing social conditions? Whereas South Africa has adopted judicial and legislative measures to reform customary laws of inheritance, the same cannot be said for Nigeria, despite recent Supreme Court decisions. Using the best interests of dependants' principle as a lens, the article offers to Nigeria lessons in customary law reform from South Africa. It argues that reform efforts and public debate in Nigeria do not adequately engage the changing social conditions that influence the customary law of inheritance, and suggests two options to remedy this situation.

Key words: *Customary law reform; succession; best interests of dependants*

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1 Introduction

The decision in *Bhe v The Magistrate, Khayelitsha*[1] marked a positive turning point in customary law reforms in South Africa. It not only hastened these reforms, but it also shaped public debate and constitutional challenges of customary law's compatibility with the South African Bill of Rights.[2] The *Bhe* narrative is in stark contrast to two judgments delivered by the Supreme Court of Nigeria on 11 and 14 April 2014.[3] Although these judgments abolished the male primogeniture rule in South-East Nigeria for its incompatibility with the Constitution's equality clause,[4] they failed to address the social context of inheritance rules.[5] Furthermore, they appear to offer protection only to women in South-East Nigeria, leaving the inheritance rights of younger male children unaddressed.[6] Given that the social settings in which inheritance rules originated have vastly changed, the operation of these rules is expected to adapt to these changes in order to curb hardship to women, girls and younger male children. In a bid to curb this hardship, some Southern African states have reformed customary law inheritance rules in order to reconcile them with changing social conditions.[7] These efforts, which are anchored on human dignity and equality rights, centre on the overall welfare of family members, especially those maintained by the deceased person. So, the question is: To what extent has Nigeria reformed customary law inheritance rules in order to reconcile them with changing social conditions? Using the best interests of dependants' principle as a lens, the article examines customary law reform in Nigeria. The best interests principle posits that individuals maintained by the deceased person shortly before death should be the main beneficiaries of an intestate estate. For purposes of scope, the article focuses on Southern Nigeria, where the male primogeniture rule is prevalent.[8] Northern Nigeria observes Islamic law, while customary law inheritance rules in Western Nigeria, generally, contain the best interests of dependants' principle. This

1 *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as* amicus curiae*); Shibi v Sithole & Others; South African Human Rights Commission & Another v President of the Republic of South Africa & Another* 2005 (1) SA 580 (CC) (*Bhe*).

2 The *Bhe* case and law reform in South Africa are discussed in part 3 of the article.

3 *Mrs Lois Chituru Ukeje & Another v Mrs Gladys Ada Ukeje* (unreported) 2014 LPELR-22724(SC); *Onyibor Anekwe & Another v Mrs Maria Nweke* (unreported) 2014 LPELR-22697(SC).

4 Secs 42(1) & (2) of the 1999 Constitution of the Federal Republic of Nigeria, as amended.

5 *Anekwe v Nweke* (n 3 above) *per* Ogunbiyi, 36-37, paras A-B.

6 See discussion in part 4 for reasons why the judgment may be construed as restrictive.

7 CN Himonga 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession' (2005) 82 *Acta Juridica* 83.

8 This area encompasses the south-east and south-south geopolitical zones.

principle is articulated with the aid of a micro-comparison of customary law reform in Nigeria and South Africa.

Three reasons inform the choice of South Africa as a comparator. First, Nigeria and South Africa have contrasting approaches to their legal pluralism. Two, South Africa offers valuable lessons to Nigeria through the tremendous legislative and judicial progress it has made in customary law reform. Unlike its skeletal recognition in Nigeria's 1999 Constitution, customary law is clearly recognised in the South African Constitution.[9] Finally, both countries emerged from crises – military rule and apartheid respectively – in the 1990s and adopted constitutions at roughly the same period.

Part two of the article argues that Nigeria's legal framework is ill-suited to prevent or reduce hardship to deceased persons' dependants. It further argues that the interaction of customary law and statutory law has not impacted positively on the inheritance rights of females and younger male children in Nigeria. It uses the best interests of dependants principle as a lens to evaluate the protection of the human rights of females and younger male children. Part three gives a brief account of customary law reform in South Africa. Part four examines law reform in Nigeria against the background of similar reform in South Africa. It argues that, despite recent judgments, there is insufficient judicial and legislative consideration of the changing social conditions that surround inheritance laws. Part five concludes the article and proffers suggestions in light of its findings on customary law reform in Nigeria.

2 Best interests of dependants principle in customary laws of inheritance in South-East Nigeria

2.1 Introduction

The term 'customary law' is used here as a matter of convenience to describe, broadly, indigenous law – that is, the widely-accepted norms that regulate the conduct of a population.[10] Unlike Western individualistic notions of property ownership, pre-colonial inheritance rules in Nigeria were concerned with the overall welfare of the family.[11] Since these rules centred on family structures, heirs inherited not only the properties of deceased persons, but also responsibilities

9 See secs 211(3) & 39(2) of the Constitution of the Republic of South Africa, 1996.

10 TO Elias *The nature of African customary law* (1956) ch 9. This clarification flows from criticisms of customary law's usage as an analytical description of pre-colonial law. See FG Snyder 'Colonialism and legal form: The creation of customary law in Senegal' (1981) 19 *Journal of Legal Pluralism* 49. 'Population' is preferred to 'community' due to increasing globalisation. See GR Woodman 'Legal pluralism in Africa: The implications of state recognition of customary laws illustrated from the field of land law' in H Mostert & T Bennett (eds) *Pluralism and development: Studies in access to property in Africa* (2012) 39.

11 SNC Obi *Modern family law in Southern Nigeria* (1966) 337.

to maintain the deceased's dependants and to preserve the continuity of the family.[12] As Chief Gboteyi, the Elesi of Odogbolu, told the West African Lands Committee in 1912: 'I conceive that land belongs to a vast family of which many are dead, few are living, and countless members are unborn.'[13] This is the context of the male primogeniture rule, which requires that the eldest male child of a deceased person should inherit his estate. It is also the context in which the article advocates the best interests of dependants principle in customary laws of inheritance.[14]

2.2 Situating the best interests of dependants principle

Succession, whether testate or intestate, consists of rules that govern the devolution and administration of a deceased person's estate.[15] The common law[16] regards it as the devolution of title to property under the law of descent and distribution. However, succession under customary law is wider than this definition because it encompasses the status and obligations the deceased person held and was subject to in society.[17] The distinction between succession under customary law and succession under the common law, thus, is the absence of conferred status and obligations on the heir under the latter. Their meaning is often mixed up because of the tendency to interpret customary law rules from a common law perspective.[18] This tendency is, in turn, traceable to the colonial influence on customary law in Nigeria. For administrative and financial reasons, the British were unable to jettison the indigenous legal order which they found in Nigeria. They subjected customary law to English law, using legislation that enforces the common law and doctrines of equity in force in England in 1900.[19] For customary law to be applicable, it must not be contrary to public policy, natural justice, equity and good conscience.[20] What constitutes public policy and good conscience was initially determined in accordance with the received English law. Later, section 42(1) – the Constitution's non-discrimination clause – became the main applicability criterion.[21]

12 N Okoro *The customary laws of succession in Eastern Nigeria and the statutory and judicial rules governing their application* (1966) 4.

13 Elias (n 10 above) 162.

14 For convenience, the terms 'inheritance' and 'succession' are used interchangeably.

15 Intestate succession refers to the devolution of a deceased person's estate in the absence of a valid will. Testate succession is the reverse.

16 As used here, the term 'common law' refers to both the received English law and statutory law.

17 Okoro (n 12 above).

18 MJ de Waal 'The social and economic foundations of the law of succession' (1997) 8 *Stellenbosch Law Review* 159-161.

19 Sec 45(1) of the Interpretation Act, Cap 89, Laws of the Federation of Nigeria and Lagos 1958.

20 Sec 18(3) of the Evidence Act 2011.

21 Sec 42(1) prohibits discrimination on grounds of 'ethnic group, place of origin, sex, religion or political opinion'.

Colonial rule changed the setting in which the primogeniture rule emerged by introducing Christianity, the migrant labour system, and new laws. In sum, it led to the following socio-economic changes: (a) diffused family structures no longer based and organised on close-knit units; (b) nuclear families accustomed to a Western culture that cares little for the notion of extended families; (c) the disappearance of a correlation between heirs' inheritance of deceased persons' assets and duties to provide support and maintenance to the deceased's dependants; and, finally, (d) the changed land tenure system.[22]

Since the colonial recognition of customary law was for administrative rather than development purposes, customary law evolved into a strange creature.[23] It became fashionable to refer to official customary law and living (unofficial) customary law. Whereas official customary law is the version that is codified in legislation and recorded in textbooks and court precedents,[24] living customary law is regarded as the norms that regulate communities in their daily lives.[25] This article argues that, because the norms of living law crystallise from people's adaptations to internal and external social changes, they ought to be the beacon of the best interests of dependants principle in the customary law of succession.

The best interests of dependants principle requires that legislative or judicial actions taken with respect to customary law of intestate succession must consider the overall welfare of everyone maintained by the deceased person shortly before death. Here, the term 'everyone' comprises of spouses and children, as well as siblings, parents and cousins of the deceased person. In advocating this principle, inspiration is drawn from the best interests of the child principle.[26] Thus, consideration should be given to distributing family property in a manner that accommodates everyone previously dependant on the deceased person. To arrive at the best interests principle, judges should be guided by two factors. The first is the manner people have adapted or are adapting to the changed social structures in which the male primogeniture rule emerged. Since living customary law constantly changes, the determination of this adaptation could be aided by the foundational value of the customary law of succession. The reasoning is that, whereas living customary law changes, its foundational value is fairly stable. For example, the author's research in South-East Nigeria shows that a foundational value guiding adaptations to intestate succession is the duty of care owed to family members by family heads. Generally, under Igbo

22 CJ Korieh *The land has changed: History, society and gender in colonial eastern Nigeria* (2010).

23 GR Woodman 'Some realism about customary law – The West African experience' (1969) *Wisconsin Law Review* 128-151.

24 Himonga (n 7 above).

25 I Hamnett *Chieftainship and legitimacy: An anthropological study of executive law in Lesotho* (1975) 10.

26 Art 3(1) Convention on the Rights of the Child (CRC).

customary law, a woman cannot sell land that she did not purchase with her own money. However, informants agree that a woman may sell land inherited by her deceased husband in order to care for her children when there is a breach of a duty of care by the family. This foundational value of duty of care is, as seen in part four, not mentioned in the judicial abolition of the male primogeniture rule in South-East Nigeria.[27]

Second, judges should robustly apply the equality clause in the Constitution in order to give weight to the best interests principle. When adjudicating disputes, they must consider what is fair, just and equitable, taking into consideration the following: the assets and liabilities of the estate; the surviving spouse's contribution to the acquisition of matrimonial assets; family members' contribution to such assets; and the existence of minor children or other dependents of the deceased person who require maintenance.[28] Problems usually arise in intestate succession when male relatives appropriate the deceased's estate on the ground that women have limited property rights under customary law.[29] Such appropriation of estates is a common problem in South-East Nigeria, and it is usually justified on tradition. However, customs are rarely received and preserved in their old forms. This is because the manner in which people utilise customs is heavily influenced by events around them. Notably, living customary law is regarded as the law that 'emerges from what people do', or 'what people believe they ought to do'.[30] I argue that 'what people do' is better seen as people's adaptation to socio-economic changes, since their reaction to these changes informs and influences their behaviour. In this light, a best interests principle should be anchored on the non-static nature of the customary law of succession. On the face of it, there is nothing wrong with the male primogeniture rule. Rather, the problem lies in how present generations have received, applied and adapted it. According to Gyekye, cultural preservation[31]

> … in part or in whole, would depend very much on the attitude the new generation adopts towards it … This means that the continuity and survival of a pristine cultural product depends on the normative considerations that would be brought to bear on it by subsequent generations.

The individuals who currently benefit from the primogeniture rule do so based on their adaptation to an individualistic notion of property,[32]

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27 Other foundational values discernible from succession and marriage are dignity, the preservation of the homestead, and a man's duty to maintain his family, irrespective of divorce.

28 Minority judgment of Ngcobo J in the *Bhe* paras 239 & 240.

29 JN Ezeilo 'Law and practices relating to women's inheritance rights in Nigeria: An overview' (1998-9) 7 *Nigerian Juridical Review* 131-139.

30 Hamnett (n 25 above).

31 K Gyekye *Tradition and modernity: Philosophical reflections on the African experience* (1997) 221.

32 *Aniekwe & Another v Nweke* 2013 Law Pavilion Electronic Law Reports 20386 (CA).

a notion that is inconsistent with the egalitarian purpose of the customary law of succession. In much the same way as they have imbibed inheritance without responsibility, they should also be able to come to terms with a best interests principle anchored on the notion of equality. The enquiry turns to the legal framework relating to customary law of inheritance in Nigeria in order to see how it accommodates a best interests principle.

2.3 Legal framework of inheritance

Nigeria is composed of about 300 ethnic groups, the largest of which are the Hausa (Northern Nigeria), Igbo (south-east) and Yoruba (south-west).[33] Other than the Hausa that mostly practise Shari'a law, each ethnic group has a system of customary law, although variations are noticeable among communities in these groups.[34] In 1914, the Supreme Court Ordinance established the Supreme Court of Nigeria and mandated it to apply the common law of England, the doctrines of equity, and the statutes of general application in force in England on 1 January 1900. On 1 October 1954 Nigeria became a federation with a central government in Lagos and three regional governments in the north, west and east. On 1 October 1960 it became independent with a federal constitution and constitutions for the three regions.[35] On 1 October 1963 it became a republic, and severed judicial and political ties with Britain. Following a civil war that lasted from 1967 to 1970, and several *coups d'état*, a constitution was adopted in 1979, and later modified into the current 1999 Constitution.

Nigeria's legal system, thus, is based on the Constitution, the received English common law, local legislation, Shari'a law, and customary law. As a federation consisting of a central government, 36 states grouped under six geo-political zones, and nearly a thousand local government councils, law making is shared.[36] Unlike federal law with unlimited territoriality, state and local council laws are limited to their respective territories. Broadly, federal law regulates marriage, land and evidence, while inheritance is regulated by state laws. The key laws governing testate inheritance include the Marriage Act, the Administration of Estates Law of 1959,[37] the Succession Law Edict of 1987 (as amended by south-east states), the English Wills Act of 1837, and the Wills Amendment Act of 1852 (generally applicable except in the south-west). Others are the Wills Law of 1959 (south-west),[38] the Wills (Soldiers and Sailors) Act of 1918, and the Wills Law of old

33 For debate, see O Otite *Ethnic pluralism and ethnicity in Nigeria* (1990) 35-36.
34 *Egharevba v Orunonghae* (2001) 11 NWLR [Pt 724] 318 [CA] 337 *per* Ibiyeye JCA.
35 Nigeria Independence Act of 1960 8 & 9 Eliz 2 cap 55.
36 Secs 2(2) & 4 of the Constitution.
37 Cap 133 Laws of Western Nigeria 1959, as amended by states in the former western region.
38 Wills Law 28 of 1958, which subsequently became Cap 113, Laws of Western Region of Nigeria 1959.

Bendel State.[39] Some states, such as Anambra and Rivers, copied sections of the above laws.

There is no uniformity in inheritance laws in Nigeria.[40] When a person subject to statutory law dies intestate, local enactments relating to the administration of estates apply. Where no local enactments exist, English law applies. When, however, a person subject to customary law dies intestate, native law applies. Generally, the applicable law in intestate situations is as follows:

(i) Immovable property is governed by *lex situs*, or the law of the place where the property is situated. If the immovable property is based in Lagos, Ogun, Oyo, Ondo or Bendel state, the Administration of Estates Law of 1959 applies when customary law does not apply. If the immovable property is based in any of the northern or eastern states, English common law applies, as laid down in *Cole v Cole*.[41]
(ii) Movable property is governed by the law of domicile of the intestate at the time of death.[42] If the intestate died domiciled in Lagos, Ogun, Oyo, Ondo or Bendel state, the Administration of Estates Law, as amended by states, applies, irrespective of the location of the property. When a person dies domiciled in any of the northern or eastern states, the law of the state in which he died applies with respect to movable property, irrespective of its location.
(iii) Where the property is subject to customary law, or the deceased was married under customary law, or was otherwise subject to native law, customary law applies.

A best interests of dependants principle is evident in some of the laws governing intestate estates in Southern Nigeria. These laws are modelled on the Administration of Estates Law of 1963[43] and the Administration of Estates Law of 1959. Generally, these laws prescribe rules for distribution of intestate property as follows:[44]

(a) A surviving spouse inherits a deceased's personal chattels. Where the deceased person is survived by a spouse but no children, parents or siblings of the same blood, the surviving spouse inherits all. However, where the surviving spouse is the wife and the intestate is survived by siblings, the wife's interest fails on her death or remarriage, and devolves to the intestate's siblings in equal shares.
(b) Where the deceased is survived by a spouse as well as children, one-third of the residuary estate is held in trust for the surviving spouse. The interest of such spouse is absolute for a husband; for a wife, it is for life or until remarriage. The remainder of the estate, together with

39 Cap 172, Laws of Bendel State, 1976.
40 PO Itua 'Legitimacy, legitimation and succession in Nigeria: An appraisal of section 42(2) of the Constitution of the Federal Republic of Nigeria 1999 as amended on the rights of inheritance' (2012) 4 *Journal of Law and Conflict Resolution* 36.
41 *Cole v Cole* (1898) 1 NLR 15 is authority that when a person who contracted a Christian marriage outside Nigeria dies intestate while domiciled in Nigeria, the English common law governs the distribution of his estate.
42 *Tapa v Kuka* (1945) 18 NLR 5; *Zaidan v Zaidan* (1974) 4 UILR 283.
43 Cap 5 Laws of Eastern Nigeria 1963. These laws include the Anambra State Administration of Succession to Estate of the Deceased Law of 1987, and the Administration of Estate Law, Cap 1 Laws of Rivers State of Nigeria 1999.
44 Sec 49(ii) of the Administration of Estates Law, Cap 1 Laws of Western Region of Nigeria 1959.

any residue from the wife's interest, is held in trust for surviving children or grandchildren of the intestate in equal shares.

(c) Where the deceased is survived by a spouse, as well as one or more of the following: a parent, a sibling, or children of a sibling, but does not leave a child, two-thirds of the residuary estate is held in trust for the surviving spouse. The interest of such spouse is absolute for a husband; for a wife, it is for life or until remarriage. The remainder of the estate, together with any residue from the wife's interest, is held in trust for male siblings of the intestate in equal shares. In the absence of male siblings or their children, the portion devolves to parents.

(d) Where the deceased is survived by children or children of deceased children but no spouse, two-thirds of the residue of the estate is held in trust for these children equally. Of the remaining one-third, one-sixth is held in trust for the intestates' parents and one-sixth for siblings.

(e) Where the deceased is not survived by a spouse, children or grandchildren, but is survived by both parents, two-thirds of the residuary estate is held in trust for the parents in equal shares. The other one-third is held in trust for siblings in equal shares. If no siblings survive, their share goes to the parents.

(f) Where the deceased is neither survived by a spouse nor children, but is survived by one parent, two-thirds of the residuary of the estate is held in trust for the surviving parent. One-third of the estate's value is held in trust for siblings in equal shares. If no siblings survived, it goes to the surviving parent.

(g) Where the deceased is neither survived by spouse, children, nor parents, the residuary estate is held in trust for siblings, half-brothers and sisters, grandparents, and the uncles and aunts of the intestate, respectively.

(h) In default of any person taking an absolute interest under the foregoing provisions, the residuary estate goes to the head of the family of which the intestate was a member. Such family head shall, out of the whole of the property devolving to him, provide for any dependant of the intestate and person whom the intestate might reasonably have been expected to include in a will.

Even where a person died testate without reasonable provision for the maintenance of dependants, some testamentary laws provide for rights of maintenance for such dependants. For example, section 2(1) of the Wills Law of Lagos State provides that spouses or children of the deceased 'may apply to the court for an order on the ground that disposition of the deceased's estate effected by will is not such as to make reasonable provision for the applicant'.[45] Not only does the succession law of Anambra State contain provisions similar to section 2(1) above, but it goes further to include the estates of deceased persons that died intestate.[46] Its provisions, modelled after the English Inheritance Act,[47] enable dependants such as spouses, male children below the age of 18 years, and unmarried females below the age of 18 years, to apply to the High Court for relief. The difference between

45 Sec 2, Wills Law of Lagos State, Cap W2 Laws of Lagos State (2004), and sec 4(1) of the Wills Edict 12 of Oyo State (1990).

46 Sec 58 Administration and Succession (Estate of Deceased Persons) Law Cap 4 Laws of Anambra State of Nigeria 1987.

47 English Inheritance (Provisions for Family and Dependants) Act of 1975.

these state laws is that, while some recognise only spouses and children, others include parents or siblings who the deceased had been maintaining immediately before death.[48]

Unfortunately, many succession laws do not apply where the distribution of an estate is governed by customary law. This is most common in laws that restrict testators' rights to dispose of their property, which the courts have upheld in a long line of cases.[49] In April 2013, the Supreme Court revisited section 3(1) of the Wills Law of old Bendel State in the case of *Uwaifo v Uwaifo*.[50] It held that the *Igiogbe* custom of the Benin, which gives the eldest son the right to inherit the family home, overrides a father's testamentary wishes. However, uncertainty surrounds the ambit of this restriction of testamentary freedom. While some opinions consider provisions such as section 3(1) as limiting a testator's freedom, others view it as merely limiting the subject of testamentary dispositions. In *Agidigbi v Agidigbi*,[51] the court held that the phrase 'subject to any customary law relating thereto' is not a qualification on the testator's capacity to make a will, but rather a qualification of the subject matter of the property disposed of or intended to be disposed of by a will. In any case, whether it is testators' freedom or the subjects of testators' freedom that are restricted, the result is the same. As Nwogugu puts it, legislation such as section 3(1) of the Wills Law means that 'real property, which cannot be effected by testamentary disposition under the applicable customary law, cannot be disposed by will'.[52] The crucial consequence of such restrictions is that land, which is mostly governed by customary law, is hardly disposed of by will. In reality, where a man married under the Marriage Act dies intestate, the statutory entitlements of his widow do not extend to land he received from his family or kin group, since it is deemed to devolve in accordance with customary law. Numerous incidents have been documented of widows who, although married under the Marriage Act, were nevertheless barred by male relatives from their deceased husbands' assets.[53] These incidents symbolise the problem of the primogeniture rule in Southern Nigeria.[54]

48 See, eg, Lagos and Oyo states.

49 The notable ones are *Arase v Arase* (1981) NSCC 101; *Igbinoba v Igbinoba* (1995) 1 NWLR (Pt 317) 375 381; *Idehen v Idehen* (1991) 6 NWLR (Pt198) 422; *Oke v Oke* (1974) 3 SC 1; *Olowu v Olowu* (1985) 3 NWLR (Pt 13) 372.

50 *Uwaifo v Uwaifo* (2013) Law Pavilion Electronic Law Reports 20389 (SC) *per* Galadima JSC.

51 *Agidigbi v Agidigbi* (1992) 2 NWLR 98.

52 EI Nwogugu *Family law in Nigeria* (1990) 379. See also IE Sagay 'Customary law and freedom of testamentary power' (1995) 39 *Journal of African Law* 173-182.

53 Ezeilo (n 29 above) 139.

54 JA Omotola 'Primogeniture and illegitimacy in African customary law: The battle for survival of culture' (2004) 15 *Indiana International and Comparative Law Review* 115; Ezeilo (n 29 above) 131-139; PO Nwankwo & PI Ibe *Critical analysis of women's conditions in Nigeria: Violence, discrimination, and other maltreatments* (2013).

2.4 Exclusion of the best interests principle in succession laws

Notably, certain succession laws do not apply where the distribution, inheritance and succession to an estate are governed by customary law.[55] Section 49(5)(b) of the Administration of Estates Law of 1959 states:

> Any real property, the succession to which cannot by customary law be effected by testamentary disposition, shall descend in accordance with customary law, anything herein to the contrary notwithstanding.

Section 3(1) of the Wills Law of old Bendel State provides:[56]

> Subject to any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of by his will executed in a manner hereinafter required, all real and all personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not so devised, bequeathed and disposed of would devolve upon the heir at law.

The above law is similar to several state laws. For example, section 1 of the Wills Law of Bayelsa State, 2006, states as follows:

> It shall be lawful for everyone to bequeath or dispose by will executed in accordance with the provisions of this Law, all property to which he is entitled in law or in equity, at the time of his death: Provided that the provisions of this Law shall not apply (a) to any property which the testator had no power to dispose of by will or otherwise under customary Law to which he was subject; and (b) to the will of any person who immediately before his death was subject to Islamic Law.

The above laws, which have received approval from the Supreme Court, are inimical to the best interests principle.[57] Their inimicality lies in their limitation of the testamentary capacity of Nigerians subject to customary law, a limitation that enables the operation of the male primogeniture rule. It is worth noting that the majority of land in Nigeria is in rural areas and customary law regulates the lives of most Nigerians.[58] Also, Nigerians are not enthusiastic about making wills because of cultural and religious phobias of death. In fact, 'it is normal to die intestate'.[59] The result is that the primogeniture rule applies in many parts of the country without an accompanying best interests of dependents principle. Such is the prevalence of male primogeniture that some probate divisions of the High Court are reluctant to grant women letters of administration unless they are accompanied by male children of over 21 years or a male relative of the deceased

55 *Zaidan v Mohsons* (1973) All NLR 86.

56 Wills Law of old Bendel State, Cap 133 Laws of Western Nigeria 1958, applicable to Lagos, Ogun, Osun, Ondo, Edo and Delta States.

57 *Arase v Arase* (1981) NSCC 101; *Igbinoba v Igbinoba* (1995) 1 NWLR (Pt 317) 375 381.

58 Nigerian Institute of Advanced Legal Studies (ed) *Restatement of customary law of Nigeria* (2013) Preface.

59 Okoro (n 12 above) 64.

husband.[60] In fact, women were, until recently, considered part of the estate of their husbands.[61] The worrying significance of this problem is that a best interests principle is hardly invoked in the few cases that challenge male primogeniture.[62] It is this harsh reality that necessitates an enquiry into reform of the customary law of succession in Nigeria. In order to highlight the state of customary law reform in Nigeria, it is important to first give a brief account of customary law reform in South Africa.

3 Customary law reform in South Africa

South Africa practises a mixed legal system, comprising of indigenous law and laws inherited from the Dutch and the British. Its customary law reforms were mainly prompted by the historical injustices occasioned by colonial rule and apartheid, during which customary law was not taken seriously.[63] The 1996 Constitution gives customary law equal standing with the received law.[64] Sections 30, 31 and 185 of the 1996 Constitution provide for the right to culture and cultural life, upon which customary law is founded. Section 211(3) states: 'The courts *must* apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.' Furthermore, section 39(2), the second limb of the Constitution's interpretation clause, outlines the duty of courts 'when developing the common law or customary law'.

Law reform in South Africa, primarily, is the duty of the South African Law Reform Commission (SALRC).[65] However, the courts, the Ministry of Rural Development and Land Reform[66] and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities[67] also engage in activities related to customary law reforms. For example, the Commission on Restitution of Land Rights works closely with parliament and civil society groups to reverse the legacy of the 1913 Natives Land Act.[68] Although most of the SALRC's successes in

60 This finding is based on the author's field research in January and June 2014. See also *Suberu v Summonu* (1957) SCNLR 45.

61 *Nezianya v Okagbue* [1963] All NLR 358 SC; *Nzekwu v Nzekwu* (1989) 2 NWLR (Pt 104) 373; *Akinnubi v Akinnubi* [1997] 2 NWLR (Pt 486) 144; *Obusez v Obusez* [2001] 15 NWLR 377.

62 *Aniekwe & Another v Nweke* (n 32 above) is a classic case that failed to invoke the best interests principle.

63 TW Bennett 'Legal pluralism and the family in South Africa: Lessons from customary law reform' (2011) 25 *Emory International Law Review* 1029-1035.

64 See sec 211(3) of the Constitution of South Africa. See also sec 1(1) of the Law of Evidence Amendment Act 45 of 1988, as amended by the Justice Laws Rationalisation Act18 of 1996.

65 South African Law Reform Commission Act 19 of 1973.

66 The Ministry's website is http://www.dla.gov.za/.

67 Sec 185 South African Constitution.

68 See Commission on Restitution of Land Rights Annual Report 2013/2014.

reforming the customary law of succession came after the end of apartheid in 1994, it had done significant work before that period. For example, it was instrumental in the promulgation of the Intestate Succession Act 81 of 1987. This Act codified the common law of intestate succession and the customary law of succession applicable to black South Africans living in rural areas. The SALRC also played a role in the enactment of the Law of Succession Amendment Act 43 of 1992, which made fundamental changes to the Intestate Succession Act of 1987 and the Wills Act of 1953. Since the end of apartheid and the adoption of new Constitutions in 1994 and 1996 respectively, the SALRC's work has accelerated. It investigated the intersection of inheritance with customary marriages,[69] which led to the adoption of the Recognition of Customary Marriages Act.[70] Furthermore, it investigated the possible harmonisation of the common law of succession and the customary law of succession with values in the Constitution's Bill of Rights.[71] In order to examine issues arising from this harmonisation, it launched Project 90 and called for public debate.[72] Oral and written submissions were made by individuals, the judiciary, traditional leaders, the Ministry of Justice, civil society, community-based organisations and the academia. Such was the massive interest it generated that parliament introduced a Customary Law of Succession Amendment Bill to extend the general common law of succession to all South Africans. Following opposition from traditional leaders, the Bill was withdrawn and the matter was referred for public debate to the SALRC. In recognising the tension between constitutional values and the changing social realities of the male primogeniture rule, the SALRC considered two key issues:

(i) Should the customary law of succession be abolished in favour of a single legal regime that would eliminate any sense of racial discrimination and promote national unity?
(ii) Should the customary law of succession be retained with little modifications but made compatible with the Constitution?

The SALRC unanimously found that, in order not to contravene constitutional values, the customary law of succession must not prejudice widows, daughters and younger male children. In April 2004, it published its report, attaching a draft Bill on reforming the customary law of succession.[73] The Bill, later revised, sought to provide for the devolution of certain property in line with the customary law of intestate succession; the disposition of house property by will; the protection of property rights in customary

69 SALRC *Report on Customary Law of Succession* (2004); SALRC *Report on Customary Marriages* (1998).

70 Recognition of Customary Marriages Act 120 of 1998, adopted 15 November 2000.

71 SALRC *Harmonisation of the common law and indigenous law* (1999); SALRC *Report on Customary Law of Succession* (2004).

72 SALRC *Report: Customary Law: Succession Discussion* (2000); SALRC *Report: Customary Law: Administration of Estates* (2001).

73 SALRC *Report on Customary Law of Succession* (2004).

marriages; an amendment of the Intestate Succession Act to protect the rights of younger male children; and an amendment of the Maintenance of Surviving Spouses Act of 1990 to enable wives in customary marriages to make claims for maintenance. On 21 April 2009, parliament approved these findings by passing the Reform of Customary Law of Succession Act (Reform Act).[74]

The passing of the Reform Act reveals how South African courts complement the SALRC in reforming the customary law of succession. In two cases[75] the Cape High Court and the Pretoria High Court declared as unconstitutional provisions of the Black Administration Act and section 1(4) of the Intestate Succession Act, which relate to the male primogeniture rule. In the *Bhe* case, two minor children born from an extra-marital union had failed to qualify as heirs in the intestate estate of their deceased father under the system of intestate succession created by section 23 of the Black Administration Act and its regulations. According to these provisions, the estate was to be distributed according to 'black law and custom'. For similar reasons, in the *Shibi* case, Ms Shibi was prevented from inheriting the estate of her deceased brother. When these two cases were brought to the South African Constitutional Court for confirmation of the orders of the High Court, they were consolidated with a third application. This application was brought jointly by the South African Human Rights Commission and the Women's Legal Centre Trust, seeking to invalidate section 23 of the Black Administration Act[76] or, alternatively, portions of it.[77] The Constitutional Court found that, due to socio-economic changes, heirs often do not reside with the entire extended family and[78]

> succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependents of the deceased.

It struck down section 23 of the Black Administration Act and section 1(4)(b) of the Intestate Succession Act 81 of 1987 for infringing the rights to equality and human dignity. It declared *inter alia*:[79]

> The rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution

74 Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

75 *Bhe & Others v The Magistrate, Khayelitsha & Others* 2004 (2) SA 544 (C) and *Shibi v Sithole and Minister for Justice and Constitutional Development* Case 7292/01, 19 November 2003 (unreported).

76 Black Administration Act 38 of 1927.

77 The portions are secs 23(1), (2) & (6). The Commission for Gender Equality acted as *amicus curiae* in the matter.

78 *Bhe* (n 1 above) para 80.

79 *Bhe* para 136. The majority judgment was delivered by the then Deputy Chief Justice, Langa DCJ. Chaskalson CJ (as he then was), Madala J, Mokgoro J, Moseneke J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concurred in the judgment of Langa DCJ.

> and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property.

The majority judgment's restriction of the unconstitutionality of the male primogeniture rule to inheritance marked its departure from the minority judgment. Delivered by Ngcobo J, the minority judgment opted to develop customary law by simply removing the reference to 'a male' in the impugned legislation so as to allow women to succeed to the intestate estate of deceased persons. Ngcobo J based his reasoning on the courts' duty to develop customary law in line with the Bill of Rights.[80]

The importance of the *Bhe* decision is two-fold: The first is the impetus it gave to law reform in South Africa as, following the judgment, parliament passed the Reform Act. The second is the insight it gives into the unsuitability of the male primogeniture rule in modern conditions. Quoting the views of the SALRC, the Constitutional Court observed as follows:[81]

> The application of the customary law rules of succession in circumstances vastly different from their traditional setting caused much hardship. Widows were … often kept on at the deceased's homestead on sufferance or … simply evicted. They then faced the prospect of having to rear their children with no support from the deceased husband's family.

South Africa's reforms recognise that social circumstances have so changed that the customary law of succession no longer provides adequately for widows, female children, younger male children and children born out of wedlock. Zambia,[82] Zimbabwe[83] and Malawi[84] have also made extensive reform efforts. Other states address customary law reforms through the judiciary. For example, in September 2013, the Botswana Court of Appeal invalidated a Ngwaketse ultimogeniture rule, which holds that 'only the last born son is qualified as intestate heir to the exclusion of his female siblings'.[85] In sum, customary law reform efforts in South Africa reveal three key aims:

(a) the need to provide 'adequate material support for vulnerable members of the family in changing social and economic conditions';
(b) the need to 'promote the human rights of family members with respect to inheritance under customary law'; and
(c) the need to cater for deceased persons' dependants by introducing flexibility in inheritance rules.

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80 *Bhe* (n 1 above) paras 222 & 239. Ngcobo J's approach was based on the foundational value of human dignity (*ubuntu*), and favoured the status of women in other areas, such as succession to traditional leadership.

81 *Bhe* (n 1 above) paras 82 & 83.

82 Intestate Succession Act 5 of 1989 (effective 14 May 1989).

83 Administration of Estates Amendment Act 6 of 1997 (effective 1 November 1997).

84 Deceased Estates (Wills, Inheritance and Protection) Act 14 of 2011 (effective 18 August 2011).

85 *Ramantele v Mmusi & 3 Others* CACGB-104-12 3 September 2013 (AC) para 80 http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/07/Mmusi-Court-of-Appeal-Judgment.pdf (accessed 7 November 2014).

Part 4 examines how these key aims feature in law reforms in Nigeria.

4 Customary law reform in Nigeria

Given the hardship caused to women and children by socio-economic changes, it is reasonable to expect serious efforts to reform customary laws of inheritance in Nigeria. This, however, is not the case. In what follows, I critique legislative and judicial interventions in Nigeria aimed at aligning the customary laws of inheritance with changing social conditions in order to highlight the need for a best interests of dependants principle.

4.1 Law reform and the Constitution

The 1999 Constitution does not dignify law reform or review with a mention. It gives the federal government exclusive legislative powers in most matters, and gives states concurrent and residual powers in the rest.[86] It is ambiguous on who possesses legislative competence over customary law, thereby making it difficult to assess customary law reform. For example, section 4(7)(a) empowers states to make laws with respect to 'any matter' outside the Exclusive Legislative List. Item 61 of this List gives the federal government powers to legislate on 'the formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law, including matrimonial causes relating thereto'. From these provisions, it is possible to argue that customary law and, impliedly, its reform, are outside the legislative jurisdiction of the federal government.[87] However, customary laws codified by states are subject to interpretation by federal courts. For example, the Supreme Court has severally debated the legal implications of section 3(1) of the Wills Law of old Bendel State which, as shown above, limits the testamentary disposition of properties governed by customary law.[88] Because of Nigeria's system of governance, the enquiry into customary law reform is undertaken at federal and state levels.

4.2 Customary law reform at federal level

Customary law reform at federal level is practically non-existent. The statutory body charged with reform of federal laws is the Nigerian Law Reform Commission (Commission), which was established in 1979. Section 5(1) of its enabling Act states that the Commission shall 'keep under review all federal laws with a view to their systematic and

86 Sec 7(5) of the Constitution gives very restricted powers to local government councils.

87 IE Sagay 'Intestate succession in the states of the former western region of Nigeria' (1998) 42 *Journal of African Law* 112.

88 *Idehen v Idehen* (1991) 6 NWLR (Pt 198) 382; *Lawal-Osula v Lawal-Osula* (1995) 9 NWLR (Pt 419) 259.

progressive development and reform in consonance with the prevailing norms of Nigerian society'.[89] Although this is a broad and laudable mandate, the Commission is neither autonomous in structure nor in operations. Rather than parliament having oversight control over the Commission, its functions, proposals and recommendations are approved by the Attorney-General of the Federation (AGF), who is a political office holder. The AGF, in turn, forwards the Commission's findings and recommendations to the President.[90] Moreover, the Commission lacks sufficient qualified personnel and operates on a 'shoestring' budget.[91] While it is active in penal reform, access to justice and juvenile justice, it has no significant achievement with respect to customary law. Of its 19 major publications from 1980 to 2010, only three are mildly related to customary law. These are reports published in 1991 and 1987 titled Review of Pre-1900 English Statutes in Force in Nigeria'. The other two are the Report on the Reform of the Land Use Act of 1992, and the Report on the Reform of the Evidence Act of 1998.[92] In October 1984, it submitted recommendations for the registration of all categories of marriages, as well as a scheme for intestate succession for registered marriages.[93] This recommendation was never implemented. In July 2013, the federal government set up a Presidential Committee on Land Reform with little involvement from the Commission.

Other than the above efforts, there are no notable efforts at federal level to reform the customary laws of inheritance in Nigeria. In September 1976, the federal military government appointed a Customary Courts Reform Committee.[94] The Committee was mandated to, *inter alia*, examine the continued existence of customary courts, their structure, enabling laws, jurisdiction, composition, the role of traditional chiefs, and whether, and to what extent and basis, customary laws and usages should be codified. The Committee submitted its findings in 1978. Notably, it recommended the establishment of a 'permanent Customary Law Commission charged with the responsibility of investigating, ascertaining and recording customary laws throughout the country'. No significant action emerged from its recommendations, as the military

89 Nigerian Law Reform Commission Act Cap 118, Laws of the Federation of Nigeria 2004 (Law Reform Act).

90 Sec 5(6) Law Reform Act. In recognition of the Commission's weaknesses, a Bill is pending in parliament to grant it more autonomy. See Nigerian Law Reform Commission Act (Amendment) Bill 2012.

91 AO Nzoma 'The process of law reform' (2012) 1 *NIALS International Journal of Legislative Drafting* 126.

92 World Catalogue search result: http://orlabs.oclc.org/identities/lccn-no89-3146 (accessed 16 August 2013).

93 Nigerian Law Reform Commission *Law Reform Report No 2* (November 1981) 15-57.

94 White Paper on the Federal Military Government's views on the Report of the Customary Courts Reform Committee 1978, reproduced in A Collett 'Recent legislation and reform proposals for customary and area courts in Nigeria' (1978) 22 *Journal of African Law* 161-187.

government relinquished power the following year. On 14 April 2014, a state-sponsored 'roundtable discussion on law reform in Nigeria' issued a Communiqué, which failed to mention customary law.[95]

Poor law reform is not restricted to the Commission. Agencies such as federal and state ministries of socio-cultural affairs and, until recently, the National Commission on Human Rights, suffer from the same lack of political will that inhibits the Commission. However, the Nigerian Institute of Advanced Legal Studies (Institute) has recently undertaken activities which could lead to and assist customary law reform. The Institute is a statutory body mandated to, *inter alia*, 'co-operate with … the Nigerian Law Reform Commission and such other bodies … engaged in any major field relating to law reform'.[96] It has published several empirical findings on customary law, including inheritance and succession practices in local communities.[97]

The absence of customary law reform at federal level in Nigeria may be traced to three reasons. The first and most obvious is political instability resulting from several military interventions in governance.[98] The second is corruption.[99] The third is a lack of political will arising from a desire to avoid potentially-divisive legislation in an ethnically large and diverse nation. In fact, the introduction of a Bill of Rights in the 1960 Independence Constitution is, largely, the result of agitations by ethnic minorities.[100] This is evident in the Harry Willink Commission of Inquiry, which sat in 1958 to 'enquire into fears of minorities and the means of allaying them'.[101] Furthermore, it is unclear whether Item 61 of the Exclusive Legislative List contributes to the federal government's reluctance to carry out customary law reforms. Notably, the Customary Courts Reform Committee was set up by a military government that had suspended the Constitution. It would probably not have been set up in a constitutional democracy. Our enquiry turns now to the reform efforts of states.

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95 Communiqué issued at a roundtable discussion on law reform in Nigeria, organised by the National Institute for Legislative Studies, in collaboration with the National Assembly Committees on Judiciary and Justice at the Transcorp Hilton Hotel on 14 April 2014' http://nils.gov.ng/uploads/LawReformCommunique.pdf (accessed 21 May 2014).

96 Sec 4(f) Institute of Advanced Legal Studies Act Cap 345, Laws of the Federation of Nigeria 2004.

97 See, eg, *Restatement of customary law of Nigeria* (2013); *Traditional administration of justice in Nigeria* (2013), *NIALS dictionary of African customary laws* (2013); E Azinge & A Awah (eds) *Legal pluralism in Africa: A compendium on African customary law* (2012).

98 USAID 'Legal and judicial sector reform in Nigeria: Report back to rule of law assessment mission to Nigeria' (19-30 June 2000) 33.

99 USAID (n 98 above) 7 17.

100 JI Dibua *Modernisation and the crisis of development in Africa: The Nigerian experience* (2006) 73.

101 M Vickers *A nation betrayed: Nigeria and the Minorities Commission of 1957* (2010) 14.

4.3 Customary law reform at state level

States in Nigeria are relatively more active in customary law-related reforms than the federal government. Most of these reforms are recent, as the frequent military intervention in governance disrupted the early progress made in law reform after independence. For example, a draft Bill on Administration of Estates, initiated in 1965 in the then Eastern Province of Nigeria, was terminated by the January 1966 military *coup* and subsequent civil war.[102] The Bill was seen as a revolutionary effort to streamline the law on intestate administration of estates under customary law.[103] Before the civil war, the Eastern Province succeeded in passing legislation against caste-based discrimination,[104] high rates of dowry,[105] and underage marriage.[106] In 1981, a Bill to fix a maximum sum payable for bride wealth in the old Imo State failed to be passed into law.[107] Regarding recent efforts, states such as Lagos, Abia, Akwa Ibom and Edo have set up law reform commissions.[108] Ekiti signed a Law Reform Commission Bill in February 2014.[109] The Jigawa State Justice Law Reform Commission trained over 1 350 traditional rulers in dispute resolution mechanisms in 2013.[110] The Akwa Ibom State Law Reform Commission presented its first annual report in 2010, while its Abia State counterpart is collecting data for a Customary Law Manual.[111] Despite these efforts, no legislation has emerged to address the changing social conditions that surround the male primogeniture rule. Our enquiry now turns to judicial law reform.

4.4 Supreme Court and customary law reform

As a country with a common law legal tradition, judicial precedents and court hierarchy are taken seriously in Nigeria. At face value, the April 2014 judgments of the Supreme Court on male primogeniture appear like the judicial reform of the customary law of inheritance.

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102 *Eastern Nigeria Gazette* 66, Enugu, 17 September 1965 Vol 14.

103 Nwogugu (n 52 above) 397-398.

104 Abolition of Osu System Law, Eastern Region Law 13 of 1956.

105 Limitation of Dowry Law, Eastern Region Law 23 of 1956, now Cap 76 Laws of Eastern Nigeria 1963.

106 The Age of Marriage Law Eastern Region Law 22 of 1956.

107 ISN Bill 70 of 1981, published in *Imo State of Nigeria Gazette* 22, 18 June 1981.

108 Some websites of these agencies are http://www.lawrecom.lg.gov.ng; http://abialawreformcommission.org; http://www.aksgonline.com/aks_agencies.aspx; and http://www.edostate.gov.ng/law-review-commission respectively.

109 'Ekiti signs criminal law, accuses FG of neglect' *The Punch* 26 February 2014 http://www.punchng.com/news/ekiti-signs-criminal-law-accuses-fg-of-neglect/ (accessed 21 May 2014).

110 'Traditional rulers in Jigawa get training on dispute resolution' *The Guardian* 20 August 2013 http://www.ngrguardiannews.com/appointments/130404-traditional-rulers-in-jigawa-get-training-on-dispute-resolution (accessed 19 September 2013).

111 See the websites of these commissions at http://abialawreformcommission.org/questionnaires.htm and http://www.aksgonline.com/articlePage.aspx?qrID=764 (accessed 21 May 2014).

Regrettably, they are not. In the first case, the plaintiff/respondent's husband was the younger half-brother of the defendants' father.[112] She sought a declaration that she was entitled to a statutory right of occupancy of a parcel of land or, in the alternative, a share of the proceeds of the sale of the land. Interestingly, she contended that the customs of the Awka people allowed a woman to inherit the property of her husband, whether she has a male child or not. From her evidence, it appears that the customs of the Awka people have changed to extend inheritance rights to women. In support of this claim, she relied on the arbitration order made by the Ozo Awka society. The defendants disagreed, claiming that, as a woman, she had no right to land under Awka customary law. Both the High Court and the Court of Appeal upheld the plaintiff's claims. In dismissing the defendants' appeal, the Supreme Court underlined the difficulty of abolishing the primogeniture rule as follows:[113]

> Any culture that disinherits a daughter from her father's estate or wife from her husband's property by reason of a God-instituted gender differential should be punitively and decisively dealt with … It is indeed much more disturbing, especially where the counsel representing such perpetrating clients, though learned, appear comfortable in identifying, endorsing and also approving of such a demeaning custom ... Consequently, the appellants' two issues raised in this appeal are both resolved against them. The appeal is without merit and is hereby dismissed while the judgment of the Court of Appeal, Enugu Division, which affirmed that of the trial High Court of Anambra State, Awka is hereby also affirmed.

In effect, the Court only affirmed the reliefs sought by the plaintiff/respondent.[114] It did not formulate any issue for determination regarding the male primogeniture rule, nor did it make any direct invalidation of the rule. Unlike in South Africa, no *amicus curiae* was involved in the case. As the Court's complaint against the defendant/applicant's lawyers indicates, the impact of this case on the abolition of the male primogeniture rule is not encouraging.

In the second case, the plaintiff/respondent was born out of wedlock. She sought a declaration against her step-mother and half-brother that, as a daughter of the deceased, she was entitled to his estate. The defendants/appellants contended that, under Igbo customary law, she was not entitled to a share in the estate. Both the trial High Court and the Court of Appeal found that she was a daughter of the deceased and upheld her claims. The Supreme Court agreed. It ruled that 'the Igbo native law and custom which deprives children born out of wedlock from sharing the benefit of their father's estate' is void because it conflicts with section 42(2) of the Constitution.[115] The judgment did not address the position of widows

112 *Anekwe v Nweke* (n 3 above).

113 *Per* Ogunbiyi, JSC 36-37 paras A-B.

114 Even at the Court of Appeal, no analysis of the changing social conditions that surround the male primogeniture rule was conducted.

115 *Per* Ogunbiyi, JSC 37 paras A-E.

and younger male children. Once again, no *amicus curiae* was involved and no attempt was made to refine the rather inelegantly-drafted claims of the parties.

It is notable that the Supreme Court did not clarify the territorial reach of its decisions in these two judgments. This is understandable, given that the common law rules of pleadings discourage courts from granting prayers not asked for by parties.[116] Unfortunately, lower courts are only bound by the decisions of higher courts when the facts are the same as the previous decision sought to be relied on. Moreover, the Court made no effort to analyse the changing social conditions that affect the primogeniture rule, nor mentioned the duty of care owed by family heads, nor even made a case for reform of the customary law of succession. This failure is in contrast with the approach of courts in South Africa. In *Mthembu v Letsela*,[117] Le Roux J pointed out that[118]

> the devolution of the deceased's property onto the male heir involves a concomitant duty of support and protection of the woman or women to whom he was married by customary law and of the children procreated under that system.

When the Constitutional Court found in the *Bhe* case that the primogeniture rule was out of tune with current social conditions because heirs hardly adhered to their duty of support, it struck down the rule.[119] It is worth noting that its approach gave voice to earlier recommendations made by the SALRC to parliament.[120] By bringing the customary law of succession under the umbrella of the Intestate Succession Act, the Constitutional Court threw a challenge to the legislature to reform the customary law of succession through a new or amended statute.[121] As shown in part 3, the result is the Reform Act. With the identified deficiencies in the two Supreme Court judgments, it is unlikely that they will have the same effect as the *Bhe* case on customary law reform in South Africa. Due to deeply-entrenched patriarchy and ethnic sensitivities in Nigeria,[122] a ripple effect from these two judgments also seems remote. The inescapable conclusion from these judgments is that the Supreme Court has yet to undertake serious reform of the customary law of succession.

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116 See *Mojekwu v Mojekwu* (1997) 7 NWLR (Pt 512) 283. Following the substitution of the deceased respondent on appeal to the Supreme Court, it became *Mojekwu v Iwuchukwu* [2004] 11 NWLR (Pt 883) 196.

117 *Mthembu v Letsela* 1997 (2) SA 936 (T).

118 *Mthembu v Letsela* (n 117 above) paras 945-947.

119 *Bhe* (n 1 above) paras 81-100.

120 *Bhe* para 121; South African Law Reform Commission Discussion Paper 93 on Customary Law: Succession xvi, 38-40 & 70-73.

121 *Bhe* (n 1 above) para 115.

122 U Ewelukwa 'Post-colonialism, gender, customary injustice: Widows in African societies' (2002) 24 *Human Rights Quarterly* 424-486.

5 Conclusion

The aforegoing analysis shows that Nigeria has neither harmonised customary law inheritance rules in order to reconcile them with socio-economic changes, nor adopted legislation with human rights benchmarks to regulate the customary law of succession. This situation of law reform is not likely to change soon because of the devolution of power between the federal government and the states. Customary rules of succession in Western Nigeria already observe a best interests of dependants principle, leaving Southern Nigeria behind, where states are, unfortunately, not active in the reform of the customary law of succession. There are two options to address this situation: The easier option is to leave customary law reform for the states and to create awareness of the need to imbibe a best interests of dependants principle in all judicial decisions and legislative policies concerning the customary law of succession. In this regard, research into living customary law is crucial. This is because superior courts could be applying obsolete rules of succession. In 1971, a government inquiry found that the difference between decisions of local customary courts and superior courts could be alarmingly wide.[123] The arbitral award of the Ozo Awka society in the *Anekwe v Nweke* case is indicative of changes in living customary law. This is significant, as research in Southern Africa showed that local courts considered changing social conditions when making divorce awards, whereas appellate courts, situated far from litigants, failed to do so.[124]

The second and difficult option is to properly give customary law a place in the Constitution and to subject it to human rights benchmarks.[125] It has been noted that 'the coexistence of modern, statutory laws with traditional customary laws and practices' in Nigeria 'has created a complex and confusing legal regime under which women generally are denied adequate legal protection'.[126] Side by side with constitutional reform should be the abolition of laws that enable the operation of the male primogeniture rule. These are, primarily, laws based on section 3(1) of the Wills Law of the old Bendel State and section 49(5)(b) of the Administration of Estates Law. As long as courts fail to take into consideration the role of socio-economic changes in the customary law of succession, the best interests of dependants principle would suffer along with females and younger male children.

123 Integrating the Administration of General Law and Customary Law – East Central State Official Document 7 of 1971.

124 CN Himonga 'Property disputes in law and practice: Dissolution of marriage in Zambia' in A Armstrong & W Ncube (eds) *Women and law in Southern Africa* (1983) 61-66. See also L Mbatha 'Reforming the customary law of succession' (2000) 18 *South African Journal on Human Rights* 273.

125 An even more difficult sub-option is to adopt federal legislation with a human rights benchmark to regulate inheritance.

126 U Ewelukwa 'Post-colonialism, gender, customary injustice: Widows in African societies' (2002) 24 *Human Rights Quarterly* 446.

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Judicial enforcement of socio-economic rights in South Africa and the separation of powers objection: The obligation to take 'other measures'

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Summary

The framework for constitutional democracy in South Africa assigns to the courts a pivotal role in assuring effective protection and translation of the range of entrenched socio-economic rights into material entitlements. This has enabled the courts in some instances to exercise considerable authority that has significantly influenced policy to the extent that power relations between the judiciary and the political arms of government have been threatened. Proponents of the doctrine of the separation of powers have expressed concerns, claiming that the meddling of the courts in the domain of policy making is politically incorrect. Consequently, the judicial enforcement of socio-economic rights has increasingly suffered setbacks, which to a large extent have retarded the constitutional vision of social transformation. Thus, in spite of South Africa's acclaimed global leadership in the enforcement of socio-economic rights, little has actually been accomplished in terms of improving the livelihood for victims of socio-economic deprivation. Considering that the enforcement of socio-economic rights is context-specific, I question the rationale for avoiding a 'jurisprudence of exasperation', which demonstrates greater potential to produce transformative outcomes than the preferred 'jurisprudence of accountability' which has shown little transformative effect. Just as the realisation of socio-economic rights through political strategies amounts

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to material entitlement, I argue that the result of positive adjudication should equally amount to entitlement to the same material things promised by the rights in question. I conclude with the suggestion that the judicial enforcement of socio-economic rights should be seen as a complementary strategy to the political objective of social transformation, rather than as an oppositional force to the proper functioning of government.

Key words: *socio-economic rights; South African Constitution; judicial enforcement; separation of powers; 'other measures'*

1 Introduction

This article aims to examine the socio-economic rights jurisprudence of South African courts following retired Justice O'Regan's assertion that the courts have avoided a 'jurisprudence of exasperation' in pursuit of a 'jurisprudence of accountability'.[1] The assertion was made as a reaction to controversies bordering around the enforcement of socio-economic rights in relation to the question of the separation of powers. Acknowledgment is given to the fact that it is democratically granted for the political arms of government to provide a framework for the progressive realisation of socio-economic rights.[2] However, within the context of a constitutional democracy, the courts are equally mandated and have practically demonstrated potential, albeit marginally, to contribute to the achievement of envisaged social change. I do not advocate for the courts to become crusaders of democracy, but as arbitrators of fair play in the political game between government and the governed the role of the courts cannot be ignored. This article needs to be understood from a socio-legal perspective, to consider what contribution the judicial enforcement of socio-economic rights could make as a complementary strategy to the achievement of social change in an otherwise disparate society. I argue that the courts (particularly the Constitutional Court) have increasingly restricted their role and therefore also limited the purpose of judicial enforcement, which to a large extent has retarded the constitutional vision of social transformation.

At the core of the impasse is a build-up of tension and mistrust between politicians and judges, triggered by allegations of judiciary usurpation of the function of 'policy formulation' and also by claims

1 K O'Regan 'A forum for reason: Reflections on the role and work of the Constitutional Court' (2011) Helen Suzman Memorial Lecture, Johannesburg, South Africa 39.

2 M Pieterse 'Legislative and executive translation of the right to have access to health care services' (2010) 14 *Law, Democracy and Development* 1-2; S Cumming & D Rhodes 'Public interest litigation: Insights from theory and practice' (2009) 36 *Fordham Urban Law Journal* 612; S Gloppen 'Social rights litigation as transformation: South African perspectives' in P Jones & K Stokke *Democratising development: The politics of socio-economic rights in South Africa* (2005) 167.

that political opponents are using the courts as a means to 'co-govern' the country.[3] These assertions stem from the fact that marginalised constituencies have through the agency of civil society progressively pressured the state by taking it to court – articulating popular demands for change, challenging government conduct, contesting the constitutionality of legislation and policies as well as claiming entitlement to futile political promises. In some instances, the Constitutional Court has handed down controversial judgments that have too frequently left the state on the losing side of the scales of justice – judgments which the political arms have considered jeopardising to the purpose of separation of powers.[4]

On this account, the state has questioned the role of the courts as well as the impact of socio-economic rights jurisprudence in transforming South African society.[5] More so, the relevance of the Constitution as a framework for democracy has been contested and political narratives have labelled the judiciary as a 'counter-revolutionary' force that may drive the country into 'judicial dictatorship'.[6] From other quarters, it is contended that litigation lacks the potential to change the socio-economic conditions that poor people contest.[7] While the Constitutional Court has recorded significant accomplishments, the impact it has had on the seemingly intractable problems of socio-economic injustices has been negligible.[8] Thus, a series of questions relating to the nature of socio-economic rights and the doctrine of the separation of powers have asked whether, how and to what extent courts should get involved in the enforcement of socio-economic rights as well as the trade-offs that are necessary to balance the role of courts and political institutions.[9] These questions need to be considered against the background of contentious state conduct that often adversely affect the social welfare of millions of people,[10] and also within the framework of the logic of

3 O'Regan (n 1 above) 5.

4 T Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 136.

5 Department of Justice and Constitutional Development 'Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African state' (2012) *Media Statement* ii.

6 O'Regan (n 1 above) 3.

7 S Gloppen 'Public interest litigation, social rights and social policy' paper presented at the World Bank Conference on New Frontiers of Social Policy, Arusha, Tanzania, 12-15 December 2005 1.

8 E Christiansen 'Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice' (2010) 13 *Journal of Gender, Race and Justice* 577.

9 D Butt 'Transformative constitutionalism and socio-economic rights: Courts and the making of public policy and the social contract revisited' (2008) *Centre for Socio-Legal Studies* 2.

10 I Trispiotis 'Socio-economic rights: Legally enforceable or just aspirational?' (2010) 8 *Opticon 1826* 1.

rights as a tool to curb the coercive powers of the state in order to protect the individual.[11]

The South African Constitution enshrines a Bill of Rights that forms the building blocks to the country's constitutional democracy.[12] This article focuses on the socio-economic rights contained in the Bill which, for the purpose of my arguments, I define as 'empowerment rights'. The political organs of state bear the major responsibility to ensure the progressive realisation of socio-economic rights. However, it is equally possible for realisation to happen through the courts – when contestation is raised challenging political strategies.[13] Stewart has ascertained that courts are mandated to utilise their 'quasi law-making' powers to translate entrenched socio-economic rights into enforceable legal claims.[14] Judicial enforcement thus constitutes a key strategy for protecting and empowering dispossessed groups, particularly when political channels of realisation become unavailable, ineffective, inaccessible or insufficient.[15]

When this happens, the contention is that the doctrine of the separation of powers becomes blurred, thereby threatening the essence and survival of democracy.[16] Arguments in this regard hold that socio-economic rights raise questions of policy, which fall exclusively within the jurisdiction of elected representatives of the people and not unelected and politically-unaccountable judges.[17] In an attempt to clear these misconceptions, Justice O'Regan's Helen Suzman memorial lecture focused on contextualising the role of the judiciary and the type of jurisprudence that is appropriate for the enforcement of socio-economic rights in relation to the question of the separation of powers. The lecture highlighted two interesting jurisprudential approaches, namely, 'jurisprudence of exasperation' and 'jurisprudence of accountability'. These constitute the point of

11 M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 386; M Rendel *Whose human rights?* (1997) 23.

12 Sec 7 Constitution of the Republic of South Africa, 1996.

13 Secs 34 & 38 Constitution.

14 L Stewart 'Adjudicating socio-economic rights under a transformative constitution' (2009) 20 *Penn State International Law Review* 506.

15 Cumming & Rhodes (n 2 above) 606.

16 OLM Ferraz 'Between usurpation and abdication? The right to health in the courts of Brazil and South Africa' (2009) http://ssrn.com/abstract=1458299 (accessed 18 March 2013) 1; M Brennan 'To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option' (2009) 9 *Queensland University of Technology Law and Justice Journal* 72; M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 13.

17 C Mbazira *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (2009) 17; E Mureinik 'Beyond a charter of luxuries: Economic rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464; D Davis 'The case against the inclusion of socio-economic demands in a bill of rights except as Directive Principles' (1992) 8 *South African Journal on Human Rights* 475; S Liebenberg 'Social and economic rights: A critical challenge' in S Liebenberg (ed) *The Constitution of South Africa from a gender perspective* (1995) 79.

departure for this article. I intend to subject both approaches to scrutiny in order to determine to what extent they have been effective in the advancement of socio-economic rights and ultimately to social transformation. Before proceeding, two key issues need clarification, namely, the question of the separation of powers and the question of jurisprudence.

The abstract doctrine of the separation of powers (not explicitly enshrined in the Constitution) conveys the idea of power sharing between the executive, the legislature and the judiciary to ensure essential checks and balances with the aim to curb the abuse of power by any one of these organs.[18] According to this arrangement, the legislature is granted the powers to make laws, the judiciary to interpret and apply laws and the executive to implement laws.[19] It has been argued, however, that the separation of powers is not absolute and that there is 'no sovereign, unlimited power in a constitutional democracy'.[20] I will return to this later in the discussion.

I look at the question of jurisprudence from the viewpoint of 'exasperation' and of 'accountability'. A jurisprudence of exasperation, as O'Regan explains, refers to the tendency of judges to base their judgments on exasperation with the state of affairs in the country rather than on reasoned arguments based on the possibilities and limits of the law.[21] Applying this approach in adjudication has the tendency of leading the courts to apply a more stringent measure of accountability on the government.[22] It is cautioned that, if not properly crafted, a jurisprudence of exasperation may 'produce worse outcomes' or have a more devastating effect than the presumed bad government policy that the courts may intend to remedy.[23] A jurisprudence of accountability, on the other hand, recognises that the political branches are responsible for government action, which must be subject to judicial scrutiny, especially when contestation is raised in court challenging such action.[24] From these explanations, I take for granted that the difference between exasperation and accountability lies in the degree of scrutiny that the courts may apply in testing government action in relation to its obligations. The questions to answer are the following: What if the jurisprudence of accountability proves inadequate in advancing envisaged

18 CM Fombad 'The separation of powers and constitutionalism in Africa: The case of Botswana' (2005) 25 *Boston College Third World Law Journal* 305-306; Brennan (n 16 above) 72.

19 E Wiles 'Aspirational principles or enforceable rights? The future for socio-economic rights in national law' (2007) 22 *American University International Law Review* 43; see also Langford (n 16 above) 31.

20 O'Regan (n 1 above) 6; C O'Regan 'Checks and balances reflections on the development of the doctrine of separation of powers under the South African Constitution' (2005) 1 *Potchefstroom Electronic Law Journal* 15.

21 O'Regan (n 1 above) 39.

22 As above.

23 As above.

24 O'Regan (n 1 above) 41.

transformation? What if the political and the socio-economic contexts necessitate the application of the jurisprudence of exasperation?

In section 2 below, I examine the constitutional imperative with regard to the enforcement of socio-economic rights, in which case I look at the transformative vision as well as the obligations imposed by the Constitution to ensure the enforcement of socio-economic rights. In section 3, I give an account of limitations to the enforcement of socio-economic rights. I illustrate with evidence from the *Mazibuko* case how the Constitutional Court's application of the jurisprudence of accountability caused a setback to the enforcement of the right to water. I argue that a possible combination of accountability with exasperation could have changed the course of the litigation to a more transformative outcome. In section 4 I draw attention to the obligation imposed on the state to take 'other measures'.[25] I argue that it does not only constrain the state to do more than business as usual, but it also requires the judiciary to be more transformative in the exercise of its broad remedial powers. I illustrate with reference to the *Modderklip* case the extent to which a measure of exasperation was applied to produce a more transformative outcome. In seeking to transform South African society, it is strategically unreasonable to dissociate exasperation from accountability and therefore I suggest that judicial enforcement should be seen as complementing political strategies to achieving social transformation rather than as an oppositional force to government.

2 Essence of judicial enforcement

2.1 Transformative vision

I examine the enforcement of socio-economic rights from the perspective of the purpose for which the rights were included in the Constitution. Knowledge of why socio-economic rights gained constitutional recognition and what they aim to achieve is important for determining the appropriateness of a strategy to ensure their enforcement. The Preamble outlines the historical context that sets the pace for the transformative vision. It provides that the Constitution was adopted to –[26]

- [h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- [l]ay the foundations of a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- [i]mprove the quality of life of all citizens and free the potential of each person …

25 Secs 26(2) & 27(2) Constitution.
26 Preamble to the Constitution.

Post-apartheid national exigency prioritises the construction of South African society on the pillars of democracy, social justice and fundamental human rights, by which sweeping social change would potentially be achieved through non-violent political processes guided by the law.[27] This envisages not just redressing the wrongs of the past, but promises to improve the quality of life and to free the potential of each person.[28] The process entails transforming the socio-economic *status quo* bequeathed by apartheid as well as the societal imbalances generated by the present system.[29] The Constitution does not only enshrine justiciable socio-economic rights, but makes provision for a comprehensive range of obligations and mechanisms relating to their realisation. It happens sometimes that the political framework becomes practically deficient in translating constitutional guarantees into real entitlements, thereby adversely affecting those whom the rights are meant to empower and to protect.[30] It thus becomes legitimately requisite for the political approaches and processes to be subjected to judicial scrutiny,[31] which virtually translates into the courts playing a complementary role in the process of social transformation.

Mbazira has noted that judicial enforcement defines the courts' commitment to fulfilling the constitutional vision of transformation from socio-economic deprivation to equitable distribution of resources with the aim of advancing the welfare of the poor.[32] It ensures that government is responsive and accountable to its people, not only through democratic processes, but also through litigation.[33] This does not make the courts an oppositional force to the state or litigation an instrument for solving political problems, but rather a response to political failure – a reaction to the realities of social injustice and a means of policing state action.[34] Based on the symmetrical power relations between the judiciary and government, it is more likely for government to abide by the decisions of the courts on socio-economic claims than it would respond when such claims are articulated through popular demands alone. When government uses power wrongfully or excessively, or when by omission or commission it derogates from its obligations, the courts have the authority to require it to render account in accordance with the prescribed rules of

27 F Coomans 'Reviewing implementation of social and economic rights: An assessment of the "reasonableness" test as developed by the South African Constitutional Court' (2005) 65 *Heidelberg Journal of International Law* 167; K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 150.

28 S Liebenberg *Socio-economic rights: Adjudicating under a transformative constitution* (2010) 25.

29 Coomans (n 27 above) 169.

30 Pieterse (n 2 above) 2.

31 As above.

32 Mbazira (n 17 above) 1.

33 *Mazibuko v City of Johannesburg* CCT 39/09 (2009) ZACC 28 paras 98 & 160.

34 Christiansen (n 8 above) 611.

law and the interest of those to whom the rights are due.[35] In instances where the government fails to actualise socio-economic rights,[36] the courts have the task to interrogate and to insist that the state's failures be redressed.[37] This implies that government is not infallible. Thus, I argue that, where it becomes absolutely necessary to apply a jurisprudence of exasperation in order to sanction state conduct and the courts fail to do so, they may leave poor victims in the worst state of desperation.

Ferraz has argued that it is legitimate for courts to encroach into the province of the political organs of the state when necessary because the political decision to give socio-economic rights constitutional recognition also gives the courts the power to enforce the rights.[38] This argument dissolves the question of the courts' legitimacy in matters of enforcement and, therefore, negates any supposed breach of the principle of the separation of powers.[39] This is still a dilemma in South Africa where the question of legitimacy and the institutional competence of the judiciary as enforcement mechanism is still fervently contested.[40] Thus, the courts have been left with the option to either abdicate their role in the transformation process or to safeguard that role and therefore sometimes to encroach into the political domain.[41] The question that I proceed to examine is whether such an incursion would be legitimate if the courts decide to take the latter option.

2.2 Constitutional obligations

According to section 7(2) of the Constitution, the state is compelled to respect, protect, promote and fulfil the range of socio-economic rights as a matter of obligation – a rule of law that must be accomplished. These obligations suggest duties for the state, either to take positive action to implement the rights or to refrain from action that could limit full realisation.[42] The core socio-economic rights impose more qualified positive obligations on the state as provided for by sections 26(2) and 27(2), to take reasonable legislative and other measures to ensure that the entitlements promised by the rights are progressively achieved. It is understandable that government holds the democratic mandate to engage in policy decision making regarding the progressive realisation of these rights. What is often not taken into consideration is what may happen if the state fails in its commitment or if it decides to use its powers to subjugate the people

35 S Gloppen 'Litigation as a strategy to hold governments accountable for implementing the right to health' (2008) 10 *Health and Human Rights Journal* 22.
36 Pieterse (n 2 above) 5.
37 Pieterse (n 2 above) 17.
38 Ferraz (n 15 above) 1.
39 As above.
40 Ferraz (n 15 above) 1-2.
41 See Ferraz (n 15 above) 20.
42 Coomans (n 27 above) 167.

whose mandate it holds or to deny them their socio-economic rights. It is under such circumstances that the obligations attributed to the courts relating to the enforcement of these rights become relevant.

Given South Africa's historical background, there was a genuine political reason for entrusting into the hands of the judiciary part of the obligation to protect the vulnerable and the marginalised against state repression. Therefore, section 8(1) enjoins the judiciary, equally as it does other organs of state, to ensure that the rights contained in the Constitution are enforced. Section 34 grants authority to the courts to adjudicate on any dispute that can be resolved by application of the law. In addition, section 38 empowers the courts with broad remedial powers to provide appropriate relief when an infringement or threatened violation of a right is established. These extensive powers give the courts the latitude to enforce socio-economic rights, which the Constitutional Court has declared justiciable and worthy of protection from improper invasion.[43] By the very nature of their justiciability, an opportunity is provided for converting socio-economic rights into actual entitlements, as right-holders have the option to insist on the fulfilment of the rights through the judicial process.[44]

This enables individuals and groups of persons to move the courts to make decisions on the impact of policies and legislation concerning the fundamental interests protected by socio-economic rights.[45] Justice Yacoob affirmed in the *Grootboom* judgment that the application of socio-economic rights is 'an obligation that courts can and, in appropriate circumstances, must enforce'.[46] The obligation consequently translates into a political commitment to construct post-apartheid South Africa on the pillar of social justice. However, Klare has observed that judges have been reticent and hesitant in assuming this wide range of powers invested in them.[47] Not only have the courts come short of exercising the full measure of their authority in matters of judicial enforcement but, in instances where they have done so, objections have been raised contesting that the courts are jeopardising the doctrine of the separation of powers. In what follows, I look at the impact of such objections.

43 *In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) para 78.
44 Pieterse (n 2 above) 3.
45 Liebenberg (n 27 above) 34.
46 *Government of the Republic of South Africa v Grootboom* 2000 11 BLCR 1169 (CC) para 94.
47 Klare (n 28 above) 165.

3 Limitations on the judicial role

3.1 Separation of powers objection

Objections to the judicial enforcement of socio-economic rights in South Africa date back about two decades when negotiations for the drafting of a new constitution began. Davis, for instance, argued that to over-emphasise the importance of socio-economic rights by giving them constitutional recognition was to put too much powers in the hands of the judiciary, which lacks the kind of democratic accountability that the legislature and the executive are gifted with.[48] The *Certification* judgment, however, made it clear that arguments with regard to the encroachment of the judiciary into matters of policy and budgetary allocation were unfounded.[49] The arguments have persisted because, as a matter of fact, the enforcement of socio-economic rights has seen the courts exercising substantial influence on policy making.[50] Proponents of the doctrine of the separation of powers have contended that this intrusive practice perpetuated by the courts is politically incorrect.[51] It is believed that when courts enforce socio-economic rights, judges tend to make decisions determining the types of programmes the government should implement. Meanwhile, according to these perceptions, the judiciary is supposed to interpret and apply the law only and not to make decisions that would have a policy or budgetary implication.[52]

Taylor has argued that the separation of powers is not distinctly partitioned into distinct 'institutional boxes'.[53] It has also been stressed that there is no absolute separation of powers under a South African constitutional democracy, which is particularly shaped by a 'delicate balancing' of functions in order to avoid a repetition of the errors of the past and to focus on societal transformation.[54] Consequently, the executive duty to develop and implement national policy is subject to scrutiny by the courts.[55] In effect, the separation of powers requires the judiciary to regulate and to moderate government conduct that has caused or is likely to cause an adverse effect on the population. In this regard, the courts have constantly been challenged with how to enforce the positive obligations imposed

48 Davis (n 17 above) 489.
49 *Certification* (n 43 above) paras 77-78; Coomans (n 27 above) 172.
50 MM Taylor 'The judiciary and public policy in Brazil' (2008) 4 *DADOS* 14-15.
51 Taylor (n 50 above) 15.
52 Brennan (n 16 above) 72.
53 Taylor (n 50 above) 14.
54 O'Regan (n 1 above) 22; C O'Regan 'From form to substance: The constitutional jurisprudence of Laurie Ackermann' in J Barnard-Naude *et al Dignity, freedom and the post-apartheid legal order: The critical jurisprudence of Laurie Ackermann* (2008) 10; Fombad (n 18 above) 309.
55 O'Regan (n 1 above) 22.

by socio-economic rights and at the same time respect the limits of the separation of powers.[56]

The Constitutional Court has struggled with this dilemma – seeking to find a point of balance in the overlapping functions between the judiciary, the legislature and the executive.[57] Constrained by the enduring tension, the courts have preferred to err on the side of abdication as a way of managing the somewhat strained politico-judicial relationship.[58] While this may seem reasonable, considering that the doctrine of the separation of powers is an important tenet of the hard-earned democracy, I argue that the tension creates unnecessary restrictions on the proper functioning of the courts as a complementary mechanism in the transformation process. In the narrative that follows, I explain how the judiciary has been the architect of its own limitations. I illustrate how this has caused difficulties and setbacks to the enforcement of socio-economic rights.

3.2 'Jurislimitation'

The Constitution grants the courts the widest possible review powers, including a broad scope in the enforcement of socio-economic rights. This autonomy has been eroded gradually through a process of 'jurislimitation'. By 'jurislimitation' I refer to the practice by which the judiciary has consciously or unconsciously succumbed to political pressures, academic criticisms or imposed unnecessary restrictions on its legitimate powers to the extent of frustrating its proper functioning, especially in the enforcement of socio-economic rights. The Court stated in the *Treatment Action Campaign* case, for example, that[59]

> [t]he Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.

In reality, the Constitution does not contemplate such a narrow role as coined by the court. Christiansen has noted that the court is endowed with incredibly unfettered authority and the liberty to set its own limits or to work without them.[60] The only limitations that are legitimate are those of general application contemplated by section 36, which of course aims at the broader interests of society.[61] Otherwise, the restraints that seem obvious are those which the

56 Coomans (n 27 above) 174.

57 Coomans 167.

58 T Roux 'Tactical adjudication: How the Constitutional Court of South Africa survived its first decade' http://www.saifac.org.za/docs/2007/Tactical%20Adjudication.pdf (accessed 14 March 2013) 13.

59 *Minister of Health v Treatment Action Campaign* (1) 2002 10 BLCR 1033 (CC) (*TAC*) para 38.

60 Christiansen (n 8 above) 594.

61 See C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 2 *South African Law Journal* 283.

judiciary has acknowledged or imposed on itself by avoiding to explore and to exercise the full parameters of its role or by delineating a narrower margin of scrutiny than is provided by the Constitution.

Providing constitutional protection to socio-economic rights means that the courts are granted the jurisdiction to interpret rights and to adjudicate upon their infringement or threatened violation. Therefore, the courts are not only permitted, as Pieterse has argued, but are authorised by the Constitution to give meaning to socio-economic rights through interpretation, evaluation, scrutiny and the granting of appropriate remedies when a breach of the rights is established.[62] The courts have, however, increasingly abridged these wide-ranging powers and have reduced it to the 'lowest standard of reasonableness – mere rationality review'.[63] Through such self-imposed restraint, even on matters that it has authority to adjudicate upon, the courts have made the context for the enforcement of socio-economic rights difficult,[64] as illustrated by this excerpt:[65]

> The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations.

In essence, the Constitution does not make provision for this limited kind of interpretation. Sections 25(5), 26(2) and 27(2) clearly stipulate that the obligation to realise socio-economic rights is to take 'reasonable legislative and *other measures'* (my emphasis). It is unnecessarily restrictive for the courts to acknowledge that 'a wide range of possible measures could be adopted by the state to meet its obligations', but to declare that a 'court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted'. An even broader scope for interpretation is provided obliging the courts, in order to give effect to a right in the Bill to apply, or where necessary to develop the common law to the extent that legislation does not give effect to the right in question.[66] This provision allows the courts to do more than defer decision making to the political organs.

Also illustrative of the practice of jurislimitation is the allegation of the courts' rejection of the jurisprudence of exasperation, which I

62 Pieterse (n 11 above) 383.

63 Steinberg (n 61 above) 281.

64 HJ Richardson III 'Patrolling the resource transfer frontier: Economic rights and the South African Constitutional Court's contributions to international justice' (2007) 9 *African Studies Quarterly* 96.

65 *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para 41.

66 Sec 26(2) Constitution.

think is illogical. I argue that the jurisprudence of exasperation demonstrates greater potential to advance the enforcement of socio-economic rights. The reasons for such rejection – probably to address the question of the separation of powers – may sound appropriate,[67] but in effect is restrictive of the courts' agency in ensuring that the state complies with its constitutional obligations. The jurisprudence of accountability, which seems a preferred alternative, in my argument is not set to achieve envisaged radical transformation. It simply gives way to conformity with government's slow-pace reformist approaches to the realisation of socio-economic rights. In instances where the Constitutional Court has relied principally on accountability, it has left much to be desired of its judgments. I justify this claim with reference to the *Mazibuko* case, in which I demonstrate how the Court faltered in its application of the jurisprudence of accountability.

3.3 Considering the *Mazibuko* case

The *Mazibuko* case dealt with the section 27(1)(b) right to have access to sufficient water. Lindiwe Mazibuko and four others, representing the community of Phiri, were extremely poor when they launched their action challenging the City of Johannesburg's water policy, which they claimed deprived the community of their constitutional right to sufficient water.[68] They alleged that the free basic water provided by the City was not sufficient water to guarantee a life with dignity.[69] Their claim was grounded on the constitutional promises to improve quality of life and to make every individual fit to survive.[70] As part of the plan to fulfil this promise, Dugard submits that the government recognised the need to 'redistribute water resources and services more equitably'.[71] In accordance, a 'progressive legislative framework for water services', comprising a national free basic water policy was passed, guaranteeing the provision of a sustenance quantity of water per household per month.[72] The good intentions of the water policy were eventually replaced by a neo-liberal obsession with cost recovery through a metering system that mechanically disconnected the water supply once the basic allowance was exhausted.[73] As a result, large numbers of poor people and households were deprived of access to sufficient water, partly because they could not afford to pay.[74]

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67 See Richardson (n 64 above) 96.

68 *Mazibuko* (n 33 above) para 44; G Quinot 'Substantive reasoning in administrative law adjudication' in K Heinz *et al Constitutional law review* (2010) 124.

69 *Mazibuko* (n 33 above) para 44.

70 See Preamble to the Constitution.

71 J Dugard 'Civic action and the legal mobilisation: The Phiri water meters case' in J Handmaker & R Berkhout (eds) *Mobilising social justice in South Africa: Perspectives from researchers and practitioners* (2010) 73.

72 Dugard (n 71 above) 73.

73 Dugard 74 77.

74 *Mazibuko* (n 32 above) para 166.

With support from an alliance of water rights activists and public interest litigation organisations,[75] the aggrieved residents instituted action against the City of Johannesburg on a number of constitutional grounds.[76] They contested the six kilolitres monthly basic water allowance as not amounting to 'sufficient water' and also argued against the installation of pre-paid metres as unlawful, unreasonable, unfair and discriminatory.[77] They urged the Court to define the content of the right to water and to quantify the amount of water that should amount to sufficient water to guarantee a right to life with dignity, which in their argument should be 50 litres per person per day.[78] The Court held that the nature of a right can only be understood within the context of the obligations imposed by it.[79] It further stated that the obligation imposed on government is one to take reasonable legislative and other measures to ensure progressive realisation.[80] The Court ruled that it was inappropriate for it to give a quantified content to what constitutes sufficient water because it is the prerogative of government to do so.[81] Judgment was pronounced in favour of the City of Johannesburg – finding its water policy reasonable and the installation of pre-paid metres lawful.[82]

3.3.1 Accountability compromised

Accountability is one of the central principles in the protection of human rights. Yamin has illustrated, with particular focus on the right to maternal health, the need for transformative accountability in dealing with socio-economic rights.[83] She underscores the fact that accountability requires more than just setting out abstract norms, but entails the formulation of policies and programmes to ensure the implementation and evaluation of socio-economic rights as well as the provision of remedies in the event of violations.[84] In Tomasevski's view, accountability necessitates explicit standards of measurement of a government's performance as well as procedures to ensure the attainment of those standards.[85] It requires the state to justify measures taken in the realisation of socio-economic rights. According to Yamin, accountability entails 'holding actors responsible for their

75 Dugard (n 71 above) 87-88.
76 As above; Quinot (n 85 below) 124.
77 Constitutional Court of South Africa *Mazibuko v City of Johannesburg* CCT 39/09 [2009] ZACC 28 (2009) Media summary 2.
78 *Mazibuko* (n 32 above) para 51.
79 Stewart (n 14 above) 504.
80 Stewart 504; *Mazibuko* (n 32 above) para 67.
81 *Mazibuko* para 61.
82 *Mazibuko* paras 9 & 169; Quinot (n 68 above) 126.
83 A Yamin 'Toward transformative accountability: Applying a rights-based approach to fulfil maternal health obligations' (2010) 7 *SUR International Journal on Human Rights* 95-121.
84 Yamin (n 83 above) 97-79.
85 K Tomasevski 'Strengthening pro-poor law: Legal enforcement of economic and social rights' (2005) *ODI – Rights in Action* 7.

actions in light of standards of behaviour and performance', which in a human rights framework combines elements of 'responsiveness, answerability and redress'.[86]

The manner in which the Court arrived at its conclusions in the *Mazibuko* case as well as its application of the reasonableness standard has been criticised for want of accountability on the part of the City of Johannesburg as duty bearer. Instead of applying the principles of accountability in the *Mazibuko* case, the Court rather took a biased and sympathetic standpoint, stating that 'the case needs to be understood in the context of the challenges facing Johannesburg as a city'.[87] Quinot has observed that the Court's approach was evidently lacking of the same kind of consideration for the dismal personal circumstances of the litigants and the impact of the inadequacy of water on their lives.[88] Requiring policy decisions that affect people's rights to be justified and subjecting those justifications to public scrutiny are fundamental to accountability.[89]

In accordance with Mureinik's conception of a culture of justification,[90] the Court should have required the City of Johannesburg to provide substantive justification for its refusal to provide the quantity of water that the litigants were laying claim to. By a culture of justification, Mureinik refers to the situation where[91]

> every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.

Another account of a culture of justification requires government to provide 'substantive justification' for its conduct in terms of the 'rationality and reasonableness of every action and the trade-offs that every action necessarily involves'.[92]

The City of Johannesburg was not called upon to justify its action to deprive the community of sufficient water. The Court rather recounted the hardship that the City had suffered as a result of significant water losses and the problem of non-payment, the efforts made by the City in constantly reviewing the water policy and the apparent success and rate of 'customer satisfaction' of the water project.[93] How the Court came to the conclusion that the water policy was reasonable remains questionable.[94] Quinot has argued that

86 Yamin (n 83 above) 97.
87 *Mazibuko* (n 32 above) para 7.
88 Quinot (n 82 above) 126.
89 Yamin (n 83 above) 100.
90 E Mureinik 'Bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 32.
91 Mureinik (n 90 above) 32.
92 M Cohen-Eliya & I Porat 'Proportionality and the culture of justification' (2011) 59 *American Journal of Comparative Law* 466-467.
93 Quinot (n 82 above) 126; *Mazibuko* (n 32 above) paras 12, 18 & 40.
94 Quinot (n 82 above) 128.

alternative interpretations seemed possible and wonders why the Court did not explain its preference for reasonableness.[95] Considering the litigants' desperate circumstances, it is necessary to ask whether it was prudent for the Court to rely solely on accountability as mode of adjudication. In Lehmann's view, the *Mazibuko* case presented an occasion for the Court to articulate its role as an 'effective agent of social change' or as custodian of the transformation project, but it failed to utilise the opportunity.[96]

3.3.2 Missing the mark

I presume that the judicial enforcement of socio-economic rights would not amount to the constitutional imperative to improve quality of life and to free the potential of every citizen if the circumstances of the poor are not taken into consideration during litigation. If the assertion is true that the courts have rejected a jurisprudence of exasperation, it means that the courts have portrayed themselves virtually out of touch with the lived realities of the poor. The litigants' claim in the *Mazibuko* case was not just about the right to water, but about having access to *sufficient* water to meet livelihood needs. It is unreasonable that the Court failed to take the desperate circumstances of the litigants into consideration or to acknowledge the fact that they simply could not afford to pay for extra quantities of water.

Approaching the case from the angle of exasperation, on the one hand, would probably have enabled the Court to undertake an empirical scrutiny of the deplorable socio-economic circumstances of the litigants.[97] Had the Court then combined its finding with a measure of accountability, on the other hand, by requiring the City of Johannesburg to justify its water policy as well as its decision to refuse to grant the litigants additional water, the Court could have arrived at a more robust and probably more transformative conclusion. Alternatively, owing to the doctrine of the separation of powers, the Court could simply have drawn the City's attention to its constitutional obligation to take 'other measures' to ensure that the deprived residents get sufficient water.

If the Court had sufficient justification to believe that the City's water policy was reasonable, there is clearly a parallel obligation imposed by section 27(2) on which the Court with its broad remedial powers could have based its accountability measurement, to require the City to take additional measures to give effect to the litigants' claims. According to the Court's argument that the content of a right

95 Quinot (n 82 above) 129.

96 K Lehmann 'In defence of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core' (2006) 22 *American University International Law Review* 165.

97 See *Mazibuko* (n 33 above) para 10.

is determined by the obligation imposed by it,[98] section 27(2) actually imposes such an obligation to take other measures to realise the right to sufficient water. This means that, as the City's water policy was challenged, the corresponding obligation to take other measures needed to have been interrogated.

According to this logic it would have been appropriate for the Court to hold the City a bit more accountable – probably to apply a measure of exasperation, considering that the Phiri residents were acutely poor and could not afford to pay for additional consumption of water.[99] It was at the Court's discretion, after analysing the necessity of water to life and the consequences of the lack of it on livelihood, to proceed to consider the matter perhaps not merely on the basis of a socio-economic right, but possibly as a 'right-to-life' case.[100] Water is life, which means a denial of the right to water amounts to a denial of the right to life.

The Constitutional Court has also established that the enforcement of socio-economic rights is context-specific.[101] It is therefore irrational for the courts to avoid one jurisprudential approach in favour of another when each of the approaches may become relevant, depending on the situation. The context in the *Mazibuko* case offered an opportunity for the Court to combine the jurisprudence of accountability with that of exasperation, but it failed to do so. It was possible for the Court to accomplish this without having to defer to the state to determine the content of the right to sufficient water. The Court could effectively have exercised its share of responsibility within the 'trialogue' of the separation of powers by ensuring that government abides by its constitutional obligations, while also providing legal protection to the poor against the state's 'coercive' powers.[102] By relying solely on accountability, which somehow got compromised by deference, the Court practically limited its agency and therefore also restricted the potential of socio-economic rights litigation to advance transformation.[103] I did make mention of the obligation to take other measures. I now turn to examine what this entails.

98 *Mazibuko* (n 33 above) para 67.
99 *Mazibuko* para 31.
100 See M Langford *Litigating economic, social and cultural rights: Achievements, challenges and strategies, Centre on Housing Rights and Evictions* (2003) 14.
101 *Grootboom* (n 46 above) para 25.
102 Taylor (n 50 above) 2.
103 Quinot (n 82 above) 136.

4 Obligation to take other measures

4.1 Matter for interpretation

The socio-economic rights enshrined in the South African Constitution impose obligations on the state to take reasonable legislative and *other measures* within its available resources to ensure their progressive realisation.[104] The obligation underlines that it is not one option or the other. It demands concurrent action. If the state has simply taken legislative measures, it is the duty of the courts to test the reasonableness of the laws in relation to the purpose of the socio-economic rights in question. It is also within the courts' broad review powers to interrogate the other measures that the state is obliged to take. This constitutes a challenge to the Constitutional Court's insistent refusal to determine the substantive content of socio-economic rights.

The Constitution does not define 'other measures', leaving it to interpretation by the courts. If the state cannot establish evidence of other measures, it falls within the interpretative duty and the broad remedial powers of the courts as custodians of the Constitution to determine what constitutes other measures. Klare has stated that 'interpretation is a meaning creating activity'.[105] Taylor has also referred to this activity as the 'definition of alternatives'.[106] Accordingly, the courts have a duty to establish what the Constitution means when it says that the state must take other measures alongside legislative measures. Interpreting this obligation in accordance with section 39(2) would require the courts to apply the rules of the common law where legislation remains silent about the rights in question.

The obligation imposed by the International Covenant on Economic, Social and Cultural Rights (ICESCR) 'to take steps … by all appropriate means', including the adoption of legislative measures,[107] relates closely to the obligation to 'take reasonable legislative and other measures' contained in the South African Constitution. The Committee on Economic, Social and Cultural Rights (ESCR Committee) has stated that the obligation 'to take steps' is not qualified or limited by other considerations, but entails such steps to be deliberate, concrete and clearly targeted towards realisation.[108] The adoption of legislative measures, the Committee notes, is not exhaustive of a state's obligations and thus the requirement 'by all

104 Secs 26(2) & 27(2) Constitution.
105 Klare (n 39 above) 159.
106 Taylor (n 50 above) 1.
107 Art 2(1) ICESCR.
108 ESCR Committee General Comment 3, The nature of states parties' obligations UN Doc HRI/GEN/1/Rev.6 14 (2003) para 2.

appropriate means' must be given its broadest interpretation, which may include the provision of judicial remedies.[109]

The ESCR Committee considers other measures to include, but not be limited to, 'administrative, financial, educational and social measures'.[110] In its concluding observations on Peru, for example, the Committee recommended the government of Peru to provide detailed information on the legislative and *other measures* and practices adopted in connection with the right to adequate housing and the right to social security.[111] The Committee ascertains its duty to make the ultimate determination as to whether all appropriate measures have been taken.[112] In the context of South Africa, it is also the duty of the Constitutional Court to determine whether other measures have been taken.

4.2 Matter of content

The enforcement of socio-economic rights is problematised by an inability to define their content.[113] With the courts' current approach which focuses principally on scrutinising government measures for reasonableness, the courts would hardly be able to determine the material content of each of the socio-economic rights. It requires considering the circumstances of the poor, which in turn means interpreting the rights provisions in a manner that addresses those circumstances. The obligation imposed on the state to take other measures requires the courts, when adjudicating socio-economic rights, to consider the lived experiences of the poor. This duty may require the courts to compel the state, where perhaps it has taken only legislative measures, to also take other measures to address the dismal conditions of impoverished communities, which more often than not constitute the basis for litigation.

Steinberg has argued that defining the content of socio-economic rights is typically a policy-making procedure and, thus, allowing the judiciary to perform that function stifles the constitutional conversation.[114] While it is important to keep the conversation alive, it is even more important to prioritise the constitutional vision to ensure that it does literally translate into making life better for the poor. The role of the courts in the transformation process may thus entail compelling the state to explicitly define the content of each of the entrenched socio-economic rights upon which the courts may then be able to base their adjudication. The obligation to take other measures may also form the basis on which civil society organisations could

109 ESCR Committee General Comment 3 paras 4-5.
110 ESCR Committee General Comment 3 para 7.
111 Concluding observations of the Committee on Economic, Social and Cultural Rights: Peru 16 May 1997 E/C.12/1/Add.14 para 40.
112 ESCR Committee General Comment 3 para 4.
113 O'Regan (n 1 above) 32.
114 Steinberg (n 61 above) 272-284.

formulate *amicus curiae* arguments in determining the content of socio-economic rights.

The realisation of socio-economic rights through political strategies generally translates into the material things guaranteed by the rights. I argue that, when the violation of a right is challenged in court, the result of positive adjudication should equally amount to entitlement to the same material things promised by the right in question. This may sound contrary to the principle of progressive realisation but, in effect, a positive judgment in my view implies that the adjudicated right has matured for immediate realisation. The effective implementation of court orders therefore becomes imperative to ensure that adjudicated rights translate into material entitlements. By immediate realisation I mean, at least, taking the first steps to guarantee that the entitlement can then progressively be expected.

Interpreting the obligation to take other measures as a matter of giving content to socio-economic rights may therefore imply mandating the state to take such action that would respond to or result in entitlement to the tangible things that realisation of the rights would amount to. It may also imply compelling the state, after taking legislative measures, to also establish the minimum core of each of the rights or, better still, to set an 'invariable universal standard', as suggested by Stewart.[115] If making this determination 'constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution', as the Court has acknowledged.[116]

4.3 Matter for adjudication

Besides interpretation and the determination of content, the duty is also incumbent on the courts to adjudicate on the basis of the provision to 'take other measures'. It means that, when the state defaults in this obligation, the courts are tasked to interrogate why other measures would not be taken and if not satisfied with the justification, to compel the state to take such other measures as mandated by the Constitution. This constitutes a pragmatic adjudication tool at the disposal of the courts to hold the state accountable for its socio-economic rights obligations. Coomans argues that, when the core elements of a right are at stake in a case, a higher degree of justification should be required from the government to justify non-implementation, in which case it also becomes legitimate for a court to apply a more profound measure of scrutiny.[117] Having to subject only legislative measures to enquiry is not enough, as the Constitutional Court rightly acknowledged in the *Grootboom* case:[118]

115 Stewart (n 14 above) 494.
116 *TAC* (n 59 above) para 99.
117 Coomans (n 27 above) 190.
118 *Grootboom* (n 46 above) para 42.

> Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive ... The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

Adjudicating on the basis of the obligation to take other measures may entail looking at the desperate circumstances of the poor. This may not overrule the possibility of the courts resorting from time to time to a jurisprudence of exasperation, if that is what it requires to remedy a situation. This may significantly *influence* the formulation of policy or the allocation of budgets, but certainly does not allow the judiciary to take over the political function. It also does not grant the courts the escape route to defer on matters which it has a discretion to adjudicate upon. I illustrate these arguments in the analysis that follows.

4.4 Revisiting the *Modderklip* case

The *Modderklip* case[119] concerned the state's obligations in the context of a private landowner's property rights against a community of informal settlers unlawfully occupying the former's farm land.[120] The case narrowly dealt with the section 26 right of access to adequate housing.[121] The litigation originated when a group of squatters from the overcrowded Daveyton Township invaded farm land in the Benoni locality belonging to Modderklip Boerdery (Modderklip).[122] Initially the spill-over population occupied a strip of government-owned land from which they were immediately forcefully evicted.[123] In their desperation, the squatters found an alternative on the Modderklip farm, which they invaded and established what became known as Gabon Informal Settlement.[124] Modderklip obtained an eviction order from the Johannesburg High Court, which never was executed because all relevant state authorities failed to collaborate.[125]

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119 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

120 S Liebenberg 'Needs, rights and transformation: Adjudicating social rights' (2005) *Centre for Human Rights and Global Justice Working Paper* 823; K Tissington 'Demolishing development at Gabon Informal Settlement: Public interest litigation beyond *Modderklip*' (2011) 27 *South African Journal on Human Rights* 192.

121 S Wilson 'Judicial enforcement of the right to protection from arbitrary evictions: Lessons from Mandelaville' (2006) 22 *South African Journal on Human Rights* 535; Tissington (n 120 above) 192.

122 S Wilson 'Breaking the tie: Evictions from private land, homelessness and a new normality' (2009) *South African Law Journal* 276; *Modderklip* (n 119 above) para 3.

123 *Modderklip* (n 119 above) para 3.

124 *Modderklip* paras 7-8.

125 *Modderklip* para 8.

Modderklip then launched action requesting the Pretoria High Court to compel the state to enforce the order.[126] Finding the state in contravention of the obligations imposed by sections 26(1) and (2) of the Constitution, the High Court issued a structural interdict requiring the state to present a comprehensive plan on how it intended to implement the eviction order.[127] Not comfortable with the ruling, the state petitioned the Supreme Court of Appeal, which substantively upheld the decision of the lower court and further ordered the state to pay compensation to Modderklip for damages incurred as a result of the unlawful occupation.[128] In a further appeal, the Constitutional Court found the state in breach of its constitutional obligations[129] and pronounced that the state was doubly responsible to protect Modderklip's right to property, and at the same time upheld the right of the squatters to have access to adequate housing.[130]

The orders required the state to pay compensation to Modderklip for the entire duration of the unlawful occupation,[131] while the squatters were granted entitlement to remain on the land until an alternative arrangement for their resettlement was made by the state.[132] In essence, as Brand has noted, the order required the state to pay tenancy so that the squatters could be guaranteed shelter, without further infringing on Modderklip's property rights.[133] In contrast to the *Mazibuko* case, the Court in the *Modderklip* case showed greater sympathy towards the poor and therefore went to greater lengths to make particularly robust findings.[134] I proceed to examine the circumstances that necessitated the Court to come to its robust decision.

4.4.1 Nowhere to go

One of the challenges for the poor to survive in democratic South Africa has to do with the acute problem of homelessness,[135] which poses 'questions of major political concern'.[136] In the *Modderklip* case, the Constitutional Court reasoned that[137]

> [t]he frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated. The fact that poverty and homelessness still plague many South Africans is a painful reminder of the

126 *Modderklip* (n 119 above) para 11.
127 *Modderklip* para 8.
128 *Modderklip* para 16.
129 *Modderklip* paras 68(3)(a) & (4).
130 D Brand *Courts, socio-economic rights and transformative politics* (2009) 109.
131 *Modderklip* (n 119 above) para 68(3)(b).
132 *Modderklip* para 68(3)(c).
133 Brand (n 130 above) 109.
134 Brand 249-250.
135 *Modderklip* (n 119 above) para 36.
136 Brand (n 130 above) 61.
137 *Modderklip* (n 119 above) para 36 (footnote omitted).

> chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved.

The manner in which the Court approached this case mattered immensely in determining the outcome. If the Court had relied on accountability alone, probably by requiring the state to justify the reasonableness of measures taken, it might have had to return to the same decision it took in the *Grootboom* case. Five years after the *Grootboom* case, the state found itself in the *Modderklip* case unable to respond to the urgent housing needs of desperate squatters who had virtually nowhere else to go.[138] It required a certain degree of exasperation to see the situation of the squatters as necessitating immediate action. Firstly, overcrowded Daveyton could no longer contain them. Secondly, they were forcefully and arbitrarily evicted from state-owned land. Thirdly, they were convicted on criminal charges for trespassing and given a legal warning upon release not to return to the farm. These notwithstanding, the squatters defied the odds and returned to continue their unlawful occupation of the Modderklip farm from which they were haunted with eviction.[139] Because they had nowhere else to go, they simply proceeded to establish the informal community, lined with streets, fenced and numbered homes, commercial activities and a functional civic structure.[140]

If the Court had relied on the jurisprudence of accountability, the state would obviously have been able to justify its action with a housing policy that it intended to pursue progressively but which, under the circumstances, could not adequately remedy the desperation of the squatters. The state overlooked the constitutional obligation to take other measures, but it turned out to be the most reasonable action as the Court was later to decide. In Wilson's view, judges must exercise the extensive authority assigned to them with profound sensitivity to the particular needs of the large number of destitute people who often are confronted with threats of arbitrary eviction.[141] The steadfastness of the squatters to stay on the Modderklip land unlawfully portrayed exasperation on such a scale that the Court could not ignore it. This played an instrumental part in determining the vigour of scrutiny of the facts of the case.[142] The state failed or refused to engage when Modderklip sought its co-operation with reasonable suggestions to finding a durable solution to the squatters' plight.[143] Exasperated by the state's intransigence and the fact that the squatters were extremely desperate, the Court came to the conclusion that, although their occupation of the Modderklip

138 *Modderklip* (n 119 above) para 25.
139 *Modderklip* paras 5 & 7.
140 *Modderklip* para 8.
141 Wilson (n 121 above) 535-536.
142 Brand (n 130 above) 157.
143 *Modderklip* (n 119 above) paras 4 & 6.

land was unlawful, they could not be evicted unless the state provided suitable alternative accommodation.[144]

4.4.2 Outcome of the litigation

As a consequence of the type of jurisprudence the Court applied, which I argue amounted consciously or unconsciously to exasperation, the *Modderklip* case produced a far more transformative outcome than in the *Mazibuko* case, which the Court adjudicated on the basis of accountability. In line with my earlier argument, the judgment resulted in direct entitlement to the material things promised by the section 26 right to have access to adequate housing. The Chief Albert Luthuli Extension 6 Township, constructed some 3,5 kilometres from the Modderklip site for relocation of the Gabon community, is reported to be a direct outcome of the judgment.[145] Thus, the judgment not only granted the squatters the entitlement to remain on the Modderklip land, but also provided immediate access to suitable alternative accommodation in the event of unavoidable eviction.[146] Further to granting direct entitlement to the squatters, the judgment is said to have also extended housing entitlement to other similarly-situated impoverished squatters from other communities within the municipality.[147] This was accomplished without the Court having to take over the political responsibility to decide how the housing project should be planned or executed. The Court determined that the state's obligation goes beyond the mere provision of 'mechanisms and institutions' for enforcement.[148] The Court simply directed the state to do what it initially refused to do.

The judgment created a significant precedent that has considerably advanced the right of access to housing. The decision in the *Grootboom* case required the state to have a reasonable housing policy that responds to the needs of the most desperate in society and that such a policy must provide at least temporary shelter for those with no access to land.[149] It is apparent, as Thomas has stated, that simply having a policy and progressively working according to that policy to provide housing to everyone 'in the long run' is not enough.[150] To support this claim, Wilson observes that[151]

> [e]ven though *Grootboom* and the Emergency Housing Policy had the potential to revolutionise the way in which the courts responded to private eviction applications which may lead to homelessness, the consequences of *Grootboom* for eviction applications were not immediately seized on by the

144 Brand (n 130 above) 157.
145 Tissington (n 120 above) 200 204.
146 Wilson (n 122 above) 289.
147 Tissington (n 120 above) 200.
148 *Modderklip* (n 119 above) para 43.
149 *Grootboom* (n 46 above) paras 42, 44 & 99; Wilson (n 122 above) 277.
150 G Thomas 'Taking socio-economic rights seriously in South Africa' in G Thomas *The discourses on the right to housing in Gauteng Province 1994-2008* (2010) 174.
151 Wilson (n 122 above) 276.

> courts. It appears that the courts needed another exceptional case to take the next logical step in securing the right to housing for people facing eviction. This step was to be taken in the *Modderklip* case.

Contrary to the *Grootboom* case – decided on the basis of accountability, which held that the homeless cannot claim 'shelter or housing' from the state 'immediately upon demand'[152] – the *Modderklip* case formed a 'new normality' according to which 'the state [was] under a duty to act positively to give effect to the right of access to adequate housing and to provide suitable alternative shelter in the event that an eviction order would otherwise lead to homelessness'.[153] It is acknowledged that the *Modderklip* case contributed enormously in shifting the 'goalposts' in the judicial enforcement of socio-economic rights.[154]

5 Conclusion

Envisaged transformation for South Africa, Richardson claims, will not be achieved by continuous nostalgia about a history and a socio-economic inheritance that remains scarred by the consequences of apartheid.[155] Justice Yacoob has emphasised that the Constitution obliges the state to act positively to ameliorate the deplorable conditions throughout the country.[156] Without appropriate checks and balances by the courts, decision making by the political system may seem efficient but may indeed be challenged by serious irregularities.[157] The judicial enforcement of socio-economic rights has in fact demonstrated a potential to balance oscillations in legislations and policies that sometimes inflict adverse consequences on the poor as a result of defective political decision making. I have shown how, through political intransigence, the state has in some instances not complied adequately with its socio-economic rights obligations, which has allowed the courts the latitude to require the state to justify its actions or in-action. Such intervention has no doubt created tension on the grounds of the separation of powers which, as indicated, has adversely affected the courts' jurisprudence, thus creating a potentially limiting effect on the enforcement of socio-economic rights.

Consequently, Wilson notes that aspirations of that kind of a judiciary that will radically interpret the Constitution and moderate the law in a manner that gives the poor a greater armoury of rights to socio-economic resources has not inspired much hope.[158] Justice

152 *Grootboom* (n 46 above) para 95.
153 Wilson (n 122 above) 289.
154 Tissington (n 120 above) 204.
155 Richardson (n 64 above) 81.
156 *Grootboom* (n 46 above) para 93.
157 Taylor (n 50 above) 16.
158 Wilson (n 121 above) 548-549.

Cameron has also acknowledged that the Constitutional Court's socio-economic jurisprudence is far from ideal.[159] However, I have pointed out the constitutional provision that obligates the state to take more positive action and, more importantly, requires the courts to subject the state to a greater measure of accountability. Interrogating the obligation to take other measures provides the opportunity for the courts to conceptualise a socio-economic rights jurisprudence that allows for more transformative outcomes. This commitment requires the courts not only to endeavour to showcase some institutional integrity in respect of the doctrine of separation of powers,[160] but essentially to adopt a more compelling jurisprudence in holding the state to greater responsiveness to the plight of the poor.[161] It is imperative for the constitutional vision of social transformation to be achieved, but such transformation will not be accomplished through complacency or mediocrity.

I have shown how the application of the jurisprudence of accountability has had but minimal effect in terms of social transformation, while the application of the jurisprudence of exasperation has proven to produce more transformative outcomes. I argued that to avoid a jurisprudence of exasperation in favour of a jurisprudence of accountability is not only strategically miscalculated, but practically illogical and also detrimental to the enforcement of socio-economic rights. Courts are sometimes better placed to protect the socio-economic interests of the poor than the coercive arrogant majority who wield excessive political influence over government.[162] In order to ease the tension created by the question of the separation of powers, the judicial enforcement of socio-economic rights should be seen and acknowledged as a complementary strategy to the political objective of social transformation, rather than as an oppositional force to the proper functioning of government.

159 E Cameron 'What you can do with rights' (2012) *Fourth Leslie Scarman Lecture,* London, 9.

160 D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 23.

161 D Landau 'The reality of social rights enforcement' (2012) 53 *Harvard International Law Journal* 402.

162 Langford (n 100 above) 18.

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The African Women's Protocol and HIV: Delineating the African Commission's General Comment on articles 14(1)(d) and (e) of the Protocol

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**** BA (Western Ontario), MSt (Oxford); karen.stefiszyn@up.ac.za. The authors of this article were part of Expert Group Sessions held in Pretoria, South Africa and Dakar, Senegal, that sought to elaborate on the provisions of articles 14(1)(d) and (e) of the African Women´s Protocol. The overall goal of the Expert Group Sessions was to produce a Draft General Comment for presentation to the African Commission for adoption in October 2012. The article was developed while the first three authors were students on the LLM programme in Human Rights and Democratisation in Africa, presented by the Centre for Human Rights, Faculty of Law, University of Pretoria.

Summary

Articles 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa specifically provide for women's sexual and reproductive health rights in the context of HIV. In spite of this unique attribute, the provisions themselves are ambiguous and require further elaboration in order to give effect to their meaning. The article therefore builds upon the recent adoption of a General Comment by the African Commission on Human and Peoples' Rights which seeks to clarify the content of the rights set out in articles 14(1)(d) and (e) of the Protocol. The article aims to provide an expansive and purposive meaning to the above-mentioned articles, and also sets out the research and thinking that went into the drafting of the General Comment prior to its adoption. In highlighting the above, the article is structured as follows: First, it provides an introductory overview of the African Women's Protocol in the context of women's sexual and reproductive health. Second, the article motivates why it is crucial to have a strong legal framework on women's rights in the context of HIV, by taking into account the actual realities faced by African women and the limitations of the current legal framework in addressing such realities. Third, the article examines the need for the adoption of the General Comment as opposed to a resolution or guidelines, as has often been the practice of the African Commission. Lastly, the article sets out the specific state obligations arising out of articles 14(1)(d) and (e), which were drafted through guidance from international best practices and standards whilst also bearing in mind the practical difficulties facing women in the African context.

Key words: *African Women's Protocol; sexual reproductive health rights; HIV/AIDS prevention; access to health care; General Comments*

1 Background: African Women's Protocol

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) was adopted in 2003 by the African Union (AU) and entered into force in 2005. The justification for the adoption of this Protocol was based largely upon concerns regarding the limited enforcement of women's human rights in the African legal framework.[1] It also emerged as a need to complement the African Charter on Human and Peoples' Rights (African Charter), which lacked elaborate provisions for the substantive protection of women's rights.[2] While the African Charter provides an important human rights framework, including reinforcing the rights to life, liberty, security and freedom from discrimination, it

1 Preamble African Women's Protocol.

2 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 19.

is silent on women's rights in general, and reproductive rights, specifically.

The African Women's Protocol is the first of its kind to include a number of protections specific to women, including reproductive choice and autonomy.[3] This is best articulated in article 14 of the Women's Protocol, which provides for women's health and reproductive rights. Under article 14, the African Women's Protocol is the only treaty to specifically address women's rights in relation to HIV, and to identify protection from HIV as a key component of women's sexual and reproductive health rights.[4] This is an important step for women in Africa, where sexual and reproductive health rights have previously been ignored as issues that are culturally sensitive.

In addition, article 1 of the African Women's Protocol defines the term 'women' to include also 'girls'. This is an important facet of the Women's Protocol, which recognises that the issues facing women in Africa do not necessarily occur in adulthood alone, but stem from societal practices that affect younger girls in their developmental stages. The Protocol further seeks to guarantee women's rights to protection from sexually-transmissible infections (STIs), including HIV, and recognises that to do so, the rights to adequate, affordable and accessible health services are necessary to support and prevent the spread of STIs.[5] This is critical in the African context, where the spread of STIs, specifically HIV, is surrounded by stigma and unequal power relationships between sexual partners. The Protocol addresses these unequal gender relationships and inequalities that manifest through various factors, many of which have substantially contributed to the disproportionate spread of HIV amongst young women in Africa.[6] It is in light of this disproportion between the infection rates of men and women in Africa that makes the African Women's Protocol so crucial to the protection of women and their sexual reproductive health rights.

On a continent where women are often treated as second-class citizens, it may be difficult for them to claim their human rights without the protections and assistance offered by the state. As a regional instrument, the African Women's Protocol serves as a benchmark in which state parties ensure adequate protection for women in Africa.

3 Centre for Reproductive Rights 'Briefing Paper: The Protocol on the Rights of Women in Africa: An instrument for advancing reproductive and sexual rights' http://reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_africa.pdf (accessed 2 June 2012).

4 As above.

5 Arts 14(1)(d) & (2)(a) African Women's Protocol.

6 UNAIDS 'Report on the global AIDS epidemic 2013' 78.

2 Women and HIV in Africa

The need for an elaborate and purposive human rights framework on women's rights in the context of HIV is further propelled by the actual realities faced by the African woman. Slightly more than one half of the people living with HIV globally are women,[7] and 69 per cent of all women living with HIV in the world are in sub-Saharan Africa.[8] Young women between the ages of 15 and 24 are at particular risk, as they are up to eight times more likely to be living with HIV than young men in the region.[9] The number of adolescent girls aged between 10 and 19 living with HIV, on the other hand, is approximately double that of adolescent boys in several regions within Africa.[10]

Gender inequalities are a key driver of the epidemic in view of the fact that gender norms relating to masculinity can encourage men to have more sexual partners, whilst those norms relating to femininity prevent women, especially young women, from accessing HIV information and services.[11] Furthermore, there is an increased vulnerability in girls and young women who are unable to readily access HIV-related services as a result of restrictive laws and policies, as well as adverse cultural norms which perpetuate negative gender stereotypes. UNAIDS has published that, in 2012, non-governmental organisations (NGOs) found that in approximately 60 per cent of countries and national governments there exist laws, regulations or policies which create obstacles to effective HIV prevention, treatment, care and support for key populations and vulnerable groups.[12] As it currently stands, many young women in sub-Saharan Africa do not know their HIV status, with as little as 28 per cent of women having been tested.[13] UNAIDS has indicated that 'in 26 of 31 countries with generalised epidemic in which nationally-representative surveys were carried out recently, less than 50 per cent of young women have comprehensive and correct knowledge about HIV'.[14]

All in all, the need to have an enhanced focus upon women's and girls' rights, especially sexual reproductive health rights, when promoting universal access to HIV prevention, treatment, care and

7 UNAIDS 'Fact Sheet UNAIDS World AIDS Day Report 2011'.

8 UNAIDS 2012 'Regional Fact Sheet: UNAIDS Report on the global AIDS epidemic' 2.

9 As above.

10 'Gender equality, women and HIV/AIDS' http://www.unwomen.org/wp-content/uploads/2011/06/HLMonAIDS_KeyDataStatsOnGenderEqualityWomenAndHIVaids_20110606.pdf (accessed 4 April 2012).

11 UNAIDS (n 8 above).

12 UNAIDS 89.

13 UNAIDS 18.

14 UNICEF, UNAIDS, UNESCO, UNFPA, ILO, WHO and World Bank 'Opportunity in crisis: Preventing HIV from early adolescence to young adulthood' http://www.scribd.com/UNICEF/d/56824411-Opportunity-in-Crisis-Report-Preventing-HIV-from-early-adolescence-to-young-adulthood (accessed 4 April 2012); UNAIDS 'Report on the global AIDS epidemic 2012' 18.

support services, cannot be overemphasised. One of the most pervasive manifestations of gender inequality is violence against girls and women of all ages and, in particular, sexual violence. Violence against women fuels the spread of HIV in Africa and contributes to the disproportionate impact of the virus on African women. UNAIDS reports that as high as 60 per cent of women have experienced some form of intimate partner violence in the last year. This substantially increases their likelihood of contracting HIV.[15]

It is therefore essential that the HIV-related articles under the African Women's Protocol (contained in articles 14(1)(d) and (e)) be read together with other relevant provisions of the Protocol that guarantee gender equality and the empowerment of women, including through the realisation of the enshrined rights of women to education, social security, economic and welfare rights, in order to obtain comprehensive protection of women in the region.

3 Limitations of the African Women's Protocol: The problem of identifying state obligations from articles 14(1)(d) and (e)

Articles 14(1)(d) and (e) of the African Women's Protocol are drafted very broadly and contain little guidance on the specific nature of state obligations contained therein, or how these are meant to better protect women from being infected and affected by HIV. The articles provide for 'the right to self-protection and to be protected from HIV' and 'the right to be informed on one's health status and on the health status of one's partner'. The reading of these provisions raises various questions, for instance, what is the difference between the right to self-protection and the right to be protected, and does each right entail different obligations on the part of the state? What does the right to be informed on one's health status and on the health status of one's partner require in terms of the information that must be provided, and how should such information be disseminated? In addition, section 14(1)(d) raises the question as to whether the right to be informed on the health status of one's partner would extend such protection to men whose spouses are HIV positive, or whether the intention of the provision was merely to protect the generally-vulnerable status of women in Africa. In the absence of absolute clarity on these provisions, there is a risk of violating the very rights that the African Women's Protocol aims to protect (for instance, through third party disclosure) which can have negative consequences for women.

It was as a result of these ambiguities that a decision was taken to draft a general comment to be presented to the African Commission on Human and Peoples' Rights (African Commission) which would unpack the obligations arising out of the provisions, and set out the

15 UNAIDS (n 8 above) 80.

specific methods in which a state could meet its responsibility under the African Women's Protocol. Below, we trace the thought processes behind the development of the general comment which was adopted by the African Commission in October 2012,[16] and the background information which fed into the drafting process.

We set out the discussion surrounding the decision to adopt a general comment format as opposed to the use of guidelines or a resolution, and look at the reasons why a general comment on articles 14(1)(d) and (e) of the African Women's Protocol was deemed necessary. We delve into the thinking behind the general comment, looking at the specifics of the obligations contained in its text and the drafting process which informed the decisions taken therein.

4 Place of general comments in interpreting human rights at the international level

Before we embark upon the substantive content of the newly-adopted General Comment under the African Women's Protocol, we will first illustrate the role and prominence of general comments at the international level. Generally, treaties are couched in broad terms and they often use ambiguous wordings such as 'measures' and 'steps' in regard to state obligations.[17] As such, it has fallen on human rights treaty-monitoring bodies to articulate the detailed and precise obligations under the various human rights treaties in a formal statement as a legal means of interpretation. Thus, general comments, recommendations[18] and guidelines attempt to 'interpret specific rights or deal with crosscutting issues by providing detailed content in a comprehensive and coherent way to the rather generally-worded provisions of a human rights treaty'.[19] They also have persuasive power on 'decision makers in domestic legal systems and national courts'.[20]

16 Centre for Human Rights 'African Commission on Human and Peoples' Rights adopts first General Comment, clarifying articles 14(1)(d) and (e) of the African Women's Protocol' http://www1.chr.up.ac.za/index.php/centre-news-2012/1052-african-commission-on-human-and-peoples-rights-adopts-first-general-comment-clarifying-article-141d-and-e-of-the-african-womens-protocol-.html (accessed 30 November 2013).

17 J Biegon 'Towards the adoption of guidelines for state reporting under the African Union Protocol on Women's Rights: A review of the Pretoria Gender Expert Meeting, 6-7 August 2009' (2009) 9 *African Human Rights Law Journal* 618.

18 Most human rights treaties use the term 'general comment'. However, 'general recommendation' has also been used by the International Convention on the Elimination of All Forms of Racial Discrimination, specifically in art 9(2), and CEDAW in art 21(1). In a strict sense, the two terms carry equivalent meanings. In this article, we, however, give preference to the use of the term 'general comment'.

19 K Mechlem *Treaty bodies and the interpretation of human rights* (2007) 23.

20 As above.

The existence of general comments or recommendations outlining the obligations of state parties in regard to particular rights in a treaty is widely practised in the United Nations (UN) human rights system whereby all the human rights treaty bodies have adopted general comments or general recommendations. For instance, General Recommendation 19 of the UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) filled the gap in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which failed to provide for sexual and reproductive health rights of women. It further draws upon state parties to ensure that measures are taken to prevent coercion in regard to reproduction.[21] General Recommendation 21 on equality in marriage and family relations elaborates on the relevant rights in CEDAW by stating that decisions by women on whether or not to have children must not be limited, and must be informed by information concerning contraceptive measures and their use, acquired through sex education and family planning services.[22] General Recommendation 24 of the CEDAW Committee touches on women and health, and thus calls upon state parties to address distinctive features of health and life for women in contrast to men, by taking into account biological factors such as differing reproductive functions, socio-economic factors, psycho-social factors, and health system factors.[23] Thus, states are obliged to prioritise the prevention of unwanted pregnancy through family planning and sex education.[24] Similarly, General Comment 14 provides an elaborate definition of the core elements of the right to the highest attainable standard of health. It recognises health as a fundamental human right that is inextricably linked to the realisation of other human rights. It based the realisation of the right to health on certain conditions such as availability, accessibility, acceptability and quality of health care services. Most importantly, on women and the right to health, it emphasises that the realisation of women's rights to health is dependent on the removal of barriers, including in the area of sexual and reproductive health.[25]

General recommendations also ensure that treaties are living documents by staying relevant in light of emerging issues that may not have been prominent at the time of drafting the treaty, such as the HIV pandemic. For instance, General Recommendation 24 further goes on to provide that state parties must also take steps to prevent unethical practices against women in health care services, such as non-consensual sterilisation or mandatory testing for sexually-transmitted diseases.[26] This includes, *inter alia,* the right to self-

21 General Recommendation 1 para 24(m).
22 General Recommendation 21 para 21.
23 General Recommendation 24 para 6.
24 General Recommendation 24 para 31(c).
25 ESCR Committee General Comment 14 para 21.
26 General Recommendation 24 para 22.

protection and to be protected against sexually-transmitted infections like HIV and AIDS-related illnesses as is found in article 14(1)(d) of the African Women's Protocol.

Thirdly, these bodies have also adopted guidelines for state reporting under the various treaties, which mainly seek to help states when discharging their reporting obligations to give adequate information on their efforts taken to realise these rights.

It is through general comments that states are able to understand and appreciate what is expected of them. They serve as yardsticks for state obligations. They also serve as advocacy tools for civil society as well as a tool for exercising their role in monitoring these rights.

5 Rationale of developing a general comment specific to articles 14(1)(d) and (e) of the African Women's Protocol

The implementation of the African Women's Protocol has been marred by several factors which include the confusion and ambiguity that generally surround state obligations under the Protocol. Some may, however, argue that existing international guidelines and recommendations already address women's health rights, and can also be used for interpretative purposes in regard to particular provisions of the African Women's Protocol. The question, therefore, is whether or not there was a need for specific guidelines (in the form of a general comment) to be adopted by the African Commission on articles 14(1)(d) and (e) of the Women's Protocol.

Firstly, it must be noted that the reproductive and sexual rights of women in the context of HIV still remain inadequately addressed, not only within the African context, but also at the international level.[27] It is without question that, as the international human rights framework continues to suffer from an ineffective enforcement system, the adoption of a general comment can play an important role in promoting a shared understanding of treaty norms and developing agreement about the detail of their content.[28] However, it must also be noted that general comments will always have this function, even when effective enforcement is happening.

Secondly, the nature of international guidelines is rather vague and broad.[29] Hence, the absence of clear and specific guidelines, coupled with insufficient knowledge of women's rights principles in the context of HIV, leave African women even more exposed to violations

27 K Stefiszyn *et al Addressing the reproductive health rights of women living with HIV in Southern Africa* (2009) 6.

28 As above.

29 UNAIDS 'AIDS at 30 Report: Nations at the Crossroad. See also Statistics: Women and HIV/AIDS' (2011) 26 http://www.amfar.org/About_HIV_and_AIDS/Facts_and_Stats/Statistics__Women_ and_HIV_AIDS/ (accessed 4 April 2012).

of their rights in this regard. Proximity of such guidelines to African realities may also enable reliable and on-going monitoring, so as to ensure that the guidelines are adhered to, and emerging problems are resolved promptly, thereby enhancing accountability.

In adopting this General Comment, it was acknowledged that the issues women encounter in the context of human rights *vis-à-vis* HIV are the same worldwide. However, African women have needs and concerns that are unique, especially in regard to cultural influences and resource constraints that expose them to greater risks of HIV and hence to a violation of their rights. The social, economic and cultural contexts within which HIV infects people and spreads across the African continent differ considerably from those in other parts of the world.[30] Thus, it is important that appropriate caution is exercised when prescribing policies or guidelines that seem to have worked in other settings for use in Africa.[31] The General Comment puts special emphasis on HIV within the context of human rights as outlined in articles 14(1)(d) and (e) of the African Women's Protocol. In addition, it is expected that the General Comment will also serve as an important advocacy and monitoring tool for other stakeholders, such as NGOs and development partners who act as human rights watchdogs so that they develop strategic efforts in line with such guidelines.

It is also worth mentioning that, prior to the adoption of the General Comment, concerns were raised about the place of a general comment in the African Commission's jurisprudence. The African Commission has focused mainly upon the development of reporting guidelines. The first set of guidelines for state reporting under the African Charter was adopted in April 1989.[32] A new set of guidelines were then adopted in 1998.[33] These guidelines have, however, failed to elicit the desired results.[34] The latest Guidelines for Reporting on the Women's Rights Protocol were adopted in 2010.[35]

Several sets of guidelines relating to various thematic human rights issues on the continent have also been adopted by the African Commission.[36] Criticisms about these guidelines have ranged from

30 AD Asante 'Scaling up HIV prevention: Why routine or mandatory testing is not feasible for sub-Saharan Africa' http://www.who.int/bulletin/volumes/85/8/06-037671/en/index.html (accessed 10 September 2012).

31 As above.

32 C Heyns (ed) *Human rights law in Africa* (2004) 507-524.

33 C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2007) 169.

34 Biegon (n 17 above) 262.

35 C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 206.

36 These include the Declaration of Principles on Freedom of Expression in Africa (2002); Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

them being 'very elaborate, but also too lengthy and complicated',[37] to being 'too brief and vague'.[38] On the other hand, the African Commission has adopted various resolutions,[39] even though they, too, have not had the desired results.[40]

This, therefore, leads us to an important question regarding the place for a general comment on articles 14(1)(d) and (e) of the African Women's Protocol. Would the adoption of a general comment, as opposed to a guideline or a resolution, as has been the case with the African Commission, be of any significant impact? This should be queried in light of the fact that there are no previously-adopted general comments on the substantive provisions of the African Women's Protocol. We have no correct answer to this question but, at best, we contend that, although the adoption of a general comment is a shift in the paradigm of the African Commission, it will 'essentially be part of the African Commission's broader initiative to unpack the content of rights guaranteed under the African Charter and the Women's Protocol'.[41] Again, in the absence of a 'clear test case', answers to these questions are merely speculative.

However, we may draw insights from the role of general comments in interpreting rights under the international human rights framework. Through lessons learnt and best practices from the international system, it is hoped that this General Comment will be of more success whilst building upon the experiences of general comments internationally in its application and enforcement. As it stands, the General Comment takes into consideration international standards, together with regional and national standards adopted by African countries. In particular, UN treaties, such as CEDAW, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Rights of the Child (CRC), and their respective treaty-monitoring bodies, authoritatively define the standards from which the implementation of articles 14(1)(d) and (e) draw inspiration.

(2003); Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2004).

37 F Viljoen *International human rights law in Africa* (2007) 372.

38 Biegon (n 17 above) 263.

39 Eg, Resolution on maternal mortality (2008); Resolution on the right to a remedy and reparation for women and girl victims of sexual violence (2007); Resolution on the health and reproductive rights of women; Resolution on the situation of women in the Democratic Republic of Congo; Resolution on the status of women in Africa and the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005); and Resolution on the situation of women and children in Africa.

40 Biegon (n 17 above) 265.

41 Biegon 268.

6 Ambiguities within articles 14(1)(d) and (e) of the African Women's Protocol which necessitated a general comment

As mentioned above, the HIV provisions of the African Women's Protocol raise important issues, but fail to provide protections in a manner that is simple to digest and easily executed by African states. These difficulties in the interpretation and implementation of the articles informed the final text of the General Comment. Below, we have set out the questions which raise the need for the development of the General Comment in relation to each of the specific articles.

6.1 Right to self-protection and the right to be protected

Questions regarding the importance of the differentiation, if any, between the right to self-protection and the right to be protected from STIs, including HIV, required consideration. This differentiation needed to be examined in relation to a number of priorities of vulnerable women, including adolescents and their access to sexual and reproductive health care services; the provision of free health care services where necessary; the availability of sexual and reproductive health information; the provision of condoms and female-controlled protection methods; and the protection for exposed groups, such as woman detainees and persons with disabilities.

Secondly, issues regarding the specific nature and practical manifestation of a state's obligation to fulfil the right to self-protection and to be protected from HIV had to be understood. Particular attention was paid to the resource dimensions of these obligations in light of inequitable allocation of resources, goods and services. While these might be contentious, it was important that a general comment is explicit in its treatment of these different issues, as well as clearly grounding the legal obligations in the non-discrimination framework as articulated under article 2 of the African Women's Protocol.

6.2 Right to know one's health status

Article 14(1)(e) provides for the right to be informed about one's health status. A simple reading of this section of the provision would imply that this guarantees the right to undertake a HIV test. However, detailed guidance on this remains lacking. It is unclear what constitutes proper HIV testing without appropriate reference to human rights principles of informed consent and confidentiality. For instance, does the right to know one's health status only border upon undertaking an HIV test freely and without hindrances, or does it entail a broader interpretation that requires the provision of information (during the HIV test) on the implications of one's HIV status, whether positive or negative, through pre- and post-test counselling? Further, what does the right to know one's health status entail for African adolescent girls who often face social and cultural

barriers when seeking to know their HIV status? In addition, what is the duty of the state in ensuring that voluntary counselling and testing (VCT) services are available and accessible for all age groups, specifically girls? Also with regard to girls seeking VCT, what additional considerations should states adopt in ensuring that VCT is provided effectively and appropriately? In developing this General Comment, it was important that proper guidance be drawn from international standards and best practices so as to ensure the appropriate interpretation of state obligations whilst also bearing in mind the specific vulnerabilities that African women face.

6.3 Right to know the health status of one's partner

In respect of the right to know the health status of one's partner (also enshrined in article 14(1)(e)), questions regarding when such a right should be granted, and whether the consent of the partner is required were and remain contentious. Given the inherent stigmatisation associated with a positive HIV status, disclosing a patient's HIV status to his or her partner highlights a number of concerns, not in the least relating to the rights of patient autonomy. Whether these personal rights should be balanced against the state's interest and indeed responsibility to reduce the spread of the HIV virus (especially between sexual partners), and what circumstances would allow for such a disclosure are some of the controversial issues that the right to know the health status of one's partner may advance. A number of international standards elaborate on this right of disclosure,[42] but there is no specific guidance in article 14(1)(e) of the Women's Protocol itself. Thus, the general comment drew guidance from these international standards, but also bore in mind the possibility of violence perpetuated against African women on the basis of such disclosure.

7 General Comment on articles 14(1)(d) and (e) of the African Women's Protocol

The General Comment was drafted to clarify and elaborate the obligations in the Women's Protocol in order to counter the enormous issues faced by women in respect of their sexual reproductive health rights, especially in the context of HIV. In addition, the General Comment was drafted to respond to the particular barriers faced by women in Africa and the constraints of

42 See L Jossel *A best practice guide to HIV disclosure* (2009); Open Society Foundation for South Africa; UNAIDS and OHCHR *International guidelines on HIV/AIDS and human rights* (2006); Joint United Nations Programme on HIV/AIDS (UNAIDS) HR/PUB/06/9 http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf (accessed 2 September 2012); SADC Model Law on HIV in Southern Africa (2008) *SADC* Parliamentary Forum http://www.justice.gov.za/vg/hiv/docs/2008_Model-Law-on-HIV-in-Southern-Africa.pdf (accessed 2 September 2012).

African governments, whilst also taking into consideration international standards and practices.

7.1 General obligations

There are four recognised general obligations of states to respect, protect, promote and fulfil the rights under the African Women's Protocol. The General Comment takes each of these general obligations and sets them out in the context required by articles 14(1)(d) and (e) of the Protocol.

The obligation to respect requires states to refrain from interfering directly or indirectly with an individual's rights. In respect of the African Women's Protocol, this requires that the state respect the right of women to protection and to self-protection, the right to be informed on their health status and on the health status of their partner. The state is also expected to promote social determinants of good health, such as environmental safety, education, economic development and gender equity, as these are ancillary elements necessary to support the state's role, ensuring that women are able to enjoy their rights under articles 14(1)(d) and (e) without interference.

The obligation to protect requires states to take measures that prevent third parties from interfering with these rights. Special attention must be paid to the health needs of women belonging to marginalised groups, such as refugee women, the girl child, old women, women involved in sex work, indigenous women and women with physical or mental disabilities. These women are often on the fringes of society, and are most likely to be abused or taken advantage of.

With regard to the right to know the health status of one's partner, states must ensure that international best practices are implemented. Legislation enforcing the compulsory testing or disclosure of HIV test results can have a negative impact on women, placing them in vulnerable positions with their spouses and communities, thereby discouraging them from being tested at all.[43] It is for this reason that voluntary testing and confidentiality of such results are imperative, and that, only when special circumstances so dictate, the HIV results of a patient be disclosed to his or her partner without consent. The General Comment attempts to guard against this possibility by setting out guidelines for testing and disclosure of HIV results in line with international best practices to ensure that the process is undertaken with due regard and care for the personal circumstances of women in Africa.

The obligation to fulfil requires states to adopt gender-sensitive laws, reform discriminatory laws, allocate adequate resources and take other measures for the full realisation of the rights in articles 14(1)(d) and (e). States must ensure that health services are culturally

43 UNAIDS 'Report on the Global AIDS Epidemic 2010'.

appropriate and that health care staff are trained to recognise and respond to the specific needs of girls and women. People living with HIV in a number of countries have reported being mistreated by health care providers or denied treatment in a manner that is cruel, inhuman or degrading.[44] A gender perspective should be included in the development of HIV health care programmes and policies and in the training of personnel involved in implementing such programmes. The state should increase and prioritise funding to provide affordable, safe and effective methods of care, support and treatment for women of various ages and support women and girls in making informed choices about their health.

7.2 Specific legal obligations

Apart from the general obligations placed on states, the General Comment delves deeper into the specific requirements of articles 14(1)(d) and (e) in order to spell out the individual obligations that each provision requires.

7.2.1 Right to protection and to self-protection (article 14(1)(d))

The right to protection and the right to self-protection in its very nature, as well as the differentiation of the two, bring a number of issues to the fore. During the drafting process of the General Comment, it was important to embark upon a careful examination as to whether this differentiation (the right to protection and the right to self-protection) is deliberate and draws out a different set of obligations on the part of the state. On the one hand, the notion of the right to self-protection would appear to be an attempt by the African Women's Protocol to address the unequal power relations between men and women in the context of a sexual relationship. Gender power imbalances, which translate into a power imbalance in sexual interactions, are increasingly being recognised as a factor in fuelling the spread of HIV-related illness by increasing the number of unsafe sexual encounters as women are unable to negotiate self-protection against HIV.[45] Thus, there is a need to see a social paradigm shift that transforms relationships between women and men, from the one of inequality and dominance, as is the case in patriarchal societies, to equality, respect and consideration for one another.[46] On the other hand, the right to protection is far clearer and would appear to encompass the actual implementation of human rights principles such as non-discrimination, participation, inclusion, transparency and accountability, in order to ensure that women have,

44 I Byrne & R Fleetwood 'Human rights abuses and health care' (2011) 16 *Interights Bulletin* 162.

45 T Langen *Gender power imbalance on women's capacity to negotiate self-protection against HIV/AIDS in Botswana and South Africa* (2005) http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1831928/ (accessed 10 September 2012).

46 As above.

amongst others, unhindered access to the provision of HIV-related services. However, as much as it may be clear to draw out state obligations arising out of the right to protection, it is not an easy exercise to determine the actual state obligations arising out of the right to self-protection.

Broadly, the right to self-protection would necessitate the creation of an enabling environment by the state that promotes behavioural change to correct the gender imbalance that hinders women from exercising their right to protect themselves from HIV through informed choice. The distinct state obligations that are subsequently implied in each instance are not obvious.[47] It is evident that the challenge for human rights law is twofold: to respond to the realities of women's entrenched gender-based inequality and historical disadvantage, as well as to ensure respect for the diversity of women's choices and the possibility of their full participation in every aspect of society.[48] In essence, this means that article 14(1)(d) is merely two sides of the same coin. In this case, the General Comment does not endeavour to seek to distinguish the state obligations under the 'two rights', but rather to jointly amass the possible obligations arising out of the need to ensure that women are ably protected, and able to protect themselves from HIV.

The General Comment, with reference to this right, firstly obligates states to take measures to ensure access to information on and education for the specific rights set out under articles 14(1)(d) and (e). In this regard, states are required to recognise the importance of providing information in the public sphere on the right to protection and to be protected. This information should be provided in an accessible manner, but must also be relevant and contextualised in a fashion that makes it understandable to women who may not have access to higher education. This was reiterated in the drafting of the General Comment, where it was felt that it was also important for the state to ensure that information on the sexual and reproductive health rights of women was publicised in a way that deconstructs the inherent stigmas, taboos and misconceptions that tend to perpetuate harmful stereotypes of women's roles in society in an attempt to place women and men on a more equal footing. The information and education obligations on states include the requirement to provide training for health workers and educators on the importance of these rights, and which sensitises them to the specific needs of women. This necessarily includes training on counselling services that must be provided when information regarding sexual and reproductive health is sought. It was also felt that states must be required to provide sexual and reproductive health services to women that are

47 K Stefiszyn *Adolescent girls, HIV, and state obligations under the African Women's Rights Protocol* (unpublished) (2012) 5.

48 D Otto *'Gender comment': Why does the UN Committee on Economic, Social and Cultural Rights need a General Comment on women?* (2002) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=319202 (accessed 10 September 2012).

appropriate to their particular needs, as well as being sensitive to the HIV treatment that is uniquely required on the African continent. These services should be provided in a manner that integrates woman-centred prevention methods with other services, including family planning, reproductive health, primary health care services, HIV and STI testing, anti-retroviral treatment programmes and antenatal care. Particular emphasis was placed on the state to ensure that women are given the option of choice, and the corresponding ability to exercise that choice through the provision of contraceptive information and devices.

It was also noted that there is a general lack of political will amongst states to make female condoms as widely and freely available as the male condom, as well as an indifference regarding their equal promotion. The unequal status of women in society, particularly within African society, which has a number of cultural practices that fail to promote women as equal members of a community, is a major contributing factor. This places them in a disadvantageous situation when promoting safe sexual relations, particularly in the use of condoms for sexual intercourse. As women are often placed in a position that weakens their ability to protect themselves, the inclusion of the provision of female condoms as a state obligation, as well as access to treatment for sexually-transmitted diseases, are important. Studies show that, whilst 74 per cent of young men know that condoms are effective in preventing HIV infection, only 49 per cent of young women are aware of this fact.[49] The General Comment specifically included the promotion of female condoms under the specific obligations placed on states in order to try to promote better protection choices for women.

To complement the provision of providing sexual and reproductive health rights services, the General Comment requires that states should also be required to adopt laws and policies that ensure that women can claim and exercise their right to protection. Fundamental in the legal requirements of states is to ensure that laws and polices prohibit any form of discrimination against women in relation to their sexual reproductive health, and should also provide redress for women who may fall victim to stigma, prejudices and practices that perpetuate and heighten women's risk to HIV and related rights abuses.

7.2.2 Right to know one's health status (article 14(1)(e))

In drafting the General Comment, it was borne in mind that it would be largely unfair for African woman if we were to interpret the 'right to know one's health status' as merely requiring the provision of HIV testing facilities and services. The widespread ignorance of HIV status

49 E Hayden 'HIV infection rate fell 25% over the last decade' (3 June 2011) http://www.theatlanticwire.com/global/2011/06/hiv-infection-rate-falls-25-percent-over-last-decade/38449/ (accessed 10 September 2013).

amongst women is not only through the direct result of poor access to HIV testing, but rather through serious problems encountered by women in its delivery. Women (just like all other people) have a right to know their HIV status, through innovative, ethical and practical models of delivery.[50] The General Comment sought guidance from World Health Organisation (WHO) principles which have long acknowledged that there has emerged a new approach to HIV testing and counselling.[51] Three underpinning principles of HIV testing (the 'three Cs') were established as norms: *counselling* and information about HIV before and after the test; *consent* to be tested given in an informed, specific and voluntary way by the person to be tested; and *confidentiality* of test results and of the fact of seeking a test.[52] Thus, there is an onus on national governments to provide good quality testing and counselling services from a human rights-based approach.[53] In addition, because the confidentiality of test results and because the seeking of an HIV test is part of protecting and respecting the right to privacy, this must also be safeguarded at all costs by state parties. Thus, the General Comment provides that states must ensure that health workers providing such services adhere to a strict code of conduct in this regard.

In regard to counselling services, the General Comment also recognises that the positive duty of the state should therefore be interpreted to not only ensure access to HIV testing, but to provide information about the results of the test; about the virus; about the means of preventing HIV infection should the test results be negative; and preventing transmission to others should the results be positive.[54] In such cases, the General Comment seeks to ensure that women are well informed on their health status and able to take appropriate measures to protect themselves or to prevent infection.

The General Comment also places a duty upon government to ensure that legal, financial and cultural obstacles to testing and counselling are removed. With regard to financial barriers, VCT services are required to be affordable or (preferably) free. Again, in drafting this section of the General Comment, cognisance was taken of African realities. For instance, some studies reveal that the use of VCT services is low for women and financial barriers are one of the reasons cited for non-testing, as some African governments have user

50 WHO 'The right to know: New approaches to HIV testing and counselling' (2003) http://www.who.int/hiv/pub/vct/en/Right_know_a4E.pdf (accessed 10 September 2012).

51 World Health Organisation 'Knowing your HIV status – The first step to accessing care and preventing further infection' (2003) http://www.who.int/hiv/pub/vct/en/Right_know_a4E.pdf (accessed 10 September 2012).

52 Open Society Institute 'Increasing access to HIV testing and counselling while respecting human rights' (2007) http://www.soros.org/sites/default/files/increasing_20070907.pdf (accessed 10 September 2012).

53 As above.

54 Stefiszyn (n 47 above).

fees in accessing health services.[55] Consequently, in order for HIV testing to have the maximum impact in Africa, the General Comment recognises that the removal of financial barriers in accessing health care is essential. The General Comment goes further to provide that the state must ensure that VCT services are affordable by taking into consideration the interests of those women less able to meet such costs. These might include rural women, refugee women, woman detainees, migrant women and the girl child, who do not have ready access to health care facilities. In addition, the General Comment also recognises that another dimension of a financial barrier is the cost that women encounter due to the distance of the VCT service from their community. The General Comment provides that states have an obligation to promote geographical accessibility of VCT services in various communities, including to vulnerable groups such as refugee women, the girl child, old women, detained women, women involved in sex work, indigenous women and women with physical or mental disabilities. This may entail the use of mobile clinics or transport services to assist women who are otherwise geographically prevented from accessing treatment.

In regard to legal barriers, the General Comment also drew guidance from WHO and UNAIDS, which recognise that, in addition to expanding access to HIV testing, 'equal efforts must be made to ensure that a supportive legal framework is in place to maximise positive outcomes and minimise potential harm to patients'.[56] Legal barriers are much more evident in regard to testing of children and adolescents.[57] There are also varied opinions amongst African countries with regard to what age a child can provide informed consent to HIV testing.[58] To make this matter worse, laws and policies setting out the rights of children and the age that defines a child also vary by country.[59] However, the General Comment took cognisance of General Comment 3 of CRC, which mandates government to give children access to 'adequate information related to HIV/AIDS

55 J Namazzi 'Determinants of using voluntary counselling and testing for HIV/AIDS in Kenya' http://www.na-businesspress.com/JMPP/NamazziWeb.pdf (accessed 10 September 2012).

56 Open Society Initiative (n 52 above).

57 For further information, see World Health Organisation & UNICEF *Policy requirements for HIV testing and counselling of infants and young children in health facilities* (2010) 1.

58 Age of consent to various health interventions in selected African countries are as follows: Burundi, 21 years; Lesotho, 12 years; Mauritius, 18 years; Namibia, 18 years; Nigeria, 16 years; Senegal, 15 years; South Africa, 12 years; Zambia, 21 years. For a full table, refer to African Regional Dialogue of the Global Commission on HIV and the Law (Issues Brief) 'Children, HIV and the Law' (2011) 9.

59 Algeria, Benin and Botswana, eg, define a child as one below the age of 18 years. Libya and Malawi define a child as one below the age of 16. Burundi puts the attainment of majority at 21 years. There, however, seems to be a growing inclination towards a child being one below the age of 18. See African Child Policy Forum (ACPF) http://www.africanchildforum.org/clr/Harmonisation%20of%20Laws%20in%20Africa/other-documents-harmonisation_1_en.pdf (accessed 11 August 2014).

prevention and care',[60] and that HIV testing and counselling are 'fundamental to the rights and health of children'.[61] Taking this information into account, it would seem that the best interests of the (girl) child should be the guiding principle in all circumstances.[62] However, the General Comment was careful not to pre-suppose that the best interests of the girl child is an easy answer to arrive at in light of competing views between parents or guardians and health care workers. In any case, the General Comment provides that it is still the obligation of the state to ensure that it adopts policies and programmes to guide the testing of children in line with the principles of informed consent, appropriate counselling and confidentiality. As such, the General Comment mandates states to provide health care services tailored for all age groups and to address the specific vulnerabilities faced by such children, including child-headed households, girl children who have faced sexual abuse or have been involved in child prostitution, as well as orphaned children.

The General Comment was also inspired by article 12 of CRC, which provides that governments are obliged to offer children, in accordance with their maturity, an increasing role in decisions that affect them. The General Comment is careful to ensure that states do not undertake to apply mandatory testing of children. In enshrining the principles of confidentiality, states must also ensure that the HIV status of the child is not used as a basis upon which to deny a girl child access to other services such as education, basic services or food security.

Women (including adolescent girls) face cultural barriers when accessing HIV-related services. In an attempt to break down the barriers that women face in accessing their sexual and reproductive health rights, the General Comment provides that states must address gender norms, harmful traditional and cultural practices, patriarchal attitudes, discriminative laws and policies. To do so, the General Comment recognises the need for collaboration with societal leaders, including traditional and religious leaders, and other non-state actors in changing patriarchal attitudes and behaviours inherent in communities. Only by engaging with communities on an equal and accessible level, will it be possible to start altering the social stigmas that create obstacles to effective HIV treatment and care. The legal mechanisms enshrining principles of non-discrimination and equality must also be strengthened and duly enforced.

60 CRC General Comment 3 para 16.

61 CRC General Comment 3 para 22.

62 World Health Organisation 'HIV testing in young children' (2002) http://whqlibdoc.who.int/hq/2011/WHO_HIV_11.02_eng.pdf (accessed 10 September 2012).

7.2.3 Right to know the health status of one's partner (article 14(1)(e))

Determining when it is appropriate to divulge the HIV status of a sexual partner is perhaps one of the more difficult aspects of article 14(1)(e). Not only does this require the state to step over the boundary into the private sphere of a person's life, but the consequences of doing so can have tremendously negative effects on the lives of individuals if not treated with care and respect. Stigmatisation towards HIV includes both internal and external elements that can reduce the desire of HIV-positive individuals to voluntarily disclose their status.[63]

The General Comment takes cognisance of the fact that stigmatisation is particularly evident in Africa, where research has confirmed that the discrimination associated with HIV can result in violence to those who admit to a positive status.[64] Women are even more so at risk when confiding their positive status to a sexual partner. There have been a number of reports where women have admitted to being HIV positive and were violently beaten or harmed as a result.[65] This fear of retribution has kept a large portion of people silent about their status, and also had a deterrent effect on those who are unaware of their status from being tested.[66] The General Comment aims at having VCT as the primary means of determining one's HIV status with the hope that a supportive environment will lead to voluntary disclosure to one's sexual partner. This is, however, not always going to be the case, specifically in environments where the stigma towards HIV is still strong. Thus, the General Comment addresses the issue of when is it appropriate for government to step in and disclose a person's HIV status without their consent.

The General Comment has adopted international best practices that require disclosure to be undertaken by a health practitioner only in circumstances where proper counselling has been given, and the patient is aware of the consequences of this disclosure. In addition, disclosure should only be done in instances where the health practitioner is of the opinion that a sexual partner is at risk of contracting HIV, and there is no danger involved for the patient if his or her HIV status were to be disclosed.

What the General Comment does require is that states provide adequate training of health care staff. It is imperative that health practitioners are aware of the risks to the individual if his or her HIV status were to be divulged, and to be supportive and understanding

63 M O'Grady 'The right to know and the right not to tell: The ethics of disclosure of HIV status' (2011) 2 *Postmodern Openings* 80.

64 O'Grady (n 63 above) 106.

65 Global Commission on HIV and the Law 'Gender and disempowerment' (2012) *Risks, rights and health* 64.

66 C Patton & D Goldstein 'Challenges associated with disclosing one's HIV-positive status' (2008) *HIV and AIDS Information* 2.

of these dangers. In the report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[67] the Special Rapporteur noted that cases where 'medical care that causes severe suffering for no justifiable reason can be considered cruel, inhuman or degrading treatment or punishment, and if there is state involvement and specific intent, it is torture'.[68] The report goes on to say that there have been numerous reports that have documented the mistreatment of or denial of treatment to people living with HIV by health providers, where patients are 'turned away from hospitals, summarily discharged, denied access to medical services unless they consent to sterilisation, and provided poor quality care that is both dehumanising and damaging to their already fragile health status'.[69] The Special Rapporteur has indicated that the unauthorised disclosure of HIV status to sexual partners, family members, employers and other health workers is a common abuse against people living with HIV that may lead to physical violence.[70]

In this regard, health practitioners are placed in an extremely difficult role having to determine when it is appropriate to disclose the status of an individual. Not only does disclosure undermine the traditional ethical obligation of a health practitioner to protect the confidentiality of a patient's health status, but it also asks the health practitioner to expose the private life of his or her patient to the community. The General Comment takes steps to stress that states must invest in proper training for health practitioners so that they are able to make informed decisions on disclosure. There also needs to be a measure of accountability for health care practitioners who act negligently in the disclosure of results, where such disclosure could result in harm of the patient.

Disclosure of HIV status to sexual partners can help individuals to maintain their own health status and potentially prevent the spread of infection.[71] It is an attempt to quell the spread of HIV through Africa and to give those individuals at risk of infection by their partners the option to test themselves and actively start treatment where necessary. The risks of disclosure, particularly for women, are immense and it is these risks that the General Comment attempts to guard against by incorporating international standards that clearly set out the circumstances under which non-consensual disclosure may occur. It is with this in mind that the General Comment hopes to guide individuals in their right to know their own status, as well as to guide health practitioners whose job it is to help their patients from potentially infecting their partners or family.

67 Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN Document (2013) A/HRC/22/53.
68 n 67 above, 9.
69 n 67 above, 17.
70 As above.
71 O'Grady (n 63 above) 98.

8 Violations

Violations of the General Comment are based upon a state's failure to fulfil these rights through their action or inaction. The provisions of the General Comment are an attempt to act as a redress for women whose rights under articles 14(1)(d) and (e) of the African Women's Protocol have been violated. It is important for states to realise that their obligations lie not only with the provision and fulfilment of rights, but also in providing mechanisms that ensure the accountability of those who are responsible when those rights are not provided. Inherent in this is the necessity for states to be transparent. Thus, it is envisioned that the General Comment should be incorporated into the reporting obligations of states to the African Commission.

9 Missed opportunities: Gaps in the General Comment

One of the evident gaps in the General Comment is its silence on the rights of sexual minorities (lesbians, bisexual women and transgender women) in the context of HIV. In as much as the General Comment has attempted to recognise the vulnerabilities of specific groups of women in a non-exhaustive manner (that is, rural women, elderly women, women living with disabilities, and so forth), and thus arguably creating a presumption that lesbian women would nevertheless be included, this was a missed opportunity for the latter's explicit recognition, especially when considering how this particular group of women has been historically and structurally discriminated against in most African societies. Although the risk of female-to-female HIV transmission is low,[72] this does not imply that their vulnerability is less pronounced. Studies reflect that health care workers do not often cater for the specific needs of lesbian, gay, bisexual and transgender (LGBT) persons, especially in the context of HIV.[73] Thus, the General Comment's omission to explicitly outline the rights and duties of the state in this regard may unintentionally reinforce existing prejudices against such groups.

The General Comment also does not provide for a dissemination plan articulating how the contents of the General Comment would be disseminated amongst relevant stakeholders. For instance, the General Comment by the African Committee on the Rights and Welfare of the Child on 'children of incarcerated and imprisoned parents and

72 AIDSMAP 'Female-to-female sexual transmission' (2014) http://www.aidsmap.com/Female-to-female-sexual-transmission/page/1323529/ (accessed 11 August 2014).

73 See Chivuli Ukwimi OSISA 'Challenges to accessing health services and rights' 6 March 2013 http://www.osisa.org/open-learning/regional/challenges-accessing-health-services-and-rights (accessed 11 August 2014).

primary caregivers' (African Children's Rights General Comment)[74] has a section that outlines how the particular General Comment will be disseminated to both duty bearers, rights holders and other key stakeholders. In that section, the African Children's Rights General Comment explicitly places an obligation upon state parties (with the support of non-state actors) to widely disseminate the General Comment to such stakeholders.

In addition, although the African Women's Rights General Comment provides for a section on state reporting, it is silent on how progress on focus areas of the general comment will be measured. In contrast, the African Children's Rights General Comment (in paragraph 66) provides that in measuring and evaluating progress made in the implementation of article 30 of the African Charter on the Rights and Welfare of the Child (African Children's Charter), the Committee shall require state parties to provide detailed information 'which shall include statistical data, on progress made, achievement, and factors for success or challenges faced in the implementation of the article along identified indicators'. The African Children's Rights General Comment then proceeds to provide indicators. This, therefore, ensures consistency in reporting and also ensures that state party reports submitted are not vague and evasive of the 'actual change' that the General Comment seeks to realise (as has sometimes been the case). These are important monitoring mechanisms that the African Women's Rights General Comment overlooked.

10 Way forward: Civil society and the promotion of the General Comment

Civil society organisations (CSOs) are important for monitoring government fulfilment of its obligations under women's rights instruments and can play an important role in ensuring accountability. CSOs should endeavour to have a fair knowledge of the General Comment and subsequently to create awareness for the African people at the national and regional levels. The popularisation of the General Comment is vital as it can be used as a monitoring and advocacy tool. CSOs should consolidate efforts in the area of awareness creation of the population on women's rights, specifically on the sexual and reproductive provisions of the African Women's Protocol through the promotion of the General Comment. NGOs can also use the General Comment as a guide in shadow reports or human rights situations reports presented before the African Commission every year. The media, religious and traditional leaders, youth associations, academic institutions, private sectors, professional associations, women's organisations and communities can be

74 General Comment 1 (art 30 of the African Charter on the Rights and Welfare of the Child) 'On children of incarcerated and imprisoned parents and primary caregivers' (2013).

consulted, and brought together to understand and advocate for women's rights through the General Comment. Strong partnerships between government, civil society and the private sector should be encouraged and fostered.

Additionally, national human institutions have an important role to play in ensuring that the General Comment is made known among people and government institutions. This can be in the form of training or roundtable discussions, the publication of the General Comment in local languages and engaging with government officials. Advocacy, awareness raising and capacity building of frontline protectors and social service providers should be carried out, while recognising the challenge of limited resources. Civil society groups and human rights institutions should also make efforts to cite or refer to the General Comment at any opportunity they have before a court.

11 Conclusion

The implications of HIV in Africa are immense and affect the broader family, community and the overall development of African states. This is particularly the case for women who are disproportionately affected by HIV. The current economic, social, cultural and legal barriers that impede women from obtaining effective treatment and care, or information that could prevent the spread of HIV, keep women in a position of reduced power.

It is hoped that the General Comment will assist in bringing clarity and precision to articles 14(1)(d) and (e) under the African Women's Protocol. Even though there is a developed legal and normative body of standards at the international level, the General Comment is meant to provide a broad interpretation of selected provisions of the Women's Protocol that have been identified as unclear. The General Comment was the first step towards the development of such an 'unpacking' of the articles, and it is now up to states to implement the provisions of articles 14(1)(d) and (e) of the African Women's Protocol in accordance with the guidance set out in the General Comment.

It is also hoped that this document will serve better at setting normative standards in realising HIV-related rights in the African context. This will ensure that governments are held accountable in their obligations to fulfilling the reproductive rights of women, who are the most marginalised and discriminated against group in Africa. It cannot be over-emphasised that the General Comment in relation to articles 14(1)(d) and (e) of the African Women's Protocol should serve a broader purpose in assisting states to implement the rights which they have undertaken to guarantee.

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Women's health and human rights: Public spending on health and the military one decade after the African Women's Protocol

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Summary

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa has been hailed for its efforts to promote women's health and rights. The Protocol has now been signed and ratified by approximately two-thirds of African Union member states, from the most populous and largest to the smallest countries on the continent. The Protocol envisages major steps to improve the status of women on the continent, from economic opportunities and food security through to marriage and the rights of widows. This article seeks to contribute to the emerging literature on gender, health and rights, by exploring how government commitments to the health mandates of the Women's Protocol have transpired in practice, one decade after its enactment, with a focus on resource allocations. The article's scope includes a review of why sexual and reproductive rights matter, intrinsically, as rights, and evidence about their instrumental importance for development. Available evidence about status and trends in women's health in Africa is presented, highlighting some advances as well as major shortcomings. This is the important empirical background against which to explore the human rights obligations of African states on this front, in particular the right to sexual and reproductive health and the potential contribution of the African Women's Protocol. New analysis is undertaken of the extent to which governments have responded to the Protocol's specific mandates with respect to military spending and social development, which suggests some promising trends. The conclusions highlight the finding that resource

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allocations in favour of health have significantly improved in countries that have ratified the Protocol, while underlining the importance of appropriate indicators and monitoring, and actions to ensure state accountability.

Key words: *gender; reproductive health and rights; government spending; Africa*

1 Introduction

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) has been hailed for its efforts to promote women's health and rights.[1] The Women's Protocol has now been signed and ratified by approximately two-thirds of African Union (AU) member states.[2] These include a diversity of countries, from the most populous (Nigeria) and largest (Democratic Republic of Congo) to the smallest (Djibouti). However, 18 states – including some of the poorest countries, namely, Ethiopia, Chad and Niger – have not ratified the Women's Protocol at the time of writing.[3] Of the states that have not made commitments to the Protocol, many are conflict- or crisis-affected, notably Somalia, Egypt and Sudan.[4]

The African Women's Protocol envisages major steps to improve the status of women on the continent, from economic opportunities and food security to marriage and the rights of widows.[5] The focus here is on health, where among the highlights are promoting and protecting access to safe abortion[6] and committing to the elimination of harmful practices, such as female genital mutilation[7] and early marriage.[8] Article 14 explicitly recognises the right of women to control their fertility, to choose methods of contraception, and the right to adequate health facilities, as well as other foundations of

1 The African Women's Protocol was adopted in 2003 and came into force in 2005.

2 At the time of writing, 36 out of 54 African states had ratified the Women's Protocol; http://www.equalitynow.org (accessed 17 October 2014).

3 Solidarity for African Women's Rights *Report on the mapping exercise on the status of ratification of the Protocol on the rights of women in Africa (data sheet)*; Algeria, Botswana, Burundi, Central African Republic, Chad, Egypt, Eritrea, Ethiopia, Madagascar, Mauritius, Niger, Sahrawi Arab Democratic Republic, Sierra Leone, Somalia, São Tomé and Principe, Sudan, South Sudan, Tunisia (September 2012).

4 FIDH *Women's rights in Africa: Eighteen countries are yet to ratify the Maputo Protocol!* (2013) http://www.fidh.org/en/africa/african-union/women-s-rights-in-africa-18-countries-are-yet-to-ratify-the-maputo-13644 (accessed 17 October 2014); World Bank *List of fragile and conflict-affected states FY 2014 – Fragility, Conflict and Violence* (2013) http://siteresources.worldbank.org/EXTLICUS/Resources/511777-1269623894864/HarmonizedlistoffragilestatesFY14.pdf (accessed 17 October 2014).

5 http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf (accessed 17 October 2014).

6 Art 14 African Women's Protocol.

7 Art 5.

8 Art 6.

reproductive health and rights. This is consistent with Sen's concept of development as a process of expanding freedoms and agency.[9] The Women's Protocol commits signatories to redirect military resources to social development, a monitorable policy action which is a major focus of the article.[10]

The article seeks to contribute to the emerging literature on gender, health and rights, by exploring how government commitments to the health mandates of the Women's Protocol have transpired in practice, one decade after its enactment, with a focus on resource allocation. The structure is as follows. First, I review briefly why sexual and reproductive rights matter, intrinsically as rights, and provide evidence about their instrumental importance for development. I then look at available evidence about status and trends in women's health in Africa, highlighting some advances as well as major shortcomings. This is important empirical background against which to explore the human rights obligations of African states on this front, in particular the right to sexual and reproductive health and the potential contribution of the African Women's Protocol. I undertake a new analysis of the extent to which governments have responded to the Protocol's specific mandates with respect to military spending and social development. The final section broadens the discussion to review the structural and individual level determinants and constraints that matter for sexual and reproductive health, beyond levels of spending. The conclusions highlight the finding that resource allocations in favour of health have significantly improved in countries that have ratified the Women's Protocol, while underlining the importance of appropriate indicators and monitoring, and actions to ensure state accountability.

Table 1 sets out, by way of context, the status of AU ratification of the African Women's Protocol, and the availability of published data on health and military spending. It reveals that data gaps on military spending are far more frequent than gaps on health spending: Indeed, for the 36 countries that have ratified the Protocol, 12 are missing data on military spending, whereas health spending is available for all but Zimbabwe. Throughout, we rely on the Stockholm International Peace Research Institute which maintains an open source data on military spending for 171 governments since 1988, which defines military spending as including spending on personnel, operations and maintenance and procurement.[11] Interestingly, the data gaps are more frequent among non-ratifying states: We lack data on military spending for seven out of 18 states.

9 A Sen *Development as freedom* (1999).

10 Art 10(3) African Women's Protocol.

11 For specific details, see http://www.sipri.org/research/armaments/milex/milex_database/definitions (accessed 17 October 2014).

Table 1: Data availability of health and military expenditures by ratification status

Ratification	Health	Military	Non-Ratification	Health	Military
Angola	✓	✓	Algeria	✓	✓
Benin	✓	×	Botswana	✓	✓
Burkina Faso	✓	✓	Burundi	✓	×
Cameroon	✓	✓	Central African Republic	✓	×
Cape Verde	✓	✓	Chad	✓	✓
Côte d'Ivoire	✓	✓	Egypt	✓	✓
Comoros	✓	✓	Eritrea	✓	×
Congo	✓	×	Ethiopia	✓	✓
Djibouti	✓	×	Madagascar	✓	✓
Democratic Republic of Congo	✓	✓	Mauritius	✓	✓
Equatorial Guinea	✓	×	Niger	✓	×
Gabon	✓	×	Sahrawi Arab Democratic Republic	×	×
The Gambia	✓	×	Sierra Leone	✓	✓
Ghana	✓		Somalia	×	×
Guinea-Bissau	✓	×	São Tomé and Principe	✓	✓
Guinea	✓	×	Sudan	✓	×
Kenya	✓		South Sudan	×	✓
Libya	✓	×	Tunisia	✓	✓
Lesotho	✓	✓			
Liberia	✓	✓			
Mali	✓	✓			
Malawi	✓				
Mozambique	✓	✓			
Mauritania	✓	×			
Namibia	✓	✓			
Nigeria	✓	✓			
Rwanda	✓	✓			
South Africa	✓	✓			
Senegal	✓	✓			
Seychelles	✓	✓			
Swaziland	✓	✓			
Tanzania	✓	✓			

Togo	✓	×			
Uganda	✓	✓			
Zambia	✓	✓			
Zimbabwe	×	×			

Note: Data is deemed missing if unavailable for more than three years during the period 2003 to 2012.
Sources: SIPRI *Military expenditure by country as percentage of gross domestic product* (2003-2012); WHO *General government expenditure on health as percentage of GDP* (2003-2011)

2 Sexual and reproductive health and rights matter

The sexual and reproductive health status and outcomes of women matter for several reasons. Firstly, there is intrinsic value in sexual and reproductive health and rights. This means that women have the right to safe and satisfying sex lives, and that they have the ability to make choices and decisions about whether or not to have children, when to have them and how many to have.[12] Several international human rights instruments, including the Universal Declaration of Human Rights (Universal Declaration),[13] the International Covenant on Civil and Political Rights (ICCPR)[14] and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[15] are among those recognising the right to life, the right to health and the right to non-discrimination.[16] Sen has powerfully argued this intrinsic value in *Development as freedom*, and this is now an accepted element of mainstream development thinking, as illustrated by the World Bank's 2012 World Development Report on Gender.

Rights advocates have long underlined the critical importance of women being able to determine their own decisions, including around sexuality and health.[17] Feminism is concerned with equity and

12 United Nations Population Fund *By choice not chance: Family planning, human rights and development* (2012).
13 Adopted by the United Nations General Assembly in 1948.
14 Entry into force in 1976, and currently has 168 parties.
15 Adopted by the United Nations General Assembly in 1979, and came into force in 1981. Currently, 188 states have ratified. See http://www.feminist.org/global/cedaw.html (accessed 17 October 2014).
16 Other important declarations include the Vienna Conference on Human Rights (1993); the Programme of Action of the International Conference on Population and Development (1994); the Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women (1995); the Southern African Development Community's Declaration on Gender and Development (1997); and the Addendum on the Eradication of All Forms of Violence Against Women and Children (1998), recognising that violence against women can constitute a violation of human rights.
17 See, eg, M Langford *et al* (eds) *Millennium Development Goals and human rights: Past, present and future* (2013); P Hunt & T Gray T (eds) *Maternal mortality, human rights and accountability* (2013) 129-143.

justice, and overcoming oppression. Gender inequality and discrimination lead to ill health, as well as other forms of disadvantage.[18]

At the same time, sexual and reproductive health has instrumental value. At the household level, poor health can have negative implications for household consumption and other forms of financial well-being. A growing body of evidence shows that poor maternal health, in particular, can create an economic burden for households.[19] In Burkina Faso, women who had more acute obstetric complications incur more financial burdens, for example, they report more borrowing, slower debt repayment rates and sold more assets in the subsequent year.[20] More recent work in Kenya found that across all income groups, the costs of a maternal death exceeded one-third of annual consumption expenditure, and this catastrophic shock often left the families impoverished.[21]

Programmes and services that help to reduce the costs associated with health care can help prevent families from accumulating debt, which can drive families deeper into poverty. Therefore, national economies can also benefit when fertility rates fall and both mothers and their children are healthy.[22]

Labour productivity suffers because of poor maternal health. In sub-Saharan Africa, women are more than 60 per cent of workers in agriculture, and they contribute the bulk of unpaid work in domestic labour and caregiving.[23] In addition to negative impacts on earnings, maternal mortality and morbidity can penalise other family members, especially those who have to fill the gap left when women are less able to work, reducing their own capacity to pursue educational and economic opportunities outside the household.[24]

Poor maternal health can bring negative inter-generational effects. Evidence suggests that poor maternal health during pregnancy can adversely affect the developmental outcomes of children later on in life and, conversely, if mothers receive adequate health care and nutrition during pregnancy, their children subsequently have better health, education and labour market outcomes.[25]

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18 L Doyal *What makes women sick: Gender and the political economy of health* (1995).

19 K Grépin & J Klugman *Closing the deadly gap between what we know and what we do: Investing in women's reproductive health* (2013) 3.

20 KT Storeng 'Paying the price: The cost and consequences of emergency obstetric care in Burkina Faso' (2008) 66 *Social Science and Medicine* 545-557.

21 A Kes *et al The economic burden of maternal mortality on households: Evidence from three sub-counties in rural Western Kenya* (2014).

22 Department for International Development *Choices for women: Planned pregnancies, safe births and healthy newborns* (2010) 8.

23 World Bank *Gender and development: World development report* (2011).

24 Grépin & Klugman (n 19 above) 3. See also AE Yamin *et* al 'Costs of inaction on maternal mortality: Qualitative evidence of the impacts of maternal deaths on living children in Tanzania' (2013) *PLoS ONE* 8(8): e71674.

25 Grépin & Klugman (n 19 above) 4-5.

Furthermore, preventing young adolescent pregnancy positively affects girls' life opportunities. In developing countries, pregnancy-related causes are the largest contributor to the mortality of girls aged 15 to 19 – nearly 70 000 girls die each year.[26] Starting sex early increases the exposure of young people to HIV or other sexually-transmitted infections.[27] Studies have also highlighted adverse long-term consequences on children born to young mothers, including low cognitive test scores, poor behavioural outcomes, grade repetition and economic disadvantage.[28]

In this light, it is not surprising that investments in health can boost an individual's lifetime income, promote economic growth and reduce poverty.[29] Studies have shown that health investments are positively linked to economic growth in sub-Saharan Africa.[30]

The evidence, therefore, is clear that improved maternal health is both a means and an end to gender equality and women's empowerment,[31] as well as important for development more broadly. We now turn to examine the situation in Africa, before outlining the context in terms of human rights.

3 Status of sexual and reproductive health in Africa: Where do we stand?

Africa has made some tremendous progress in improving women's and girls' sexual and reproductive health over the past two decades – but some major gaps remain. Here we review key highlights.

Most notable among the advances has been the drop in maternal mortality rates, by over 40 per cent since 1990[32] and, while data constraints make it difficult to assess trends in contraceptive use, there are some success stories. For example, Demographic and Health Survey (DHS) data suggests that Namibia has increased the number of

26 UNFPA *State of the world's population 2013: Motherhood in childhood* (2013).

27 MJ Hindin & AO Fatusi *International perspectives on sexual and reproductive health* (2009) 35 58-62.

28 JP Azevedo *et al Teenage pregnancy and opportunities in Latin America and the Caribbean on early child bearing, poverty and economic achievement* (2014) http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/04/15/000442464_20140415134309/Rendered/INDEX/831670v10REVIS00Box385190B00PUBLIC0.txt (accessed 17 October 2014).

29 TP Schultz 'Health and schooling investments in Africa' (1999) 13 *Journal of Economic Perspectives* 67, as cited in JC Anyanwu & AE Erhijakpor *Health expenditures and health outcomes in Africa* (2007) 2

30 K Gyimah-Brempong & M Wilson 'Health, human capital and economic growth in sub-Saharan and OECD countries' (2004) 44 *Quarterly Review of Economics and Finance* 296, as cited in Anyanwu, & Erhijakpor (n 29 above) 2.

31 Department for International Development (2010) 8.

32 UNFPA East and Southern Africa *Saving mothers' lives* (2013) http://esaro.unfpa.org/public/cache/offonce/lang/en/pid/9829;jsessionid=D3E1DCE44D68D0F4724915D55C9D5AA3.jahia01 (accessed 17 October 2014).

women who use contraception by 20 percentage points.[33] In North Africa, Egypt has moved from a 38 per cent prevalence rate to almost 60 per cent, and Zimbabwe has the highest prevalence rate in Eastern Africa with 59 per cent in the 2010-2011 DHS.[34] Concerted local efforts have led to the elimination of female genital mutilation in some communities, such as in the well-known case of Tostan using collective empowerment approaches to end the practice in Senegal.[35]

Yet, enormous challenges continue to affect women's health in Africa. Most notably, maternal mortality remains unacceptably high, contraceptive prevalence is low in many countries, and child marriage and gender-based violence are both pervasive phenomena.

Sub-Saharan Africa is the region with the highest maternal mortality in the world. Currently, about 165 000 African women die from childbirth-related complications each year, and for every death, approximately 20 more suffer from maternal morbidities, such as obstetric fistula.[36] Chad ranks the worst, with 1 100 deaths per 100 000 live births. African women have a one-in-39 lifetime risk of dying from pregnancy or childbirth-related complications, and in countries such as Liberia, Niger, Somalia and Sierra Leone, the risk is much higher: one in 25.[37] The risk factors for maternal mortality and morbidity include a high number of lifetime pregnancies, closely-spaced births and adolescent fertility.[38] African women average close to five children each, and gaps in services make births riskier: Fewer than 47 per cent of births had skilled birth attendants.[39]

The availability and utilisation of contraception are integral components of sexual and reproductive health and rights, as we explore below. Yet, there are vast differences across regions and countries in the extent to which this is realised, as shown in Figure 1.[40] Among women aged 15 to 49 in North America, Latin America and Europe, prevalence rates are 73 to 78 per cent; however,

33 Current use of contraception among currently-married women; any method. Moving from 29% to 55,1%; USAID Stat Compiler http://www.statcompiler.com/, (1992 DHS), (2006-07 DHS).

34 Current use of contraception among currently married women; any method: (38%) 1988 DHS to 59% USAID Stat Compiler http://www.statcompiler.com. (2005 DHS).

35 UNFPA *Ending harmful practices through community-led social change in Senegal* (2010) http://www.unfpa.org/public/news/pid/5181#sthash.yjILCDYg.dpuf; http://www.unfpa.org/public/news/pid/5181 (accessed 17 October 2014).

36 UNFPA (n 32 above).

37 UNFPA *The health of mothers is improving: Campaign on accelerated reduction of maternal mortality in Africa* http://esaro.unfpa.org/public/public/lang/en/pid/7130 (accessed 17 October 2014); Grépin & Klugman (n 19 above) 16.

38 UNFPA (n 32 above).

39 World Bank Fertility Rate, Total. Data Bank http://data.worldbank.org/indicator/SP.DYN.TFRT.IN/countries/1W-ZG?display=graph (accessed 17 October 2014); Grépin & Klugman (n 19 above) 8.

40 United Nations Department of Economic and Social Affairs *World contraceptive use 2011* http://www.un.org/esa/population/publications/contraceptive2011/contraceptive2011.htm (accessed 17 October 2014).

in sub-Saharan Africa, more than two-thirds of women do not use modern contraceptives. [41]

In sub-Saharan Africa in 2009, about a quarter of women reported having an unmet need for family planning. This figure reflects no overall improvement since the 1990s. At the same time, there is a wide variation in contraceptive prevalence across the continent. Among the 44 AU countries with data since 2003, the highest coverage is observed in Algeria and Cape Verde (both at 61 per cent), whereas Sudan (8 per cent) and Chad (3 per cent) have the lowest rates of contraceptive coverage.[42]

In terms of sub-regions, as shown in Figure 2, Southern Africa leads, with contraceptive prevalence of 59 per cent, approaching the global average, while Central and Western Africa are both below 20 per cent.[43] Rates in Eastern Africa range from Kenya at 45 per cent, to Burundi at 9 per cent. Several AU countries that have not ratified the African Women's Protocol have low prevalence rates, including Eritrea, Chad and Sierra Leone.

41 United Nations Department of Economic and Social Affairs (n 40 above); UNFPA (n 32 above).

42 Available data from 2004 to 2010 analysed. Figures from Algeria represent 2006 rates and figures from Cape Verde represent 2005 rates; Chad (2004) and Sudan (2006); United Nations Department of Economic and Social Affairs (n 40 above).

43 Calculated using data from United Nations Department of Economic and Social Affairs (n 40 above). Global figure 62,7% (2009); women aged 15-49, married or in a union using any method. Regional composition: Southern Africa: Botswana, Lesotho, Namibia, South Africa, Swaziland; Northern Africa: Algeria, Egypt, Libyan Arab Jamahiriya, Morocco, Sudan, Tunisia; Eastern Africa: Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Mozambique, Réunion, Rwanda, Somalia, Uganda, United Republic of Tanzania, Zambia, Zimbabwe; Central Africa: Angola, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon, São Tomé and Principe; and Western Africa: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo.

Figure 1: World contraceptive prevalence by region – Per cent women ages 15-49, any method, 2009

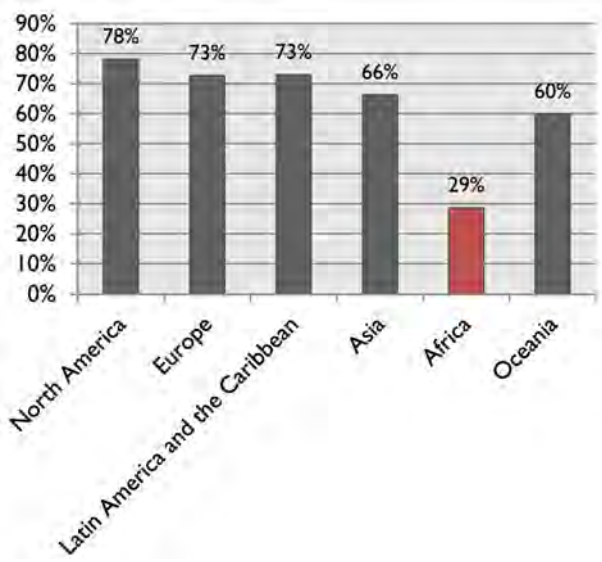
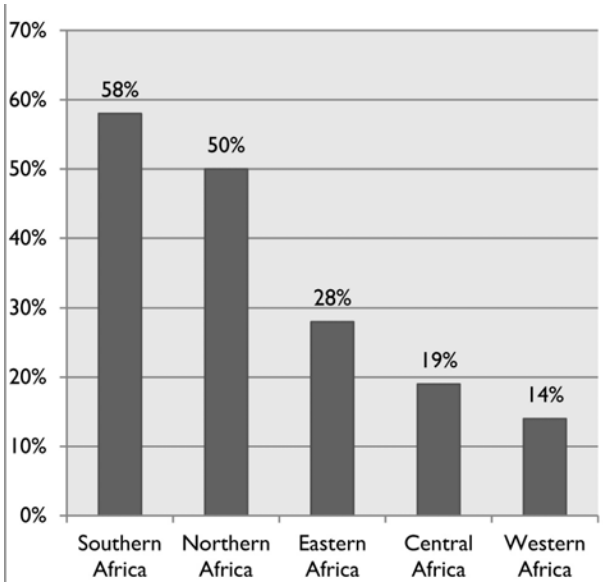


Figure 2: Contraceptive prevalence in Africa – Per cent women ages 15-49, any method 2009



Source: United Nations, Department of Economic and Social Affairs. (2011) World contraceptive use 2011

Sub-Saharan Africa counts for a disproportionate share of abortion-related deaths that happen globally every year – some two-thirds of the almost 50 000 deaths. This is largely attributable to unsafe abortions, often in poor and rural areas, often associated with traditionally-restrictive regimes that criminalise abortion. Young women face particular challenges in accessing abortion care – they account for approximately 40 per cent, or as many as 3,2 million,[44] unsafe abortions worldwide.[45] Tunisia and South Africa have been the most progressive reformers on this front, with a positive impact on maternal mortality.[46] In South Africa, the annual number of abortion-related deaths fell by 91 per cent after liberalisation of the abortion law.[47] It is worth noting that such legislation has also been associated with lower overall fertility rates and higher female labour force participation.[48]

Overall, fertility rates in sub-Saharan Africa have declined slightly, moving from 5,6 births per woman in 2004 to 5,2 births in 2011.[49] Vast differences still exist sub-regionally. For example, Southern Africa, with a rate of 2,6 births per woman, has approximately half the fertility level of Central, Western and Eastern Africa.[50] North Africa also has relatively low rates between 2 and 3 births per woman and, at the country level, rates range from 7 (Niger) to 2,9 (South Africa) births per woman.[51]

In sub-Saharan Africa, almost 40 per cent of women aged 20 to 24 were married before they were 18 years old, and 12 per cent married before their fifteenth birthday. The practice is especially widespread in West and Central Africa. Niger has the highest rates in the world, with 75 per cent of girls marrying before their eighteenth birthday, and in Chad, Central African Republic and Eritrea, between 20 and 30 per cent of girls married before their fifteenth birthday.[52]

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44 UNFPA (n 26 above).

45 I Shah & E Ahman 'Age patterns of unsafe abortion in developing country regions' (2004) 12 *Reproductive Health Matters* 9.

46 J Benson *et al* 'Reductions in abortion-related mortality following policy reform: Evidence from Romania, South Africa and Bangladesh' (2011) *Reproductive Health* 8(39).

47 R Jewkes & H Rees 'Dramatic decline in abortion mortality due to the Choice on Termination of Pregnancy Act' (2005) 95 *South African Medical Journal* 250.

48 DE Bloom *et al* 'Fertility, female labour force participation and the demographic dividend' (2009) 12 *Journal of Population Economics* 79-101.

49 World Bank Fertility Rate, Total (2013). Data Bank: http://data.worldbank.org/indicator/SP.DYN.TFRT.IN/countries/1W-ZG?display=graph (accessed 17 October 2014).

50 EL Madsen, The Wilson Center, New Security Beat *Why has the demographic transition stalled in sub-Saharan Africa?* (2013) http://www.newsecuritybeat.org/2013/08/demographic-transition-stalled-sub-saharan-africa/#.Uo0B0KAlj-o (accessed 17 October 2014).

51 USAID Stat Compiler; total fertility rate for African sub-regions.

52 R Vogelstein *Ending child marriage: How elevating the status of girls advances US foreign policy objectives* (2013) 5.

Child marriage can bring a range of negative health outcomes. Girls who marry between the ages of 10 to 14 are five times more likely to die in childbirth than women aged 20 to 24 years, with specific risks related to obstetric fistula and obstructed labour.[53] Child marriage is also strongly associated with high fertility levels (three or more births), repeated childbirth in less than 24 months and multiple unwanted pregnancies, as well as higher risks of contracting HIV. [54]

Gender-based violence is another challenge that is both major and pervasive.[55] It occurs in various forms, including intimate partner violence, sexual violence, and female genital mutilation.[56] For sub-Saharan Africa as a whole, the best available estimates suggest that 37 per cent of women have experienced intimate partner violence and 12 per cent have experienced non-partner sexual violence.[57] A sub-regional disaggregation of intimate partner violence in sub-Saharan Africa reveals that Central Africa has the highest prevalence rate with 66 per cent, while Southern Africa has the lowest with 30 per cent[58] and, while estimates specific to North Africa are not available, the regional figure for North Africa and the Middle East stands at 35 per cent. With respect to the prevalence rates for non-partner sexual violence, in sub-Saharan Africa, Central Africa has the highest rate again with 21 per cent, and West Africa emerges with the lowest rate of 9 per cent. Available data for North Africa and the Middle East suggests that the rate stands at 4,5 per cent.[59]

In some countries, rates are much higher: For example, over 80 per cent of women in Uganda have experienced intimate partner violence. The National Violence against Children Surveys suggest that about one-third of young women in Swaziland, Tanzania and

53 A Raj *et al* 'Prevalence of child marriage and its effects on fertility and fertility-control outcomes of young women in India: A cross-sectional, observational study' (2009) *Lancet* 1883-1889. Fistulas can occur due to early sexual initiation, which in many cases occurs before a girl's first period when she is a child bride.

54 As above.

55 For a global review, see J Klugman *et al Voice and agency* (2014) ch 3.

56 R Coomaraswamy *Integration of human rights of women and the gender perspective: Violence against women, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms Radhika Coomaraswamy: Addendum: Communications to and from governments* (1999).

57 WHO Africa region: Botswana, Cameroon, Democratic Republic of the Congo, Ethiopia, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, South Africa, Swaziland, Uganda, United Republic of Tanzania, Zambia, Zimbabwe; WHO *Global and regional estimates of violence against women* (2013) Appendix 1; Lifetime prevalence of physical and/or sexual intimate partner violence among ever-partnered women. WHO *Global and regional estimates of violence against women* (2013) 17-19.

58 Prevalence of intimate partner violence - Central Africa: 66%; East Africa: 39%; Southern Africa: 30%; West Africa: 42% in WHO (n 57 above).

59 WHO (n 57 above) 47-48.

Zimbabwe experienced sexual violence before their eighteenth birthday.[60]

Violence has enormous repercussions for survivors, their children, communities and societies. Alongside psychological trauma and physical injuries, survivors often suffer reduced earnings, both in the short and long terms. In Tanzania, Veema (2013) estimated that women experiencing intimate partner violence earned approximately 29 per cent less than women who did not, and this figure increased to 43 per cent if the level of violence was severe.[61] The World Bank has reported that the costs of violence range between 1,5 to 4 per cent of GDP, often exceeding what governments spend on primary education, for example.[62]

4 Key provisions of the African Women's Protocol

We now turn to examine the key provisions of the African Women's Protocol in light of the established literature around human rights and health, and women's health. The African Women's Protocol marks a potentially-important advance, with major provisions on sexual and reproductive health and rights.

It is useful to begin with the broader international context. The adoption of the Vienna Declaration and Programme of Action at the United Nations (UN) World Conference on Human Rights in 1993 is widely regarded as a watershed moment in the women's rights movement. This universally recognised, for the first time, that women's rights are human rights, paving the way for their integration into human rights norms and practice.

There are major synergies between human rights and health, which are especially relevant here, given the commitments that states have made to the protection and promotion of women's health. States have recognised girls' and women's rights to health in several international agreements, including the right to health, medical care treatment and public health. The links between human rights and health have been well analysed by Ngwena and Yamin, as well as Cook and Shaw and others, and various issues of the *Journal on Health and Human Rights*.[63]

60 See United Republic of Tanzania, UNICEF, CDC, Muhimbili University *Violence against children in Tanzania: Findings from a national survey 2009* (2011) http://www.unicef.org/swaziland/sz_publications_2007violenceagainstchildren.pdf (accessed 17 October 2014).

61 S Vyas *Estimating the association between women's earnings and partner violence: Evidence from the 2008-9 Tanzania National Partner Survey* (2013).

62 Klugman *et al* (n 55 above).

63 See D Shaw & C Ngwena (eds) *Health and human rights* (2007); D Shaw & RJ Cook 'Applying human rights to improve access to reproductive health services' (2012) 119 *International Journal of Gynaecology and Obstetrics* S55–S59; AE Yamin 'Toward transformative accountability: Applying a rights-based approach to fulfill

Human rights instruments that are relevant to health include provisions in CEDAW, ratified by 188 states, and which calls on state parties in article 24 to 'take all appropriate measures to eliminate discrimination against women in the field of healthcare in order to ensure, on a basis of equality of men and women, access to health care services'.

There are also relevant commitments in ICCPR on non-discrimination;[64] article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (the right to the highest attainable standard of health); and the Convention on the Rights of the Child (CRC). The right to sexual and reproductive health was recognised in 1994 by the Programme of Action of the International Conference on Population and Development (ICPD), and subsequently adopted by 179 governments.[65]

As recently well summarised by Shaw and Cook,[66] the UN Human Rights Council has acknowledged that preventable maternal mortality and morbidity are human rights violations.[67] The UN High Commissioner for Human Rights has adopted guidance on the application of human rights to reduce preventable maternal mortality and morbidity. These guidelines underline the importance of underlying structural and social determinants, points that we return to in the final section of this article.[68]

At the heart of treaties are state accountability and responsibility. State parties are required to take positive action to realise the rights enumerated. However, the extent to which the rights to health laid out in global and regional legal instruments have been translated into constitutions, legislation and enforcement and accountability mechanisms at the national level varies. A recent analysis by Assi *et al* at the World Policy Analysis Centre suggests that, if we distinguish between different enumerations of rights, with attention to their gender dimensions, we observe the following patterns:

- A broad right to health is more frequently included in constitutions of CEDAW member states relative to individual rights in health. Overall, 62 per cent of constitutions guarantee any health rights, either specifically to women in aspirational terms or universally. Protections of health were more common in constitutions adopted after CEDAW ratification (87 compared to 41 per cent).

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maternal health obligations' (2010) 7 *SUR International Journal on Human Rights*; F Bustreo & P Hunt *Women's and children's health: Evidence of impact of human rights* (2013).

64 Adopted by the United Nations General Assembly in 1966, and in force from March 1976. As of April 2014, the Covenant has 74 signatories and 168 parties.

65 International Conference on Population and Development (ICPD) Programme of Action http://www.unfpa.org/public/home/publications/pid/1973 (accessed 17 October 2014). Note that some of the governments adopted ICPD with certain reservations.

66 Shaw & Cook (n 63 above).

67 United Nations Human Rights Council 'Preventable maternal mortality and morbidity and human rights' 18th session, 23 September 2011 A/HRC/18/L.8.

68 Yamin (n 63 above).

- Among all CEDAW ratifiers, 47 per cent protect women's rights to medical care treatment by guaranteeing the right in any of the following ways: to women explicitly (17 per cent of countries); to citizens universally and providing general protection against discrimination based on gender (14 per cent); to women in aspirational terms (8 per cent); or universally without mentioning gender (9 per cent.
- Most of CEDAW state parties (84 per cent) do not mention the right to public health in their constitutions. Out of all constitutions from CEDAW-ratifying countries, 12 per cent protect women's rights to public health explicitly or guarantee the right to citizens and provide general protection against discrimination based on gender.

Looking more specifically at Africa, we see that several countries have constitutions that guarantee medical care to women, including Egypt, Namibia, Mozambique and Tunisia, while a couple of others have more general provisions, including Kenya and South Africa. Most African constitutions, however, have no provisions relevant to women's access to health care. Nearly all lack a constitutional guarantee to public health, the exceptions being Congo and Tunisia, while Ethiopia has an aspirational provision to this effect.[69]

A recent study by the World Health Organisation (WHO), the first of its kind, asks: What evidence is available to policy makers that human rights have helped to improve women's and children's health.[70] Drawing on quantitative data mainly collected for other purposes, the authors conclude that there is plausible evidence that human rights contributed positively to health and health-related gains for women and children in the four countries, such as increased access to emergency obstetric care (Nepal), increased access to modern contraception (Brazil), reductions in early childhood mortality (Malawi), and increased vaccination coverage (Italy).

Landmark litigation is emerging on this front.[71] In the first ever maternal death case to be decided by an international human rights body, the CEDAW Committee held Brazil responsible for the preventable maternal death of Alyne da Silva Pimentel Teixeira, a Brazilian of African descent, due to post-partum haemorrhage following the delivery of a 27 week-old stillborn fetus in a private health centre. As Shaw and Cook underline, this decision establishes as a matter of international law that governments have human rights obligations to guarantee that all women in their countries, regardless of income level or racial background, have access to timely, non-discriminatory and appropriate maternal health services in public and private health facilities. Similarly, historic decisions have been issued for Paraguay and India. These decisions mark the first time that courts of law have applied constitutional and human rights law to hold

69 T-M Assi *et al Are states parties to CEDAW living up to their commitments to women and girls? A globally comparative review of laws and policies* (2014).

70 Bustreo & Hunt (n 63 above).

71 See AE Yamin & S Gloppen (eds) *Litigating health rights: Can courts bring more justice to health?* (2011); Shaw & Ngwena (n 63 above) Part IV.

governments legally accountable for the preventable maternal death of women arising from gaps in the healthcare system.

Turning now to Africa, we begin with the African Charter on Human and Peoples' Rights (African Charter), ratified by all 53 member states of the AU, which is also the parent treaty of the African Women's Protocol. Article 2 enshrines the principle of non-discrimination, including on the grounds of sex, and article 18(3) calls on state parties to eliminate 'every discrimination against women and also ensure the protection of the rights of the woman … as stipulated in international declarations and conventions'.

Recognised shortcomings of the African Charter include the failure to explicitly define discrimination against women; lack of guarantees of the right to consent to, and equality in, marriage, and an emphasis on traditional values and practices that can impede the advancement of women's rights in Africa. This led non-governmental organisations (NGOs) in Africa to advocate for the adoption of the African Women's Protocol to strengthen the provisions on gender equality, which led to the wide-ranging Protocol.

The Women's Protocol has been described as an important advance in the protection and the promotion of the rights of women in Africa, and innovative in key respects.[72] It is the first international law instrument to call for an end to all forms of violence against women, whether in private or in public, including sexual harassment; to prohibit all forms of female genital mutilation; protect women's rights to seek abortion under certain conditions; prohibit forced marriages; and specify 18 years as the minimum age of marriage. There is an expansive set of rights enshrined in the Women's Protocol, extending to a broad range of economic and social rights, including rights to equal pay for equal work and to adequate and paid maternity leave in both the public and private sectors, that are beyond the scope of this article.[73]

The focus here is on article 14, which spells out a woman's right to health. It covers sexual and reproductive health, which includes her right to control her fertility; to decide whether to have children, her number of children and their spacing; to choose any contraceptive methods; self-protection and to be protected against sexually-transmitted infections; to be informed of her and her partner's health status; and to have family planning education. State parties are required to:[74]

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72 See, eg, the foreword to the Guide to Using the Protocol to Advance the Rights of Women in Africa, published by Equality Now, by Soyata Maïga, Commissioner/ Special Rapporteur on the Rights of Women in Africa.

73 See World Bank *Gender at work* (2014), for a recent review of the status of economic opportunities globally, including in Africa; J Klugman & S Twigg *Gender at work in Africa: Legal constraints and opportunities for reform* (forthcoming) *African Journal of International and Comparative Law*.

74 For the full text, see http://www.achpr.org/files/instruments/women-protocol/achpr_instr_ proto_women_eng.pdf (accessed 17 October 2014).

- provide adequate, affordable and accessible health services, including pre-natal, delivery and post-natal health and nutrition services for women during their pregnancy and while they are breast feeding;
- provide family planning information and services, including to women in rural areas; and
- authorise medical abortion in cases of sexual assault, rape, incest and where continued pregnancy endangers the health or life of the mother or the foetus.

This means that a state party violates the Women's Protocol when it, for example, has family planning policies that do not respect the rights of women to choose the number or spacing of their children, or prohibits abortion in cases noted above. At the same time, however, it is important to note Ngwena's critique that the Protocol does not go far enough to the extent that it largely medicalises the grounds of abortion and implicitly makes health care professionals the gatekeepers rather than the women themselves.[75]

It is useful to outline the key elements of the human rights architecture in Africa. This is done drawing on the valuable Guide to Using the Protocol to Advance the Rights of Women in Africa, published by Equality Now.

- The African Commission, which began functioning in 1986, was established under the African Charter to protect and promote human and peoples' rights and to monitor state compliance with the Charter and its Protocols. It comprises 11 independent commissioners who are elected by the Executive Council of the AU to serve for six-year terms on a part-time basis, with the possibility of a single re-election, and meets twice yearly for two-week sessions. During these sessions, the African Commission considers:
  - complaints (also referred to as communications) submitted by individuals, NGOs, institutions, lawyers and state parties;
  - periodic state party reports under article 62 of the African Charter on compliance; and
  - reports of human rights violations and promotional activities of the commissioners.

2 Special Rapporteur on the Rights of Women in Africa

- The African Commission has special mechanisms such as Special Rapporteurs and working groups to bolster its activities in the promotion of human and peoples' rights. The Special Rapporteur on the Rights of Women in Africa was established in 1998, who is selected from among the commissioners and whose tasks include following up on the implementation of the African Women's Protocol, by preparing reports on the situation of women's rights in Africa, and proposing recommendations to be adopted by the African Commission. Complaints for violations of rights under the Women's Protocol may be brought by individuals or approved NGOs (those with African Commission observer status in the case of the African Court and those with accreditation to the AU in the case of the African Court of Justice and Human Rights) directly to the relevant court as well, subject to provisions in the relevant court's protocol. At

75 C Ngwena 'Using human rights to combat unsafe abortion: What needs to be done?' (2013) http://www.chr.up.ac.za/africlaw/charles_ngwenya.pdf (accessed 17 October 2014).

the time of writing, the African Commission has yet to issue any decisions that directly address women's rights. As Equality Now notes, there are however several determinations under the African Charter that are relevant to women's rights claims, which may be useful to draw upon in making arguments for women's rights.[76]

- The African Court on Human and Peoples' Rights was established to strengthen the protective mandate of the African Commission, and decided its first case in 2009.[77]

At the domestic level, provisions of the African Women's Protocol can be used in complaints and arguments before the courts. After domestic remedies have been exhausted, practitioners can bring cases to the African Commission or the African Court, if applicable.

If the African Women's Protocol has been ratified by the state but not duly incorporated into national law, practitioners can still call on courts to take judicial notice of the state's obligations under the Protocol. This was successfully done in a 2008 case of teacher rape in Zambia, for example. The High Court of Zambia noted the government's obligations under the Women's Protocol, even though this had not been formally incorporated into domestic law. The plaintiff was awarded significant damages for pain and suffering and mental torture, as well as aggravated damages and medical expenses. The judge also directed the Ministry of Education to put regulations in place to protect students in school; and referred the case to the Director of Public Prosecutions to initiate a criminal case against the teacher, calling the failure to prosecute 'a dereliction of duty'. Significantly, the judgment cited the full text of the relevant article of the Women's Protocol. While judicial notice does not make the international instrument enforceable as law, it does mean that the decision can be cited as precedent in subsequent legal arguments.

Strong advocacy is critical to promote these rights at the local level. Women's groups around the world have used international human rights commitments to lobby for progressive legal reform. In Morocco, for example, CEDAW was used as a platform to successfully push for equal citizenship rights and land rights for tribal women.[78] Likewise, increased awareness can help to support and refresh dialogue on women's rights and health. Equality Now has undertaken a campaign for the enactment of a law against female genital mutilation in Mali. This refers to Mali's obligations under the African Women's Protocol: In 2005, Mali ratified the African Women's Protocol which in article 5(b) requires state parties to prohibit FGM through legislative measures backed by sanctions. This is in addition

76 See 52-68 for examples from the African and other regional human rights systems, including the European system.

77 When a new African Court of Justice and Human Rights comes into force (after the necessary ratifications), these will be merged.

78 The national citizenship law was reformed in 2004; a 2012 Ministerial Circular recognises tribal women's rights and affirms full equality for men and women under CEDAW and the Constitution; S Riza *Women's collective action in the Middle East and North Africa* (2013).

to article 1 of Mali's Constitution, which sets forth the right of all citizens to integrity of person and guarantees the protection of all citizens from inhumane, cruel and degrading treatment, as do other similar international obligations of Mali.

Of special interest here is article 10(3) of the African Women's Protocol, urging African governments to spend more on women's development and less on the military. Article 10 is about the right to peace, and includes a specific provision, worded as follows (article 10(3)):

> States parties shall take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.

Article 26 of the Women's Protocol – related to implementation and monitoring – commits state parties to ensure 'the implementation of this Protocol at national level' and to 'undertake to adopt all necessary measures and in particular shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised'. It is also important to highlight the 2001 Abuja Declaration, where heads of state in Africa committed to ensuring that all necessary resources were made available and used effectively in the area of public health, and pledged to allocate 15 per cent of their annual national budgets to health.[79]

In this context, it is interesting and important to understand whether trends in military and health spending reflect these aspirations and commitments. Health is an important element of social development in general, was specifically cited in the Abuja Declaration, and is amenable to empirical investigation. We use the most comprehensive data available, from the Stockholm International Peace Research Institute, the World Bank, and the World Health Organisation.[80] We look at spending for the period 2003 to 2011, complemented by more recent data where available. The earlier years provide a useful baseline, prior to the African Women's Protocol coming into force.

5 How has spending on health changed one decade later?

We have noted that the African Women's Protocol commits state parties to significantly reduce military expenditure in favour of spending on social development, and the promotion of women in particular, and therefore turn to examine whether there is empirical evidence of this shift. The focus is on health, given the centrality of

79 LG Sambo *et al Health financing in Africa: 2000 to 2009 data analysis* (2013) 2.

80 SIPRI *Military expenditure database* (2013); World Bank's Data Bank; WHO *Global health expenditure database* (2013).

sexual and reproductive health to human rights, and the major commitments to these rights in the Protocol. Reductions in military spending can help create the fiscal space needed to allow other priority expenditures, including health, to expand.[81] The focus on health does not diminish the importance of other dimensions of gender equality but, for reasons of space and tractability, these issues are outside the scope of the article. Whilst it is impossible to prove causality between the changes in observed levels of spending on military and health, it is nonetheless interesting and important to document and understand the broad empirical trends.[82]

Over the decade under review, there is evidence of increased effort in health spending among members of the AU. Between 2003 and 2011, general government expenditure on health rose from 2,5 to 3,0 per cent of their Gross Domestic Product (GDP). This was supported by rising donor investments on African healthcare systems. In 12 African countries, external funding accounted for over 30 per cent of their total health spending in 2006, and exceeded 50 per cent in Mozambique and Madagascar.[83]

We undertook an analysis of spending levels and trends to compare countries that had, and had not, ratified the Women's Protocol. Highlights are as follows:

- In 2011, countries that ratified the African Women's Protocol directed more of their GDP to health than countries that have not ratified the Protocol (3,3 per cent versus 2,5 per cent). [84]
- The largest efforts are evident in Lesotho and Malawi, which averaged 6 per cent from 2003 to 2011, both of which have ratified the Protocol.[85]
- Looking at changes over time, Lesotho, Liberia and Rwanda achieved the largest gains, increasing on average by more than 3 percentage points, and all three countries have ratified the African Women's Protocol.[86]
- At the low end, the following countries directed less than 1,5 per cent of their GDP toward health care over the 2003 to 2011 period: Cameroon, Côte d'Ivoire, Guinea, Chad, Congo, Eritrea and Gabon.[87] While many of these countries at the low end have in fact ratified the Women's Protocol, the 'non-ratifiers', Chad and Eritrea, are the only countries that witnessed *decreases* in spending as a share

81 S Seguino *Financing for gender equality: Reframing and prioritizing public expenditures to promote gender equality* (2013) http://www.gender-budgets.org (accessed 17 October 2014).

82 The interested reader is also referred to key literature on gender budgeting, namely, UNDP *Gender responsive budgeting manual for trainers* (2005).

83 Global Fund to Fight AIDS, Tuberculosis and Malaria *Trends in development assistance and domestic financing for health in implementing countries* (2010) 7.

84 WHO (n 80 above).

85 As above.

86 Largest increases in GDP spending from 2003 to 2011. Lesotho increased spending from 4,03% to 9,08%; Liberia increased spending from 1,19% to 4,63%; and Rwanda increased spending from 3,34% to 6,13%.

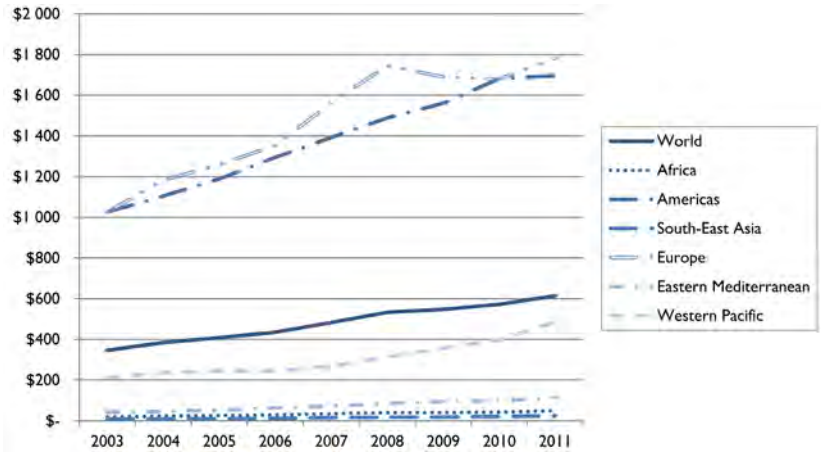
87 Cameroon: 1,2%; Côte D'Ivoire: 1,3%; Guinea: 1,3%; Chad: 1,4%; Congo: 1,4%; Eritrea: 1,4%; Gabon: 1,4%. WHO (n 80 above).

of GDP for the period (by -1,7 and -0,2 percentage points, respectively).

- The largest declines in spending as a share of GDP are seen among 'non-ratifiers': Chad, as previously mentioned, and São Tomé and Principe, which had a decrease of about 3,3 percentage points.[88]
- Among North African countries with data (Algeria, Egypt, Libya and Tunisia), Tunisia leads in spending as a share of GDP averaging 3 per cent over the 2003 to 2011 period, while Libya spent the least with 1,9 per cent.[89]

What this translates into in terms of actual spending on the ground obviously depends on the size of income *per capita*. The overall trend is impressive with the public spending *per capita* on health more than doubling from US $19 in 2003 to US $49 in 2011.[90] However, this is also where the relatively low levels of economic development in Africa are thrown into sharp relief – the average world spending *per capita* is now over US $600 dollars (US $615), as shown in Figure 3, thus demonstrating enormous disparities in income translating into the resources available for health. [91]

Figure 3: *Per capita* government expenditure on health – by region, 2003-2011 (Current USD)



Source: World Health Organization. (2013). Global Health Observatory Data Repository

88 WHO (n 80 above).

89 As above.

90 *Per capita* government expenditure on health at average exchange rate (USD) - http://apps.who.int/gho/data/view.main.1910?lang=en (accessed 17 October 2014).

91 WHO *Global Health Observatory Data Repository, health financing: health expenditure per capita by WHO region* (2013) http://apps.who.int/gho/data/view.main.1910?lang=en (accessed 17 October 2014).

In the most recent year available (2011), public health spending *per capita* among signatories ranges from US $7 (Democratic Republic of Congo) to US $819 (Equatorial Guinea).[92] At the high end for that year, alongside Equatorial Guinea are the Seychelles (US $404) and South Africa (US $329), all countries which have ratified the African Women's Protocol. Among countries that spent the least in 2011, in addition to DRC, are Eritrea (US $7) and Burundi (US $7,6). Eritrea and Burundi are yet to ratify the Women's Protocol. *Per capita* spending data for North Africa is unfortunately limited to Algeria, which in 2011 spent in the mid-range with US $182 *per capita*.[93]

Outliers are interesting to observe, particularly in terms of ratification. Over the entire period of 2003 to 2011, the highest spending countries at the sub-regional level are Botswana (Southern Africa), the Seychelles (East Africa), Cape Verde (West Africa) and Equatorial Guinea (Central Africa).[94] Notably, all but Botswana have ratified the African Women's Protocol. At the low end, Lesotho (Southern Africa), Burundi (East Africa), Guinea-Bissau (West Africa) and Chad (Central Africa) spent the least *per capita* on health in their respective sub-regions, and Chad and Burundi are yet to ratify the instrument. [95]

Botswana is a noteworthy case. There have been major public investments in health and a recent World Bank Public Expenditure Review notes that almost all urban residents are within 15 kilometres of a primary health care facility, as are 80 per cent of rural residents, reflecting widespread healthcare provision.[96] However, civil society organisations, in a report for Solidarity for African Women's Rights on the Protocol, have highlighted worries about the lack of political will for ratification of the African Women's Protocol.[97] Given the forecast of the decline in mineral resource revenues, there are concerns about sustainability of and commitment to public spending on health.

Liberia increased spending efforts from 1,2 to 4,6 per cent of GDP between 2003 and 2011. A recent World Bank study highlights these gains, but finds that the distribution of spending is inequitable. The disparity between spending in the richest and poorest regions was more than six times and there are large differences in regions in the availability of skilled health personnel. Donor funding accounted for about 80 per cent of public health sector funding, which underlines potential issues of sustainability.[98] Clearly, the outbreak of Ebola in

92 n 90 above.
93 WHO (n 80 above).
94 Botswana (273); Seychelles (371); Cape Verde (97); and Equatorial Guinea (345).
95 Lesotho (47); Burundi (5, 7); Guinea Bissau (7, 12); Chad (7,8).
96 World Bank *Botswana public expenditure review* (2010) 92.
97 Solidarity for African Women's Rights. *Report on the mapping exercise on the status of ratification of the Protocol on the Rights of Women in Africa* (2012) 3.
98 World Bank Africa Region *Liberia public expenditure review: Human development* (2012) 47.

West Africa in 2014 created enormous stress on the health system in Liberia and neighbouring countries.

In sum, then, we see encouraging trends in health spending and evidence of increased government effort in many signatory countries, including Equatorial Guinea, South Africa and Gabon, which have had the largest increases since 2003.[99] We also see relatively significant efforts in non-signatory countries for which data are available, including Botswana and Mauritius.[100] In North Africa, we see increases in Algeria, although the country is yet to ratify the Women's Protocol.[101]

At the same time, it is important to underline that we have not reviewed the evidence about how this money is being used, whether it is being actually directed to programmes likely to benefit women's and girls' health, nor anything about the links between such spending and outcomes. The share of social spending devoted to human priority concerns varies significantly across countries, and likely matters even more than how much they spend on social services overall.[102] Improving the quality of services and availability of contraceptive methods can increase agency. Take-up of weak services is often low. A recent Egyptian study suggests that certain dimensions of quality are particularly important. These include privacy, both during medical examinations, and respect for patient confidentiality, facility cleanliness, friendly staff, shorter waiting times and limited staff turnover.[103]

The broad picture is nonetheless indicative of improved efforts and directions, without being definitive or conclusive. It is important to recognise that assessing whether the goal of equitable distribution of health-related resources has been met would require careful identification of the similarities and differences in the health needs of men and women in the local context, alongside an analysis of the obstacles that currently prevent men and women from realising their potential for good health.[104] With these caveats in mind, we now turn to the evidence on military spending.

99 Changes from 2003 to 2011: Equatorial Guinea (83 to 818); South Africa (125 to 329); Gabon (67 to 192); WHO (n 80 above).

100 Changes from 2003 to 2011: Botswana (180 to 263); Mauritius (100 to 205); WHO (n 80 above).

101 Changes from 2003 to 2011: Algeria (63 to 182); WHO (n 80 above).

102 United Nations Development Program *Financing human development* (1991) 39.

103 T Rabie *et al Transforming family planning outlook and practice in Egypt: A rights-based approach* (2013).

104 L Doyal 'Gender equity in health: Debates and dilemmas' (2000) 51 *Social Science and Medicine*:931-939.

6 Trends in military spending

Publicly-available data about military spending is relatively scarce. The best-established and most renowned source is the Stockholm International Peace Research Institute (SIPRI), which is an independent international institute that researches conflict, armaments, arms control and disarmament. SIPRI figures reflect government reporting and if there is evidence about the unreliability of national data, estimates are made using government budget and expenditure accounts.[105] Here we focus on the period 2003 to 2011, and include 2012 data when available.

Military spending as a share of GDP globally stands at about 2,5 per cent.[106] In recent times, there have been divergent trends regionally, with military spending falling in North America, as well as Western and Central Europe witnessing reductions in 2012, in part due to austerity measures, and there were increases in North Africa, South America and East Asia.

In 2012, military expenditure averaged about 2 per cent as a share of GDP among AU countries with available data (35 out of 54 countries). At the country level, using available data, we see a large range. At the top end, South Sudan and Algeria spend 8,4 per cent and 4,5 per cent respectively on military as a share of GDP while, at the low end, we see Mauritius with 0,2 per cent and Ghana with 0,3 per cent.

In terms of ratification, in 2012 AU countries that have ratified the Maputo Protocol spent less as a share of GDP than 'non-ratifiers' (1,7 per cent versus 2,3 per cent of GDP). It is also notable that some data is missing for several countries, many of which are 'non-ratifiers', where the spending might be expected to be high, including Chad, Central African Republic, Somalia and Sudan.

As a share of GDP, military spending in the AU shrank by over one-fifth between 2003 and 2012, from an average of 2,4 to 1,9 per cent of GDP. This average trend inevitably conceals divergence at the country level: Burundi, Ethiopia, and Botswana reduced spending by 4,9, 2,0 and 1,8 percentage points, respectively, while the countries with the largest increases are Swaziland (1,5 percentage points), Libya (1,3 percentage points) and Algeria (1,2 percentage points).

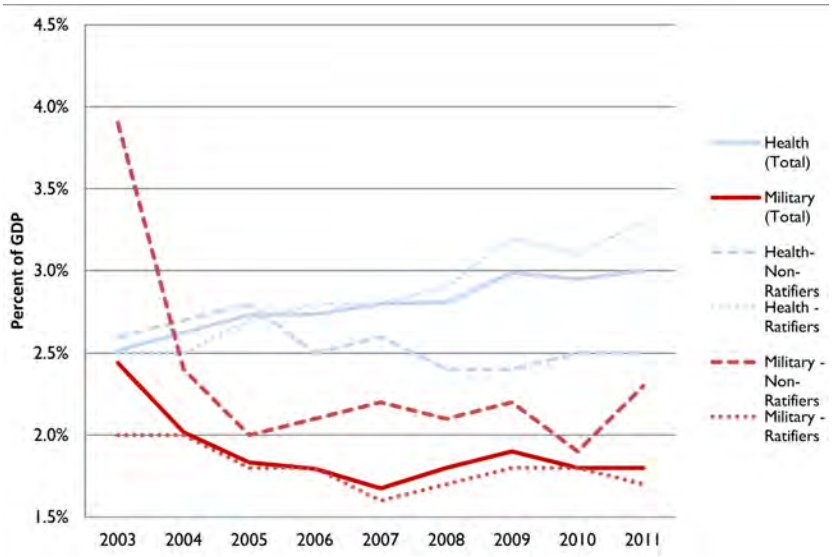
Given gaps in the data, it is difficult to draw any conclusions about the relationship between (non)-ratification and military spending. Nevertheless, spending as a share of GDP is moving in welcome

105 SIPRI *Sources and methods* (2013) http://www.sipri.org/research/armaments/milex/milex_database/copy_of_sources_methods#4-methods (accessed 17 October 2014).

106 All military spending figures in this article are based on SIPRI *Yearbook 2013* and *Military expenditure database: Military expenditure by country as percentage of gross domestic product, 1988-2012* (2013) http://www.sipri.org/research/armaments/milex/milex_database (accessed 17 October 2014).

directions, namely, military spending is falling and health spending is increasing. This is summarised in Figure 4 overall, and separately for ratifying and non-ratifying countries.

Figure 4: Average public health and military expenditure in the African Union 2003-2011



Sources: Author estimates based on SIPRI. (2013). Military expenditure database and World Health

Comparative trends can be illustrated with selected country cases for the period 2003 to 2011:

- Lesotho (5,7 per cent), Malawi (5,7 per cent) and Botswana (4,9 per cent) led in terms of share of GDP spent on health care. Among these countries, Lesotho and Botswana also cut military spending as a share of GDP by about 1 and 2 percentage points, respectively.[107] Indeed, between 2010 and 2012, Lesotho reduced military spending by some 40 per cent falling as a share of GDP from 3,2 per cent of GDP in 2010 to 1,9 per cent.
- While Swaziland increased military spending over the time period and has the largest increase over the 2003 to 2011 period as measured in percentage points, the government spends significantly more on health spending and recently ratified the African Women's Protocol in 2012.[108]

Exploring the health and military spending in countries that have not ratified the Women's Protocol reveals a mixed picture. On the one

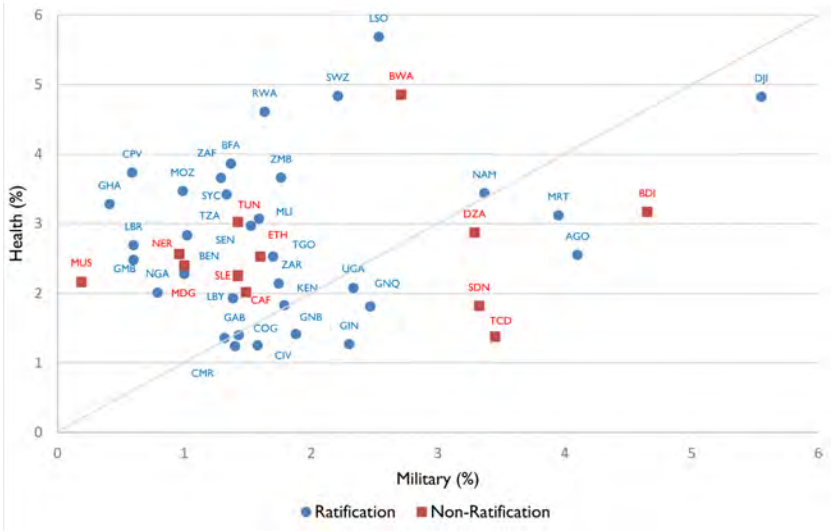
107 In the 2003 to 2012 period. Lesotho's military spending fell from 2,8% to 1,9% and Botswana moved from 3,7% to 1,9%.

108 WHO (n 80 above).

hand, 'non-ratifiers' like Chad and Algeria spend more on military than on health. Yet, we also have the cases of other 'non-ratifiers', such as Sierra Leone, Botswana, Madagascar and Mauritius which direct a larger share of their GDP to health than to military purposes. Indeed, Mauritius's military spending (only 0,2 per cent of GDP) is the lowest in the AU.

Overall, most countries are spending more on health as a share of national income than they are on their militaries. This is shown in Figure 4, where most countries are above the 45 degree line. Among countries that have ratified the Women's Protocol, 23 of the 33 countries with data spend more on health and, of the 'non-ratifiers', 8 of out 12 with data spend more on health.

Figure 5: National public health and military expenditure: Contrasting Maputo Protocol signatories and non-signatories, average share of GDP expenditure (average for period 2003-2011)



Sources: SIPRI. (2013). Military expenditure database and World Health Organization. (2013). Global Health Observatory Data Repository

7 So what can health spending potentially achieve?

We know that, on the supply side, long distances and poor quality hinder equitable access to health services. Evidence from Burkina Faso illustrates the severity of the problem, with around half of women identifying distance as a primary barrier to health care access.[109]

An increasing number of examples from Africa illustrate how innovations supported by public spending can address supply side barriers. In Rwanda, results-based financing (RBF) is improving the delivery and quality of health services. Small financial incentives are given to service providers, conditional on their patients receiving maternal and child health services. After 23 months, institutional deliveries improved by almost 25 per cent.[110] Another programme in Zimbabwe also showed promising results. Rural health clinics receive a subsidy conditional on the provision of a set of free health services to pregnant women and young children. After the first year, the number of women who had four or more prenatal appointments increased by 65 per cent.[111] Likewise, in Nigeria coverage of institutional deliveries increased by 30 percentage points (to 39 per cent) and coverage of ante-natal care increased from 16 per cent to 77 per cent in the year to December 2012, following the introduction of an RBF approach.[112]

However, we know that spending alone is not enough. Measures to enhance accountability and transparency are needed, alongside changes that enable women to have a strong say in their own healthcare and broader decisions. We address each of these in turn.

Promising approaches to improving maternal health outcomes include participatory community mechanisms and ameliorating the quality of information available about services, to help make providers more accountable to users.[113] In Uganda, for example, a social accountability mechanism which increased community participation as well as information about the health centre's performance showed favourable outcomes. After one year, institutional delivery rates increased, and after three years, the rate of stillbirths dropped by almost one percentage point. Information about the quality and quantity of the centre's services played a critical role in the functioning of this accountability mechanism; when the community

109 Grépin & Klugman (n 19 above) 8.

110 http://www.rbfhealth.org/country/rwanda (accessed 17 October 2014).

111 'In rural Zimbabwe, no fees, better care for women and children' (2012) http://www.worldbank.org/en/news/2012/11/30/in-rural-zimbabwe-no-feesbetter-care-for-women-children (accessed 17 October 2014).

112 Health Results Innovation Trust Fund (HRITF) Initial Results 17 April 2013.

113 D Berlan D & J Shiffman 'Holding health providers in developing countries accountable to consumers: A synthesis of relevant scholarship' (2012) 27 *Health Policy and Planning* 271-280.

lacked such information, this approach did not change health outcomes.[114]

Budget monitoring can play an important role. In South Africa, the Eastern Cape Province has the worst health outcomes in the country. There is a high demand for public services, but limited delivery capacity, corruption and dysfunctional administration systems.[115] The lack of accountability of managers and administrators, wasteful expenditure and poor planning were revealed in 10 consecutive audits. A civil society group launched the Public Service Accountability Monitor (PSAM), which is a multi-pronged campaign, including budget monitoring, access to information litigation, and community mobilisation. Major changes followed, including the replacement of the head of the Department of Health, the investigation of thousands of employees for misuse of funds and corruption, and the blacklisting of over 100 companies with potentially-fraudulent tenders. While these changes are not empirically linked to the campaign, the outcomes suggest that the increased public awareness and detailed documentation of the mismanagement of funds helped to provide the evidence base and increased the political will for change.[116] This has promising implications for rights-based approaches focused on accountability.

Core to feminist approaches is the pivotal importance of disadvantage and the distribution of power.[117] Social accountability mechanisms are shaped by surrounding power structures, social contexts and broader policy architectures.[118] In cases where regimes are pluralistic and democratic and the rule of law is upheld, there is greater space for political and civil rights and voice.[119] These factors help facilitate social accountability mechanisms. The legal and policy frameworks can help facilitate citizen participation and oversight. Finally, the capacity of civil society to organise and function, citizens' relations with the government, and people's willingness to question authority are all important.[120]

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114 M Bjorkman-Nyqvist *et al* 'Information is power: Experimental evidence of the long run impact of community-based monitoring' Working Paper.

115 International Budget Partnership *When opportunity beckons: The impact of the public service accountability monitor's work on improving health budgets in South Africa* (2011) 1 http://internationalbudget.org/publications/when-opportunity-beckons-the-impact-of-the-public-service-accountability-monitors-work-on-improving-health-budgets-in-south-africa/ (accessed 17 October 2014).

116 International Budget Partnership (n 115 above) summary 2-3.

117 WA Rogers 'Feminism and public health ethics' (2006) 32 *Journal of Medical Ethics* 351.

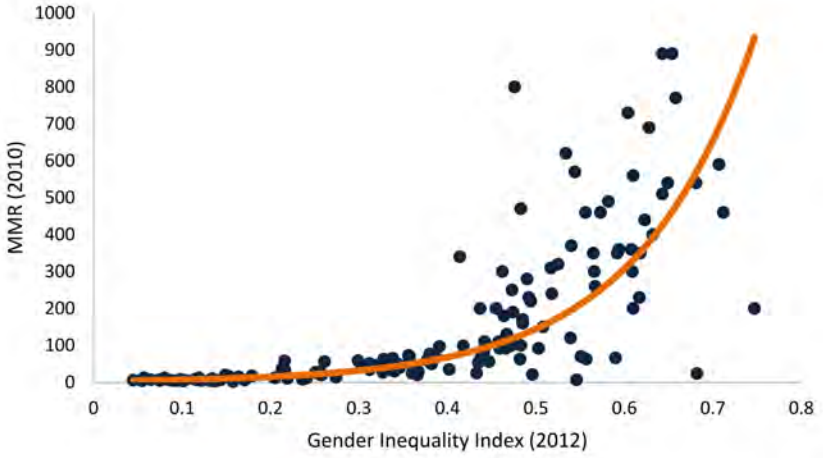
118 A George '*Using accountability to improve reproductive health care'* (2003) 11 *Reproductive Health Matters* 161-170; Z Bhutta *et al* '*Community participation: Lessons for maternal, new-born, and child health'* (2008) *The Lancet*; Grépin & Klugman (n 19 above) 11.

119 M McNeil & C Malena *Demanding good governance: Lessons from social accountability initiatives in Africa* (2010) 186.

120 McNeil & Malena (n 119 above) 186.

This underlines the importance of gender inequality in the society more broadly, to health outcomes. Indeed, there is a clear correlation between maternal mortality rate and gender inequality, as illustrated in Figure 5, using the UNDP's multidimensional index of gender inequality, which includes economic opportunities, education and health. Simply put, the more gender unequal the society, the more likely a woman is to die giving birth.

Figure 6: Maternal mortality rate and gender inequality



Source: Grépin and Klugman, 2013

Weak agency inhibits women's capacity to insist on safer sex practices. For example, in 10 countries around the world, more than half of the women report that they cannot ask their partner to use a condom. In Niger, this figure stands at 89 per cent.[121] There is evidence of African women's increasing preference for concealable contraceptive methods (injectables), rising from 6 to 20 per cent in sub-Saharan Africa. In some contexts it has been found that giving women ultimate control over family planning shows results. For example, unwanted births in Zambia were reduced only when women had individual control over contraceptive decision making.[122] However, enabling women to access and use contraceptives in secret can also carry risks. For example, in some cases, women fear – or more actually, face –

121 World Bank *Sexual and reproductive health and family formation, voice, agency and participation series* (forthcoming) (2013) 9.

122 N Ashraf *et al Household bargaining and excess fertility: An experimental study in Zambia* (2010).

violence from their partners if the use of contraceptives without the spouse's knowledge is discovered.[123]

8 Conclusions

The African Women's Protocol is a landmark agreement in the promotion of the health and rights of women in Africa. The article has examined the extent to which the Women's Protocol is associated with positive shifts in government resource commitments, in the context of the broader literature about women's health and human rights. A human rights approach provides tools to hold governments legally accountable for their failure to address the preventable causes of maternal death and to enable good sexual and reproductive health – and this was combined with an empirical budget analysis to try to understand what is happening in practice.

Our review suggests that there has been some improvements in spending efforts since the Protocol came into force. Public spending is moving in the right direction. Indeed, we documented that in the AU, general government expenditure on health increased by some 20 per cent, a significant boost, and available data on military spending as a percentage of GDP reveals a fall of about 21 per cent in the AU over the decade.

Interestingly, the increasing health efforts were most marked among governments that had ratified the Women's Protocol. However, there does not appear to be a strong correlation between ratification and the direction of trends in military spending.

The findings point to several key recommendations: first, the importance of openness and transparency, and ensuring that reliable budget data is published on a regular and timely basis; second, and relatedly, the value of budget monitoring by civil society and human rights advocates to support efforts to promote health and human rights, and considering the scope to bring cases to help establish jurisprudence in this important sphere. Third, as the cross-country findings are inevitably limited in depth, it is important to undertake further research and analysis using gender-responsive budgeting, building on the pioneering work of UN Women, UNDP and others.

At the same time, I underlined the importance of broader factors that drive sexual and reproductive health outcomes for women and girls. While spending on social development is critical, accountable and transparent structures and institutions are also crucial. More fundamentally, expanding the agency and choice of women and girls is fundamental. This is linked to broader structures of equality and inequality in society which affect multiple dimensions of wellbeing.

123 AA Bawah *et al* 'Women's fears and men's anxieties: The impact of family planning on gender relations in Northern Ghana' (1999) 30 *Studies in Family Planning* 54-66.

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Policing bodies, punishing lives: The African Women's Protocol as a tool for resistance of illegitimate criminalisation of women's sexualities and reproduction

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Summary

Sexual and reproductive conduct and identities are all too often the target of criminal laws and policies worldwide, which disproportionately impact women and marginalised individuals in violation of their sexual and reproductive rights. Women and girls in Africa, in particular, are policed, investigated and penalised for engaging in sex work, sex outside of marriage, obtaining abortions, for HIV exposure and transmission and same-sex intimacy. While some advocates rely on international human rights norms and standards to demand that states punish and prevent certain conduct through criminal justice systems, less attention is paid to restraining states' power to police sexuality and reproduction. In fact, there is little guidance within human rights law generally regarding the legitimacy of states criminalising sexual and reproductive conduct and identities, absent harm to others. For example, similar to other human rights instruments, the African Women's Protocol calls upon states to enact legislation, policy and programmes to fulfil and realise women's rights and prevent violence and rights violations, yet it fails to explicitly address the outer limits of states' policing power. Moreover, there is little foundation for challenging states' failure to criminalise particular conduct, in accordance with their human rights obligations, yet illegitimately criminalise sexual and reproductive conduct and identities, to the detriment of women's and marginalised individuals' sexual and reproductive rights. This article explores existing normative guidance

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regarding the illegitimate criminalisation of women's and girls' sexual and reproductive conduct and identities, highlighting gaps in such guidance, and reviews the African Women's Protocol with an eye toward locating potential restraints on African states' police power in the realms of sexuality and reproduction. It also provides additional human rights-based arguments that can be used to constrain states' overbroad and discriminatory criminalisation of sexuality and reproduction and to potentially pave the way for further normative developments in this regard.

Key words: *criminalisation; sexuality; reproduction; gender; human rights*

1 Introduction

One of the most politically-scrutinised and heavily-regulated aspects of peoples' lives is their sexuality.[1] While sex and sexuality are essential to the human experience, states are increasingly using criminal laws and policies to control and punish particular expressions of sexuality and gender, and women's reproduction. Such punitive regulation disproportionately affects women and marginalised individuals and in many cases, and violates their fundamental human rights.[2]

1 According to the World Health Organisation, '[s]exuality encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors.' World Health Organisation 'Defining sexual health' (2006) 5, report of a technical consultation on sexual health 28-31 January 2002, Geneva, http://www.who.int/reproductivehealth/topics/gender_rights/defining_sexual_health.pdf (accessed 11 November 2013).

2 See generally Report of the UN Special Rapporteur on Violence against Women, its Causes and Consequences, Pathways to, Conditions and Consequences of Incarceration for Women, UN General Assembly 68th session, 21 August 2013, UN Doc A/68/340. (Women are increasingly being incarcerated worldwide due to violence, coercion to commit crimes, abortion, purported moral crimes (eg extramarital sex and adultery), leaving home without permission, 'protection' from 'honour crimes,' 'rehabilitation' from prostitution, anti-drug policies, and political activities.) Notably, some research indicates that approximately 50% of women in prisons have been convicted of 'moral' crimes. *See* United Nations Office on Drugs and Crime 'Afghanistan: Implementing alternatives to imprisonment, in line with international standards and national legislation' (2008) para 14; Human Rights Watch ''I had to run away.' The imprisonment of women and girls for 'moral crimes' in Afghanistan' (2012) 1.

In the African context, sexuality is mediated and experienced through legislation, custom and religion.[3] Those who do not conform to conscripted sexual norms, such as sex workers, rape survivors, young people, those who are or perceived to be lesbian, gay, bisexual, transgender or intersex (LGBTI), widows, single mothers and people living with HIV, are marginalised. According to Tamale, it is[4]

> [t]hrough the intersection of religion, the law and reinterpreted customs, [that] the complexity of African sexualities (particularly women's) is instrumentalised, controlled and regulated by the patriarchal state.

Laws regulating sexuality, often labelled 'Offences against morality', are enumerated in African penal codes prohibiting and/or regulating various sexual relations and identities. These laws 'squarely place issues of "sexual morality" between consenting adults within the realm of the state and the public'.[5] While much of the conduct targeted by criminal laws in Africa are framed as 'un-African' and 'Western imports', rather it is the actual criminalisation of such conduct that is a relic of the countries' colonial pasts.[6] Before colonialism, most African traditional practices were characterised by their sexual tolerance and openness.[7] Sexual acts that were 'acceptable in pre-colonial, pre-Islamic and pre-Christian Africa [were later labeled] "deviant", "illegitimate" and "criminal" through the process of proselytisation and acculturation'.[8]

While human rights standards regarding the criminalisation of sexuality and reproduction are patchy and, at times, inconsistent, such penalisation is not a new human rights issue – it has been over two decades since international human rights jurisprudence established that the criminalisation of sexual relations between consenting adults is a violation of the rights to privacy and non-discrimination on the basis of sex.[9] Since that time, international human rights bodies and experts have increasingly recognised the human rights impact of criminalising a wide range of sexual and reproductive conduct and identities. While the African human rights system has yet to make such pronouncements, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of

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3 See generally S Tamale 'Exploring the contours of African sexualities: Statutory, customary and religious laws' 2013, paper presented at a conference on 'Law and religion in Africa: Comparative practices, experiences and prospects' University of Ghana, Accra, 14-15 January 2013.

4 Tamale (n 3 above) 19.

5 As above.

6 African Men for Sexual Health and Rights and the Coalition of African Lesbians 'Violence based on perceived or real sexual orientation and gender identity in Africa' (2013) 6-9.

7 See Amnesty International 'Making love a crime: Criminalization of same-sex conduct in sub-Saharan Africa' (2013) 15, citing interview, Dr Basile Ndjio, Senior Academic, University of Douala, Cameroon, 27 April 2011).

8 Tamale (n 3 above) 4.

9 See Communication 488/1992, *Toonen v Australia* UNHR Committee, 4 April 1994, UN Doc CCPR/C/50/D/488/1992.

Women in Africa (African Women's Protocol) may provide a strong platform for advocacy on these issues, as it contains some of the most progressive pronouncements of women's sexual and reproductive rights. Most notably, article 14(2)(c) explicitly calls on state parties to[10]

> [take all appropriate measures to] … protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

This article lays the groundwork for strategic advocacy to challenge states' illegitimate criminalisation and punishment of various aspects and expressions of sexuality and reproduction. First, it discusses the global trend of overcriminalising people's sexualities and reproduction, and provides an overview of the various legislative, policy and enforcement means states use to police and punish individuals' bodies and lives. Next, the article summarises the existing international human rights standards that advocates have used to confront such overcriminalisation, highlighting the gaps in standards that can hinder advocacy. The article then specifically reviews the African Women's Protocol with the eye toward locating further substantive restraints on states' policing power that may enable advocates to not only contest rights violations that result from the overcriminalisation of sexuality and reproduction, but also the very legitimacy of such application and enforcement of criminal law. Finally, the article provides additional human rights-based arguments that can be used to constrain states' overbroad and discriminatory criminalisation of sexual and reproductive conduct and identities and

10 See Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2nd ordinary session, Assembly of the AU, adopted 11 July 2003, entered into force 25 November 2005, art 14(2)(c). Other provisions which support women's sexual and reproductive rights include art 2 (elimination of discrimination against women, including modifying social and cultural patterns and elimination of harmful cultural and traditional practices and other practices based on the idea of the inferiority or superiority of either sex or on stereotyped roles for women and men); art 3 (right to dignity, including prohibiting exploitation and degradation of women and protection from sexual and verbal violence); art 4 (rights to life, integrity and security of the person, including enforcing laws to prohibit all forms of violence against women in private and public spheres, including unwanted sex, ensuring prevention, punishment and eradication of all forms of violence against women, providing adequate budgeting and resources to prevent and eradicate violence, and ensuring the death penalty is not carried out on pregnant or nursing women); art 5 (elimination of harmful practices, including through punishing female genital mutilation); art 8 (access to justice and equal protection before the law); art 13 (economic and social welfare rights, including combatting and punishing sexual harassment, adequate and paid pre- and post-natal maternity leave, preventing exploitation and abuse in advertising and pornography); art 23 (special protection of women with disabilities, including freedom from violence and sexual abuse); and art 24 (special protection of women in distress, including the right of pregnant or nursing women or women in detention to be treated with dignity), among other rights. See also generally C Ngwena 'Inscribing abortion as a human right: Significance of the Protocol on the Rights of Women in Africa' (2010) 32 *Human Rights Quarterly* 783.

to potentially pave the way for further normative developments in this regard.

2 Global trend of overcriminalisation of sexuality and reproduction

According to the 2012 Risks, Rights and Health Report of the Global Commission on HIV and the Law, approximately 78 countries criminalise same-sex sexual activity, with penalties ranging from decades of imprisonment, to whipping, to execution.[11] Sex workers are also frequently stopped, questioned, searched, and arrested for loitering or vagrancy; offences which are categorised anywhere on the spectrum of criminal, civil or administrative crimes.[12] Women and girls who obtain abortions, as well as service providers who support them in terminating their pregnancies, continue to face harsh penalties despite legal reforms that have expanded the grounds for abortion as a necessary medical procedure in many countries.[13] Women are also increasingly being punished for their conduct during pregnancy and for pregnancy- and birth-related complications. For example, authorities have prosecuted women for 'depraved heart murder' after they have experienced a stillbirth, without any scientific evidence that drug use or any other action, inaction or circumstance faced by the woman actually caused the death of her foetus.[14]

In the context of HIV, it is a crime to expose another person to HIV or to transmit it, especially through sex, in over 60 countries.[15] The Global Commission on HIV and the Law has further reported that '[a]t least 600 individuals living with HIV in 24 countries have been convicted under HIV-specific or general criminal laws'.[16] In some of these cases, laws criminalising HIV exposure have been applied

11 See Global Commission on HIV and the Law 'Risks, rights and health' (2012) 44, http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf (accessed 5 November 2013).

12 See UNAIDS 'Guidance note on sex work and HIV' (2012) 4; see generally Human Rights Watch 'Sex workers at risk: Condoms as evidence of prostitution in four US cities' (2012) http://www.hrw.org/sites/default/files/reports/us0712ForUpload_1.pdf (accessed 5 November 2013).

13 See generally Ipas 'When abortion is a crime: The threat to vulnerable women in Latin America' (2013) http://www.ipas.org/~/media/Files/Ipas%20Publications/CRIMRPTE13.ashx?utm_source=resource&utm_medium=meta&utm_campaign=CRIMRPTE13 (accessed 5 November 2013).

14 K Sheppard 'Mississippi could soon jail women for stillbirths, miscarriages' *Mother Jones* 23 May 2013, http://www.motherjones.com/politics/2013/05/buckhalter-mississippi-stillbirth-manslaughter (accessed 5 November 2013).

15 See Global Commission on HIV and the Law (n 11 above) 8.

16 As above.

broadly to convict individuals based on conduct when HIV transmission was virtually impossible, such as spitting.[17] Finally, the mere provision or distribution of sexual and reproductive health information is zealously controlled through administrative and public health laws and anti-pornography legislation.

While the intent behind some of these laws and policies may be to promote public health or to 'protect' women and children, such legislation is often overbroad, infringing on a range of human rights, and disparately applied to the detriment of women, young people and marginalised groups. Furthermore, it may often be the case that the purported intent is actually a mask for bias or the true aim of enforcing a uniform 'moral' code and/or strict gender roles. To this end, questions can and should be raised regarding the legitimacy of states regulating such intimate aspects of peoples' lives, absent harm to others.

3 How states criminalise sexuality and reproduction

States criminalise sexuality and reproduction directly through criminal laws and policies that target particular sexual and reproductive conduct and identities, and indirectly through the selective enforcement of general criminal, civil and religious laws against particular individuals and groups.[18] Such application of punitive regulation in these realms not only permits arrests, prosecutions and punishment, but also extortion, harassment and violence by state and non-state actors against people simply for who they are, for expressing their innate sexualities and identities, or for transgressing sexual and gender norms. Regardless of the motives underlying states' enforcement of laws and policies that directly or indirectly criminalise sexuality or reproduction, the result is the same – a significant risk of grave human rights violations.

The various means states use to regulate, police and punish individuals' sexual and reproductive conduct and identities are discussed in greater detail below. The range of regulations used highlights how entrenched state control is over women's and marginalised individuals' bodies and lives and the extent of the phenomenon of illegitimate criminalisation in this regard.[19]

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17 See 'Gay-rights group protests HIV-positive man's sentence' *Houston Chronicle* 17 May 2008, http://www.chron.com/news/houston-texas/article/Gay-rights-group-protests-HIV-positive-man-s-1650528.php (accessed 26 April 2013).

18 States also use criminal laws to punish individuals' status in life (eg impoverished, widow, transgender). See generally African Men for Sexual Health and Rights and the Coalition of African Lesbians (n 6 above).

19 While all people suffer the impact of illegitimate criminalisation of sexuality and reproduction, this article largely focuses on women and girls because its overarching aim is to forge new analysis and advocacy under the African Women's Protocol.

3.1 Direct criminalisation

Governments can criminalise sexuality or reproduction directly through passing and implementing criminal laws that explicitly punish specific sexual or reproductive conduct and identities. Examples of this type of criminalisation include laws that prohibit same-sex sexual conduct, sex outside of marriage, consensual buying and selling of sex, obtaining and/or providing an abortion, consensual sex between young people, cross-dressing, HIV exposure and transmission and dissemination of information or education on sexuality or reproductive rights issues.

People living under these laws may face investigations, prosecutions, criminal or financial sanctions, loss of liberty and public judgment or disgrace, for attempting to assert their basic sexual and reproductive rights. The particular behaviours that these laws tend to criminalise and the power structures that often exist in the countries that enforce these laws mean that certain groups of people are more vulnerable to policing and punishment – primarily women, young people, sex workers, people identified as LGBTI, and people living with HIV. For example, laws banning abortion disproportionately impact poor women and girls who may lack resources and education to prevent unwanted pregnancies and/or cannot afford to pay for safe clandestine abortions.

3.2 Indirect criminalisation

States also criminalise sexual and reproductive behaviour and identities indirectly by enforcing general criminal, civil or religious laws against particular individuals in a targeted manner. These laws are predominantly enforced against individuals who challenge sexual and gender norms or because of their socio-economic status. Even if these laws were not originally intended to prohibit particular sexual and reproductive behaviour, they may be selectively enforced against people regardless of whether they have committed any crime, in an effort to punish, shame or, in extreme cases, eradicate them. Such laws may be applied in this way because they are poorly written, vague or overbroad, making them open to misinterpretation and abusive enforcement, or due to biased and corrupt law enforcement officials having the power to enforce the law in a discriminatory manner with impunity.

Examples of general criminal, civil law or religious laws that can be used to criminalise sexuality or reproduction and punish individuals based on their socio-economic status include vagrancy or loitering provisions that are misused by police to disproportionately punish, disperse, harass or even extort sex workers, and laws targeting LGBTI people gathering in public spaces, regardless of whether there is

evidence that a crime was committed.[20] Public indecency or morality provisions (for example, 'shameless public acts' or 'contempt for religion') are also most commonly used against LGBTI individuals, sex workers or women accused of sex outside of marriage, in countries where non-heteronormative, non-marital sex is considered morally unacceptable.

In some instances, regulations intended to manage public health emergencies are also misused to control or punish individuals' sexual or reproductive conduct and decisions. People living with HIV, sex workers or pregnant women most often face punishment under these regulations based on the assertion that they could pose a risk to others or their foetuses. These regulations are often relied upon by the police or prosecutors despite having little or no evidence that a public health risk exists. Assault, reckless injury, or even murder charges have also been used in some countries to prosecute women for purportedly causing harm to other people or to a foetus based on their sexual or reproductive behaviour or choices. These laws are most often used against people living with HIV who are accused of exposing or transmitting the infection to another person. They have also been used in recent years in the United States of America and some parts of South America to prosecute pregnant women who, in some cases, are unfairly accused of harming their foetuses.

Finally, in some instances, sexual offence laws designed to protect young people from abuse or harm are used to punish people for consensual sex with another person of a similar age. A small number of countries also misuse sexual offence legislation to prosecute same-sex sexual activity and sex work. People convicted under these statutes often face prison sentences and/or statutory requirements to register as sex offenders.

3.3 Criminal justice approaches - A blunt tool to address complex social and public health issues

Studies have confirmed that the enforcement of laws and policies that punish specific sexual or reproductive conduct does not necessarily increase safety, reduce harm, or encourage health-promoting behaviour. For example, pregnant women who use drugs may not seek prenatal care or drug treatment if they fear arrest; individuals living with HIV may not get tested or disclose their status to their partner if doing so would increase their chances of arrest and prosecution; and sex workers may not carry and use condoms if these could be used as evidence to detain, harass and punish them. Instead, the enforcement of overbroad punitive laws and policies to suppress

20 As above. See also generally R Thoreson & S Cook (eds) *Nowhere to turn: Blackmail and extortion of LGBT people in sub-Saharan Africa* (2011); Open Society Foundation 'Ten reasons to decriminalize sex work: A reference brief' (2012) 2, http://www.soros.org/sites/default/files/decriminalize-sex-work-20120713.pdf (accessed 5 November 2013).

peoples' consensual sexual and reproductive conduct and identities can negate individuals' bodily autonomy, lead to discrimination and violate a wide range of human rights. Such punitive laws also encourage criminality by placing those targeted by the law outside of criminal justice protection, and giving a licence to law enforcement officials to commit blackmail, extortion and violence, and foster corruption within criminal justice systems.[21]

Not only are criminal laws and policies regulating sexuality and reproduction often ineffective at preventing harm and promoting health, but they have a disproportionate impact on racial and ethnic minorities, women, gender non-conforming people and/or the resource poor. For example, transgender and other gender non-conforming people are regularly profiled and arrested for doing nothing more than walking down the street.[22] Moreover, most people punished or imprisoned for sexual and reproductive 'crimes' are often being sanctioned for actions and decisions related to poverty, social exclusion or their status in society.[23] Drawing attention to the causes of criminalisation of sexuality and reproduction does not deny that actual harm occurs within sexual and reproductive spheres. Rather, it places criminal law enforcement within social, economic, political and colonial contexts, and highlights that individuals are not equally regulated and punished by criminal justice systems.[24] It also provides the opportunity to consider the underlying intent behind such laws and the legitimacy of states' exercise of police power in this manner.

While states have a positive obligation under international human rights law to provide a functioning legal and policy framework for the safety and public health of those who live in their territories, they do not have unlimited power to regulate lives in a manner that violates people's human rights and infringes upon their human dignity.[25] When states criminalise individuals' sexual and reproductive conduct or identities, absent harm to others, they are most likely overstepping these limits.

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21 R Thoreson 'Responding to blackmail and extortion as human rights violations' in Thoreson & Cook (n 20 above) 130.

22 See S Lamble 'Transforming carceral logics: Ten reasons to dismantle the prison industrial complex through queer/trans analysis and action' in E Stanley & N Smith (eds) *Captive genders: Trans embodiment and the prison industrial complex* (2011) 241; see also generally INCITE! Women of Color Against Violence 'Law enforcement violence against women of color & trans people of color: A critical intersection of gender violence and state violence', http://www.incite-national.org/media/docs/3696_TOOLKIT-FINAL.pdf (accessed 5 November 2013).

23 See Lamble (n 22 above) 246.

24 Lamble 246-247.

25 See D Uberoi *et al* 'Using human rights to address consequences of criminal laws on sexuality and reproductive autonomy' (2012) 16 *International Journal of Human Rights* 7 11.

4 Outer limits: Human rights-based restraints on states' policing power

Criminal justice systems are built on the notion that criminal law enforcement can provide redress, deter future harm and rehabilitate those who offend. While principles of self-governance permit states to criminalise particular conduct and pursue criminal justice initiatives to regulate society, this discretion has limits. International human rights standards provide some guidance for what states can criminalise, how they go about criminal law enforcement, and what constitutes appropriate punishment, yet this guidance is spotty and, at times, inconsistent. It also fails to specifically set limits on states' policing power in the realms of sexuality and reproduction,[26] enabling states to pass and enforce laws and policies in the name of 'morality' to punish acts that do not harm others and inhibit actions that may in fact be beneficial to the 'criminal' and/or society as a whole (for instance, the possession of condoms, the disclosure of a drug addiction to obtain treatment, the termination of a pregnancy to save a woman's life, and so forth). This lack of clear guidance is complicated by the fact that human rights systems are often used to call upon states to criminalise conduct as a means to 'realise' rights. For example, international 'due diligence' obligations clearly require states to use their policing power to prevent, punish and provide redress for violence, in order to respect, protect and fulfil individuals' rights to life, health, security of person, equality and non-discrimination and to be free from torture and cruel, inhuman and degrading treatment, among other rights.[27]

Advocates often base their challenges to states' punishment of sexuality and reproduction on the disproportionality between an 'offence' and the punishment, and/or the rights violations that directly result through the process of criminalisation. While some success has been achieved using this approach, it fails to get to the heart of the issue – the legitimacy of states using their police power to socially engineer society and enforce a uniform 'moral' code and/or strict gender roles through the application of laws against particular individuals who challenge patriarchy and heteronormativity, and states' failure to enforce laws and policies aimed at tackling gender stereotyping and sex and gender discrimination (for instance sexual violence legislation).

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26 While international criminal law also provides some guidance on the scope of states' police power, it says very little about states' discretion to regulate sexuality and reproduction specifically. This is an area for further exploration, as it is not fully addressed within this article.

27 See Committee on the Elimination of Discrimination against Women, General Recommendation 19 (1992) (Violence against Women); see also Declaration on the Elimination of Violence Against Women, General Assembly Resolution 48/104, art 4(c).

Set forth below is an overview of the substantive international human rights-based limits on states' power to criminalise and otherwise punish sexuality and reproduction and related procedural protections. This discussion is followed by an overview of the range of emerging human rights standards that provide further support for restraining states' policing power over sexual and reproductive conduct and identities.

4.1 Substantive limits on how states criminalise

While states generally have a broad discretion to pursue criminal justice within their country contexts and in some instances are required to do so under international law, there are limits on how they go about criminalising conduct. For example, while law enforcement officials have a pivotal role in respecting, protecting and fulfilling human rights, their actions and the structure and implementation of criminal justice systems may lead to restrictions on individuals' human rights. United Nations (UN) human rights bodies have developed a framework to safeguard against unjust restrictions.[28] For example, for such restrictions to be permissible, states must demonstrate that the criminal sanctions have a legitimate aim.[29] While punishing and deterring harm and providing remedies for rights violations may be legitimate aims, penalising innate human behaviour, such as consensual sexual and reproductive conduct and expression that does not cause harm or pose a significant risk of harm to others, is arguably not legitimate. To that end, human rights bodies and experts are increasingly speaking out regarding the human rights violations posed by criminalising particular sexual and reproductive conduct and identities.[30]

Criminal laws and policies must also clearly outline what behaviour is criminalised. Laws that aim to prevent intangible societal harms, such as generic public morality laws, can work to punish a wide range of behaviours and can be misinterpreted and enforced in an abusive

28 See UN Commission on Human Rights, Siracusa Principles on the Limitation and Derogation of Provisions of the International Covenant on Civil and Political Rights (1984) UN Doc E/CN.4/1985/4. Similar frameworks have been developed across international and regional human rights systems and are used by national courts.

29 As above. Notably, the Siracusa Principles primarily relate to situations involving national security. Nevertheless, these principles have been further elaborated upon by UN human rights bodies. See also International Covenant on Civil and Political Rights, adopted 16 December 1966, GA Res 2200A (XXI), UN GAOR, 21st session, Supp No 16, UN Doc A/6316 (1966), 999 UNTS 171 (entered into force 23 March 1976), art 19(3) (requires restrictions on freedom of expression to be 'provided by law' and 'necessary' to respect of the rights or reputations of others, protect national security, or for public order, public health or morals); Communication 550/1993, *Faurisson v France*, UNHR Committee (8 November 1996) UN Doc CCPR/C/58/D/550/1993, para 8 (concurring opinion). (The restriction on freedom of expression must be necessary to protect the given value. This requirement of necessity implies an element of proportionality to the value which the restriction serves to protect.)

30 See sec 4.3 discussing emerging international human rights standards further setting limits on states' policing power.

manner.[31] Criminal laws and policies must also be proportionate and suitable to pursue their legitimate aim.[32] This means that the punishment meted out by the law should fit the crime committed; so non-serious crimes that do not pose significant harm to others should not call for severe penalties. Equally, the criminal law should not be used where other non-punitive measures could better achieve the aim. For example, in areas of public health it may be far more effective to develop responsive health and education programmes instead of enforcing criminal punishment.

The criminal law and the impact it has must also be reasonable.[33] The severity or the effect of a particular law should not outweigh the benefit. Simply speaking, if criminalising an activity causes more harm to people and society than good, it cannot be considered reasonable or fair. Equally, the law should not interfere with individuals' day-to-day lives in an overly broad way and should not create an excessive burden on the exercise of their rights.

4.2 Procedural protections within criminal justice endeavours

In addition to the substantive limits on how states go about criminalising conduct, there are certain procedural protections that states must abide by in carrying out criminal justice endeavours. These limits are generally based on procedural safeguards provided under international human rights and international criminal law. For example, every person charged with a criminal offence is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The right to a fair hearing includes a presumption of innocence until proven guilty; prompt information on the nature and cause of the charges against him or her in a language which he or she understands; adequate time and facilities to prepare a defence; communication with counsel; language assistance in court; and access to appeal procedures, among other things.[34]

While human rights law calls for accountability for crime, it simultaneously recognises the difference between justice and gravely disproportionate or discriminatory punishment.[35] In terms of punitive sanctions for sexual and reproductive conduct and identities, states are prohibited from punishing people in a manner far greater than the purported 'harm' done. The human rights principle of proportionality requires both that punishment is commensurate with the severity of the crime and that those convicted for engaging in similar prohibited

31 See Siracusa Principles (n 28 above); see also *Naz Foundation (India) Trust v Government of NCT of Delhi & Others,* Writ Petition (Civil) 7455/2001, Delhi High Court (2 July 2009).

32 See Siracusa Principles (n 28 above).

33 As above.

34 Art 9 ICCPR.

35 See J Fellner 'The human rights paradigm: The foundation for a criminal justice system we can be proud of' in The Sentencing Project *25 Experts Envision the Next 25 Years of Reform* (2012).

conduct receive similar punishments.[36] While the concept of proportionality is somewhat culturally-specific, particularly with regard to notions of 'seriousness', 'normality' and 'acceptability', punishment is generally considered 'disproportionate' if the balance between the seriousness of the offence and the severity of the penalty is outside that which is considered normal and acceptable.[37]

States are also prohibited from punishing particular conduct or expression in a manner that is arbitrary or discriminatory. Therefore, sentencing that punishes people for something other than the crime itself would be contrary to the rights to liberty and security of person and to not be subjected to arbitrary arrest or detention.[38] With regard to prohibitions of discrimination under international law, states cannot impose sentences that punish people for something other than the crime, such as not conforming to a particular gender role. Overarching principles of non-discrimination also prohibit the discriminatory enforcement of criminal laws and policies against individuals.[39]

Finally, capital punishment or the death penalty may only be used to punish the 'most serious crimes'[40] or 'intentional crimes with lethal or extremely grave consequences'.[41] 'Illicit sex' is not an offence that rises to the level of 'most serious' which could justify capital punishment.[42] Additionally, international law prohibits the imposition of the death penalty for crimes committed by people under 18 and pregnant women.[43]

36 See D Husak *Overcriminalization: The limits of criminal law* (2008) 28; see generally Report of the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, UN Doc A/Conf144/28/Rev1, Res 1(a), 5(c) (1990) (punishments imposed upon conviction following a fair trial must be proportionate to the gravity of the crime and the circumstances of the offender).

37 The Human Rights Committee has provided some insight into the concept of 'arbitrariness' of punishment. In *AW Mukong v Cameroon*, the Committee noted that art 9 of ICCPR prohibits arbitrary arrest or detention, meaning not only that which is outside the law, but also where the law imposed 'include[s] elements of inappropriateness, injustice, lack of predictability and due process of law'. Communication 458/1991, *AW Mukong v Cameroon*, UNHR Committee (21 July 1994), UN Doc GAOR, A/49/40 (vol II) para 9.8.

38 See ICCPR (n 29 above) art 9.

39 See E Blower *et al* 'The human rights implications of contemporary patterns of social control' (2012) 4 *Journal on Human Rights Practice* 2 207.

40 Art 6(2) ICCPR.

41 UN Commission on Human Rights Resolution 2003/67, UN Doc E/CN.4/RES/2003/67/add.2 (9 January 2003); see also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Commission on Human Rights, 59th session, UN document E/CN.4/2003/3/Add.1 on Nigeria.

42 Concluding observations of the Human Rights Committee: Sudan, UN Doc CCPR/C/79/Add.85 (1997) para 8.

43 See R Hood *The death penalty: A worldwide perspective* (2002) 230 (highlighting a survey regarding the relation between the death penalty and homicide rates worldwide, conducted by the UN in 1988 and updated in 2002).

4.3 Emerging international human rights standards further limiting states' policing power in the realms of sexuality and reproduction

In addition to general substantive human rights-based limits on states' policing power and procedural protections, there are emerging standards that more specifically critique illegitimate criminalisation and provide additional support for restraining states' punitive regulation of sexuality and reproduction. Almost two decades ago, the UN Human Rights Committee handed down the landmark decision Toonen v Australia, where it held that laws criminalising sexual relations between consenting adults in private is a violation of the rights to privacy and non-discrimination based on sex under the International Covenant on Civil and Political Rights (ICCPR).[44] Notably, the Committee rejected the government's public morality justification for its criminal law. Moreover, while reviewing Australia's criminal sodomy law, the Committee's reasoning did not solely focus on sexual orientation-based discrimination. Rather, it based its decision on the fact that the law interfered with adult consensual sex, suggesting that all laws prohibiting sex outside marriage may be in breach of article 17 (privacy) of ICCPR.

Since that time, several human rights bodies and experts have expressed concern regarding states' use of criminal or punitive measures in the areas of sexuality and reproduction. Notably, the UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (Special Rapporteur on the Right to Health) has observed that the criminalisation of sexual and reproductive conduct is discriminatory, impedes the public health goals that ostensibly justify the interventions, impairs human dignity, interferes with autonomous decision making and creates and perpetuates stigma.[45] In two separate reports, the Special Rapporteur analysed the negative impact of punitive approaches to many of the above-referenced sexual and reproductive health and rights issues on the realisation of the right to health.[46] In those reports, the Special Rapporteur has specifically called for the decriminalisation of abortion,[47] the provision of sexual and reproductive health-related information,[48] sex work and the

44 See generally *Toonen v Australia* (n 9 above).

45 See generally Report of the Special Rapporteur on the Right to the Highest Attainable Standard of Health, UN General Assembly, 66th session, 3 August 2011, UN Doc A/66/254.

46 As above. See also Report of the Special Rapporteur on the Right to the Highest Attainable Standard of Health, Human Rights Council, 14th session, 27 April 2010, UN Doc A/HRC/14/20.

47 See 2011 Report of the Special Rapporteur on the Right to Health (n 45 above) para 65(h).

48 2011 Report (n 45 above) para 65(e).

practices around it,[49] and the unintentional transmission of or exposure to HIV.[50] The Special Rapporteur has further called upon states to suspend the application of criminal laws to various forms of conduct during pregnancy,[51] and to take immediate steps to decriminalise consensual same-sex conduct, as well as to repeal discriminatory laws relating to sexual orientation and gender identity.[52]

4.3.1 Limits on states' authority to criminalise abortion

With regard to abortion, UN human rights bodies have expressed great concern regarding rising maternal mortality rates due to unsafe abortion, and have recommended that states overturn abortion bans or decriminalise the procedure, in particular when women's lives or health are at risk,[53] when the pregnancy results from rape[54] or incest, or in cases of fetal impairment. The UN Human Rights Committee has specifically confirmed that criminal provisions on abortion are incompatible with women's right to life,[55] and repeatedly called upon states to decriminalise abortion.[56] The UN Committee on the Elimination of Discrimination Against Women has also called upon state parties to review legislation criminalising abortion and to potentially remove barriers restricting access to safe abortion,

49 See 2010 Report of the Special Rapporteur on the Right to Health (n 46 above) para 76(b).

50 2010 Report (n 46 above) para 76(c).

51 2011 Report para 65(n).

52 See 2010 Report (n 46 above) para 76(a). The UN High Commissioner for Human Rights has similarly recommended that states '[r]epeal laws used to criminalize individuals on the grounds of homosexuality for engaging in consensual same-sex conduct, and [to] harmonize age of consent laws for heterosexual and homosexual conduct'. Report of the United Nations Office of the High Commissioner for Human Rights, Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity, Human Rights Council, 19th session, 17 November 2011, UN Doc A/HRC/19/41 para 84(d). The High Commissioner further recommended that states 'ensure that other criminal laws are not used to harass or detain people based on their sexuality or gender identity and expression, and abolish the death penalty for offenses involving consensual sexual relations'.

53 See Concluding Observations of the UN Human Rights Committee: Chile, UN Doc CCPR/C/CHL/CO/5 para 8 (2007); Madagascar, UN Doc CCPR/C/MDG/CO/3 para 14 (2007); Mauritius, UN Doc CCPR/CO/83.MUS para 9 (2005); and Venezuela, UN Doc CCPR/CO/71/VEN para 19 (2001).

54 See Concluding Observations of the UN Human Rights Committee: The Gambia, UN Doc CCPR/CO/75/GMB para 17 (2004).

55 See Concluding Observations of the UN Human Rights Committee: Peru, UN Doc CCPR/CO/70/PER para 20 (2000).

56 See Concluding Observations of the UN Human Rights Committee: Ecuador, UN Doc CCPR/C/79/Add.92 para 11 (1998); Mongolia, UN Doc CCPR/C/79/Add.120 para 8(b) (2000); and Poland, UN Doc CCPR/C/79/Add.110 para 11 (1999).

connecting such barriers to women's rights to health.[57] The Committee further expressed concern regarding laws criminalising abortion when the pregnancy resulted from rape or incest[58] and, in at least one case, called upon a state to liberalise its law to allow abortion in cases of rape.[59]

4.3.2 Limits on states' authority to criminalise HIV exposure and transmission

In the context of HIV, the Global Commission on HIV and the Law recently issued a report observing that 'punitive laws, discriminatory and brutal policing and denial of access to justice for people with and at risk of acquiring HIV are fueling the epidemic'.[60] The report further confirmed that HIV-specific criminal laws and policies do not increase safer sex practices, but rather discourage individuals from obtaining HIV tests or treatment, due to fear of prosecution, thus fuelling the HIV epidemic.[61] The Commission also noted that such[62]

> legal practices create and punish vulnerability … promote risky behaviour, hinder people from accessing prevention tools and treatment, and exacerbate the stigma and social inequalities that make people more vulnerable to HIV infection and illness.

As such, the Commission has recommended that states[63]

> [r]epeal punitive laws and enact laws that facilitate and enable effective responses to HIV prevention, care and treatment services for all who need them … [e]nact no laws that explicitly criminalise HIV transmission, exposure or non-disclosure of HIV status, which are counterproductive.

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57 See Concluding Observations of UN Committee on the Elimination of Discrimination against Women: Andorra, UN Doc A/56/38 para 48 (2001); Argentina, UN Doc A/52/38 Rev.1, Part II para 319 (1997); Belize, UN Doc A/54/38 para 57 (1999); Burkina Faso, UN Doc A/55/38 para 276 (1999); Cameroon, UN Doc A/55/38 para 60 (2000); Chile, UN Doc A/54/38 para 229 (1999); Chile, UN Doc A/50/38 para 158 (1995); Chile, UN Doc CEDAW/C/CHI/CO/4 paras 19-20 (2006); Colombia, UN Doc A/54/38 para 394 (1999); Dominican Republic, UN Doc A/53/38 para 349 (1998); Ireland, UN Doc A/54/38 para 186 (1999); Jordan, UN Doc A/55/38 para 181 (2000); Mauritius, UN Doc A/50/38 para 196 (1995); Mexico, UN Doc A/53/38 para 408 (1998); Namibia, UN Doc A/52/38/Rev.1, Part II para 127 (1997); Nepal, UN Doc A/54/38 paras 139 & 148 (1999); Panama, UN Doc A/55/38/Rev.1 para 201 (1998); Paraguay, UN Doc A/51/38 para 131 (1996); Peru, UN Doc A/53/38/Rev.1 para 340 (1998); Peru, UN Doc A/50/38 paras 446 & 447 (1995); Saint Vincent and the Grenadines, UN Doc A/52/38/Rev.1 para 148 (1997); United Kingdom, UN Doc A/55/38 para 310 (1999); and Zimbabwe, UN Doc A/53/38 para 159 (1998).

58 See Concluding Observations of the UN Committee on the Elimination of Discrimination against Women: Nepal, UN Doc CEDAW/A/54/38 para 147 (1999).

59 See Communication 22/2009, *LC v Peru,* Committee on the Elimination of Discrimination against Women (4 November 2011), UN Doc CEDAW/C/50/D/22/2009 para 9(b)(iii).

60 Global Commission on HIV and the Law (n 11 above) 7.

61 Global Commission on HIV and the Law 8.

62 Global Commission on HIV and the Law 7.

63 Global Commission on HIV and the Law 9.

International policy guidance similarly recommends against the specific criminalisation of HIV transmission.[64]

4.3.3 Limits on states' authority to criminalise sex work and adult consensual sex

With regard to sex work, both the Global Commission and UN Women have recognised sex workers as rights holders and recommended the decriminalisation of sex work.[65] The International Labour Organisation (ILO) has also recommended that sex work be recognised as an occupation so that it can be regulated in ways that protect workers and customers.[66]

As noted earlier, it has been confirmed that the criminalisation of adult consensual sexual conduct in private violates the right to privacy.[67] To that end, various international and regional human rights declarations and recommendations have called for the decriminalisation of consensual same-sex conduct.[68] Moreover, around 20 different judgments, rulings and decisions from a variety of international, regional and sub-regional courts have found that the

64 See generally UNAIDS, UNDP, 'Policy brief: Criminalization of HIV Transmission' (2008), http://data.unaids.org/pub/basedocument/2008/20080731_jc1513_policy_criminalization_en.pdf (accessed 8 September 2012).

65 Global Commission on HIV and the Law (n 11 above) 10. The Global Commission on HIV and the Law has recently recommended that states 'decriminalise private and consensual adult sexual behaviours, including … voluntary sex work … enforce laws against all forms of child sexual abuse and sexual exploitation, clearly differentiating such crimes from consensual adult sex work … and ensure human trafficking laws are used to prohibit sexual exploitation, as opposed to consensual sex work'. See also UN Women 'Note on sex work, sexual exploitation and trafficking' (2013) http://www.nswp.org/sites/nswp.org/files/UN%20Women's%20note%20on%20sex%20work%20sexual%20exploitation%20and%20trafficking.pdf (accessed 29 October 2013). UN Women's statement further confirmed the organisation's position that sex work should not be conflated with trafficking and that sex work should be regulated in a manner as to protect sex workers from abuse and violence.

66 See International Labour Organisation 'Recommendation concerning HIV and AIDS and the world of work (No 200)' (2010), http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/normativeinstrument/wcms_194088.pdf (accessed 11 November 2013). The ILO's labour standard on HIV/AIDS, adopted in 2010, includes non-discriminatory access to health services and occupational safety for sex workers, including empowerment to insist on safe and protected paid sex in their workplaces.

67 See *Toonen v Australia* (n 9 above).

68 See Human Rights Council, UN General Assembly Resolution: Human rights, Sexual Orientation and Gender Identity, UN Doc A/HRC/17/L.9/Rev.1 (adopted 15 June 2011); Organization of American States, General Assembly Resolution: Human rights, Sexual Orientation and Gender Identity, OAS Doc AG/RES.2435 (XXXVIII-O/08) (adopted 3 June 2008); Organization of American States, General Assembly Resolution: Human rights, Sexual Orientation and Gender Identity, OAS Doc AG/RES.2504 (XXXIX-O/09) (adopted 4 June 2009); Council of Europe, Committee of Ministers Recommendation (Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity, CM/Rec(2010)5 (adopted 31 March 2010).

criminalisation of sexual orientation is incompatible with international human rights law.[69]

4.3.4 Limits on states' authority to criminalise pregnant women's conduct and the provision of sexual and reproductive health information

Finally, the Special Rapporteur on the Right to Health has called upon states to[70]

> [s]uspend/abolish the application of existing criminal laws to various forms of conduct during pregnancy, such as conduct related to treatment of the foetus, most notably miscarriage, alcohol and drug consumption and HIV transmission.

Moreover, he has called on states to '[d]ecriminalise the provision of information relating to sexual and reproductive health, including evidence-based sexual and reproductive health education'.[71]

5 African Women's Protocol: A tool to further resist states' illegitimate criminalisation of sexuality and reproduction

While there is no clear guidance that explicitly sets forth what states can criminalise in the realms of sexuality and reproduction under international human rights law, the African Women's Protocol, as one of the most progressive pronouncements of women's sexual and reproductive rights,[72] may provide an additional platform to resist states' illegitimate criminalisation of women's bodies and lives.

Similar to international law, the African Women's Protocol contains provisions that call upon states to criminalise and prevent violence (for instance articles 3, 4, 5 and 13),[73] yet lacks explicit normative

69 See 'Jurisprudential annotations to the Yogyakarta Principles' http://www.yogyakarta-principles.org/yogyakarta-principles-jurisprudential-annotations.pdf (accessed 21 August 2012).

70 2011 Report of the Special Rapporteur on the Right to Health (n 45 above) para 65(n).

71 2011 Report (n 45 above) para 65(e).

72 See earlier discussion provided in n 10.

73 Art 3 (right to dignity) calls for the adoption and implementation of measures to prohibit any exploitation or degradation of women and to 'ensure the protection of every woman's right to respect for dignity and protection of women from all forms of violence, particularly sexual and verbal violence'. Art 4 (rights to life, integrity and security of the person) calls for the enactment and enforcement of laws to prohibit all forms of violence against women, including unwanted or forced sex, whether the violence takes place in private or public, the punishment of perpetrators of violence against women, and the prevention and condemnation of trafficking in women and the prosecution of traffickers. Art 5 (elimination of harmful practices) calls for the prohibition of all forms of female genital mutilation through legislative measures backed by sanctions. Art 13 (economic and social welfare rights) calls for 'effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography'.

restraints on states' police power in the realms of sexuality and reproduction. Nevertheless, there are key provisions within the Women's Protocol that can be relied upon to not only address rights violations that result from criminalisation, but to challenge the very legitimacy of passing and enforcing criminal laws that punish women's exercise of their sexual and reproductive rights, absent harm to others. More broadly, the Protocol's strong textual language and incorporation of substantive equality principles can be used to articulate human rights claims for accountability for rights violations resulting from states' illegitimate policing and punishment.

Set forth below are proposed arguments advocates can make relying upon the African Women's Protocol to further restrain states' policing power and to seek redress for rights violations resulting from unjust intrusions into peoples' personal sexual and reproductive lives under the guise of 'protecting the public' and 'safeguarding culture and morality'.

5.1 States' overarching obligations to respect, protect and fulfil human rights

In the absence of specific human rights-based restraints on what states can criminalise, advocates generally focus on the violations that result from the passage and enforcement of punitive laws and policies. State laws and policies that criminalise individuals' sexual and reproductive conduct, identities or socio-economic status (which do not harm others) violate the right to equality and non-discrimination. Such penalisation also leads to a wide range of human rights violations, including the rights to life, integrity and security of person,[74] to be free from cruel, inhuman and degrading treatment, health and reproductive rights,[75] access to justice and equal protection of the law,[76] economic and social welfare rights,[77] and special protection of women.[78] Article 2 of the African Women's Protocol explicitly requires that states reform laws and practices that discriminate against women.[79]

The African Women's Protocol also specifically recognises women's right to redress, requiring states to 'provide for appropriate remedies to any woman whose rights or freedoms … have been violated'.[80] Moreover, as part of states' overarching obligations to respect, protect and fulfil human rights, they must remedy these violations and prevent similar violations in the future.

74 Art 4 African Women's Protocol.
75 Art 14.
76 Art 10.
77 Art 13.
78 Art 24.
79 Art 2.
80 Art 25(a).

5.2 Accountability for priortisation of resources

In addition to seeking redress under the African Women's Protocol for rights violations that result from the passage and enforcement of criminal legislation, advocates can challenge states' failure to adequately budget for and prioritise state initiatives to prevent and eradicate violence against women under article 4 and, more broadly, to realise all of the rights (including sexual and reproductive rights) contained within the Protocol under article 26.

Notably, the Women's Protocol is the first human rights instrument to introduce a hierarchy of budget priorities.[81] Advocates should rely on this novel aspect of the Protocol and seek justice for the disparities between state expenditure on the military and security, and anti-violence and other rights-promoting programmes. These disparities may be particularly revealing and compelling given the Protocol's explicit call of reduction in military spending in favour of social development and the promotion of women.[82] States' lack of commitment to anti-violence programmes is also ironic, given that it is one area where international law and the Protocol have explicitly affirmed states' power to legislate, criminalise and police.

5.3 States' duty to combat discrimination against women and modify cultural patterns of discrimination

States' illegitimate criminalisation of sexuality and reproduction can also be challenged under the African Women's Protocol's requirement to combat all forms of discrimination against women through legislative, institutional and other measures, and to modify social and cultural patterns to eliminate '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'.[83] The enforcement of laws and policies that police and punish women's exercise of their sexual and reproductive rights undoubtedly amounts to discrimination against women. Moreover, states' failure to address violence, abuse and harassment of individuals who do not conform to restrictive gender norms (often at the hands of law enforcement officials) amounts to gender stereotyping, which states are obligated to combat. The fact that states in Africa (and worldwide) unabashedly criminalise women's sexual and reproductive conduct and identities is particularly egregious when reviewed under the Women's Protocol, since it contains the most explicit pronouncement of women's sexual and reproductive rights as compared to other human rights instruments.[84]

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81 See F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11 31.

82 Art 10(3) African Women's Protocol.

83 Art 2(2).

84 Art 14(2)(c) and further discussion in n 10.

5.4 Women's rights to equal protection of the law

Article 8 of the African Women's Protocol specifically recognises that '[w]omen and men are equal before the law and shall have the right to equal protection and benefit of the law'.[85] Passing and enforcing criminal laws that specifically target women's expression of their sexuality and attempt to control women's fertility are by definition contrary to equal protection. The disparate impact on women of criminal laws that punish particular sexual and reproductive conduct and identities similarly contravenes states' duties to ensure that women are equally protected under and benefit from the law. As noted by the UN Special Rapporteur on Violence against Women, its Causes and Consequences, the 'principle of non-discrimination requires states to take into account and address any disparate impact of criminal justice strategies on women,[86] even if they have been adopted for legitimate goals'.[87]

Article 8 also requires that 'law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights'.[88] As an initial matter, non-discriminatory laws are a necessary precursor to ensuring that law enforcement representatives can assist with promoting gender equality. Moreover, many rights violations that stem from the criminalisation of sexuality and reproduction are often at the hands of law enforcement personnel (for instance extortion, harassment, blackmail and violence), as discussed earlier. Therefore, greater progress must be made to ensure that rights violations no longer occur at the hands of those who are tasked with purportedly 'carrying out justice'.

6 Looking forward: Additional steps to promote justice and accountability

In the absence of a clear standard of legitimacy under international and regional human rights law regarding what states can criminalise in the realms of sexuality and reproduction, at a minimum, resources should be directed toward ensuring transparency and accountability within justice systems.[89] To that end, the first step must be to raise peoples' awareness of their human rights and knowledge of laws that prohibit blackmail, extortion and violence by law enforcement personnel.[90] Additionally, the rule of law and criminal justice reform

85 Art 8.

86 See UN General Assembly Resolution: Intensification of Efforts to Eliminate all Forms of Violence Against Women, UN Doc A/RES/61/143 (adopted 30 January 2007) para 8(f).

87 UN Special Rapporteur on Violence against Women, Report to the General Assembly (n 2 above) para 81.

88 Art 8(d) African Women's Protocol.

89 See Thoreson (n 21 above) 131.

90 Thoreson 132-33.

initiatives should be prioritised by advocates, governments and funders.

Advocates should also continue to search for normative restraints on states' policing power. While outside of the scope of this article, human rights advocates should engage with international and national criminal justice advocates to clarify traditional criminal law principles that count against states' intrusion into personal matters such as sexuality and reproduction, absent clear harm to others. Normative restraints may also be located in religious law. These explorations may be particularly salient in the African context where countries have pluralistic legal systems and codified law that – formally or informally – operate side-by-side with customary law and/or Shari'a (Islamic law). Further research in this regard may reveal additional limits on states' power to control and punish individuals' bodies and intimate lives.

Finally, when leaders are fuelling a 'moral panic'[91] and proposing increased penalties for particular 'non-normative' sexual and reproductive conduct and identities, advocates should look beyond the rhetoric to determine whether their government is trying to distract the public's attention from its own deficiencies. All too often, states use non-conforming sexualities as a metaphor for immorality and degradation of society to instil fear in and paralyse the public at times when political and civil mismanagement and faltering economies are looming.[92] Identifying this hypocrisy and the politics of distraction is yet another way of delegitimising states' overzealous criminalisation of sexuality and reproduction.

In the end, there are many tools advocates can use to tackle the illegitimate criminalisation of sexuality and reproduction. In addition to challenging the means through which states punish particular conduct and identities and seeking redress for rights violations, advocates should think more broadly and consider ways to locate additional normative restraints and/or foster normative developments that explicitly confine states' policing power, to ensure that it is not exercised to infringe on individuals' sexual and reproductive rights and lives. States may have a pivotal role in promoting public safety and safeguarding health, but these justifications can only go so far. They cannot be used to intrude on individuals' sexual and reproductive autonomy and matters so intimately connected to their dignity, sense of self and fundamental human rights.

91 See generally S Cohen *Folk devils and moral panics* (1972).
92 Tamale (n 3 above) 24.

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HIV is not for me: A study of African women who have sex with women's perceptions of HIV/AIDS and sexual health

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Summary

Women who have sex with women face a unique, yet under-researched set of HIV/AIDS-related risks in sub-Saharan Africa. The findings of this study highlights a tension that, on the one hand, exists between the heteronormativity of healthcare providers and broader society, and the ways in which this silences lesbians and other women who have sex with women in their healthcare interactions and, on the other, the totalising view of WSW sexualities within this community, which silences conversations about HIV because such conversations may expose or accuse a person of 'not being a real lesbian'. The women within the African lesbian, gay, bi-sexual, transgender and intersex (LGBTI) community who participated in our study had scant access to credible HIV/AIDS and safe-sex information, resulting in various and dangerous (mis)conceptions proliferating. The vulnerability of lesbians and other

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WSW to HIV infection is a complicated public health issue that is perplexing to some and ignored by many, not only on the African continent, but globally. Our research indicates that some WSW engage in high-risk behaviour that places them at an increased risk for HIV transmission. Furthermore, a lack of access to inclusive prevention and healthcare services and an unwillingness to seek treatment are often the consequence of stigma and discrimination and point to distinct inequalities for female-identified LGBTI persons. The study explored the prevailing perceptions of women within the LGBTI community on HIV/AIDS, using various fora, including social media sites, anonymous surveys and anecdotes shared anonymously with the organisation, and which highlights the urgent need for specifically-tailored sexual health and HIV-preventative and coping strategies toward improved health outcomes and an understanding of this vulnerable group. In addition, the experience of our participants demonstrated a strong demand for LGBTI health needs training for healthcare professionals, with a specific focus on the depathologisation of LGBTI identities on the continent. Potential strategies and further research in this community are suggested.

Key words: *HIV/AIDS; sexual health; women who have sex with women (WSW); Queer African Women; African Women's Protocol*

1 Introduction

In many parts of Africa, rights discourses about gender and sexuality have been most prominent in the post-colonial period. This has meant that the African state mechanism has been assigned distinct obligations for the realisation of the rights of women and sexual minorities – albeit not explicitly with respect to non-discrimination on the basis of sexual orientation. However, the emergence of extreme levels of gender-based violence in this period points to a type of 'patriarchal backlash', resultant from a shift in focus away from essentialised notions of womanhood towards more fluid and varied expressions. Problematic rhetoric about the susceptibility of lesbian and bisexual women to HIV has become dominant; managing to quell the dissemination of scientifically-verifiable, appropriate and relevant information, thereby allowing for problematic notions to become central to thinking on issues of sexual health and safer sexual practices and leaving an already vulnerable group in an even more vulnerable position.

Distinct discursive nodes, shaped by social forces, have emerged as a result of this 'confused state'. Therefore, any attempt to accurately address the challenges women who have sex with women (WSW) face with HIV would identify the ways in which specific 'folk' knowledge is being created within various spaces – particularly online blogs and social media sites, the central objective being to evaluate the discourses on HIV that are emerging online among African women performing non-normative sexualities.

Our research found that young, non-normative African women are using social media tools to create a large number of groups where discussions about gender and sexuality occur and events, focusing on sexual identity and performance, like 'open-mic' nights, are promoted. Some of these groups are extremely vibrant and active, while others 'pop up' for shorter periods of time; usually being organised around a particular concern, such as the controversies that occurred during the 2012 Johannesburg Gay Pride Festival. However, regardless of the permissiveness of the online space, our research has shown that sexual health issues are rarely addressed and, where they are addressed, they are often inaccurate. Therefore, the primary motivation for this study is the high number of problematic statements made on certain social media platforms, pertaining to the sexual health strategies taken up by WSW to mitigate the impact of HIV. Although it must be noted that information on safe(r) sex for African WSW was presented on a few sites, with posts such as 'Unwrap me'[1] and 'On hot safe lesbian sex',[2] these posts were the exception rather than the rule.

WSW's silence about sexual health mirrors wider societal silences about non-conforming women and their location within the pandemic. Healthcare providers are often under-prepared or unwilling to adequately cater to the needs of WSW, which leads many WSW to believe that they cannot be affected by the illness. Unfortunately, these silences mask the fact that there is indeed a need for equitable access to sexual health information and services; while also hiding a significant social group that is being denied their right to sexual health through state-sanctioned heterosexism.

2 Human rights framework

2.1 Context

HIV has challenged the ways in which African states think about the relationship(s) between public health, sexuality and the law, and has been one of the biggest threats to development and sustainable livelihoods.[3] Globally it has been recognised that women comprise one of the more vulnerable groups to the pandemic because of the interaction between their biological and socio-cultural susceptibilities. The marginalisation of women directly impacts their health status and their ability to fully realise their health rights. Therefore, feminist scholars have been arguing for gendered approaches to public health that analyse and address the ways in which structural, social, cultural

1 Miss Pamstar 'Unwrap me, indulge, but cover your tools' 11 September 2012 http://www.holaafrica.org (accessed 29 June 2013).

2 Lady Mango 'On hot safe lesbian sex' 4 July 2013 http://www.holaafrica.org (accessed 4 July 2013).

3 KM de Cock *et al* 'Shadow on the continent: Public health and HIV/AIDS in Africa in the 21st century' (2002) 360 *The Lancet* 67-72.

and biological factors interact to promote and/or impede the ability of women to access health care and to secure protection from HIV and other sexually-transmitted infections (STIs).[4]

Utilitarian considerations have traditionally underpinned public health approaches to disease control which, in their most extreme manifestations, focused on isolating affected populations as a means of containing infectious diseases; thereby limiting their spread amongst the general population. The emergence of the HIV pandemic in the post-World War II period has meant that public health has necessarily been subjected to human rights standards. To this extent, utilitarianism, crude cost-benefit analyses and social contract theories have been challenged and subordinated to the principles of social justice[5] and equality, demonstrated by the application of human rights norms and principles to HIV activism and litigation in South Africa in the early 1990s and 2000s.[6]

2.2 Non-discrimination

It can be said that the defining characteristic of international human rights discourse is the notion of non-discrimination.[7] This principle is articulated in the African Charter on Human and Peoples' Rights[8] (African Charter) to mean that 'every individual shall be entitled to the enjoyment of the rights and freedoms guaranteed [with]in the ... Charter without discrimination of any kind'.[9]

Internationally, advocacy for the recognition of the right to non-discrimination for sexual minorities has been framed in terms of the right to privacy. In the seminal case of *Toonen v Australia*,[10] the complainant challenged the criminalisation of same-sex consensual sexual conduct on the grounds that it violated his right to privacy by failing to distinguish between 'sexual activity in private and sexual activity in public', thereby bringing 'private activity into the public

4 V Tallis 'Health for all? Women who have sex with women health needs and issues' in V Reddy *et al* (eds) *From social silence to social science: Same-sex sexuality, HIV/AIDS and gender in South Africa* (2009) 216.

5 S Corrêa *et al Sexuality, health and human rights* (2008) 152.

6 M Mbali 'The Treatment Action Campaign and the history of rights-based, patient-driven HIV/AIDS activism in South Africa' Research Report 29, Centre for Civil Society, University of KwaZulu-Natal; P Jones & K Stokke *Democratising development: The politics of socio-economic rights in South Africa* (2005); E Cameron 'Legal and human rights responses to the HIV/AIDS epidemic' (2006) 17 *Stellenbosch Law Review* 47.

7 CE Welch Jr 'Human rights and African women: A comparison of protection under two major treaties' (1993) 15 *Human Rights Quarterly* 549-574.

8 African Charter on Human and Peoples' Rights, Organisation of African Unity 27 June 1981, CAB/LEG/67/3 Rev 5, 21 *ILM* 58 (1982), entry into force 21 October 1986, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 29.

9 Art 2 African Charter.

10 *Toonen v Australia* CCPR/C/50/D/488/1992, UN Human Rights Committee, 4 April 1994.

domain'[11] which, it was further argued, would have the undesired effect of enabling unlawful attacks on the 'honour and reputation'[12] of 'suspected' individuals. In elaborating on the content of the right, the Committee held that the right to non-discrimination within the Universal Declaration of Human Rights (Universal Declaration) on the basis of 'sex'[13] could be 'taken as including sexual orientation'.[14]

Within the African regional system, there is no explicit recognition of the right to non-discrimination on the basis of sexual orientation. However, the interpretive provisions of the African Charter state that the African Commission on Human and Peoples' Rights (African Commission) shall 'draw inspiration from international law',[15] especially from the provisions of both international and regional legal instruments. The African Charter further states that 'international norms ... customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine'[16] shall be taken 'into consideration' for the purposes of interpretation.

Internationally, the right to non-discrimination is codified in a number of instruments. The notion was first articulated in article 2 the Universal Declaration, where it reads: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind.'[17] A similar expression of the right to non-discrimination is found in the International Covenant on Civil and Political Rights (ICCPR), where state parties are compelled 'to ensure to all individuals' within their territory to enjoy the rights within ICCPR without 'distinction of any kind'.[18] ICCPR further states that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. [19] The International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees non-discrimination in similar terms to the aforementioned instruments, as it states: 'The rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex … or other status.'[20] The phrase 'or other status' as mentioned in these three treaties indicates that the recognised grounds for non-discrimination are not exhaustive, but can be expanded to accommodate new classes of people and/or new instances of discrimination.

11 *Toonen* (n 10 above) para 3.1.
12 As above.
13 UN General Assembly Universal Declaration of Human Rights, 10 December 1948 217 A (III).
14 *Toonen* (n 10 above).
15 Art 60 African Charter.
16 Art 61.
17 Universal Declaration of Human Rights (n 13 above).
18 Art 2(1) ICCPR.
19 Art 26 ICCPR.
20 Art 2(2) ICESCR.

In presenting their central thesis, Murray and Viljoen[21] argue that the drafters of the African Charter borrowed from ICESCR. They hence argue that, in the wording of the non-discrimination provisions of the African Charter, the utilisation of the phrases 'such as' and 'or other status' indicates that the grounds for non-discrimination within the Charter are not exhaustive, meaning that it is possible that the right to non-discrimination on the basis of sexual orientation is implied within the provisions of the African Charter.

2.3 Right to health

The right to health, as it was first articulated in ICESCR, does not imply the right to be healthy, which is impossible to guarantee. Instead, it is understood as the right of all persons, irrespective of their sexual orientation,[22] to the 'highest attainable standard of physical and mental health'.[23] The definition of the right to health is not confined to clinical health care, and has been interpreted to include the underlying determinants of health, such as 'healthy occupational and environmental conditions and access to health-related education and information, *including on sexual and reproductive health*'.[24] Affirming this, the African Charter recognises a general right of individuals to 'enjoy the best attainable standard of physical and mental health',[25] and further obligates states to take 'the necessary measures to protect the health of their people'.[26]

The right to health is a classical socio-economic right in that it is programmatic in its nature, meaning that states are required to enact laws and devise policies that create the conditions necessary for its realisation. This characteristic of socio-economic rights has called to question their justiciability. However, the fact that international law has evolved to recognise that all human rights are 'interdependent, indivisible and mutually supporting'[27] has led to the recognition and enforcement of the existence of a right to health. The African Commission has confirmed the justiciability of socio-economic rights under the African Charter in both *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*[28] and *Purohit & Another v The*

21 R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 89.

22 UN ESCR Committee General Comment 14: The right to the highest attainable standard of health (art 12), 11 August 2000, E/C12/2000/4 para 12.b.

23 Art 1(1) ICESCR.

24 General Comment 14 (n 22 above) para 11 (our emphasis).

25 Art 16(1) African Charter.

26 Art 16(2).

27 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* 556.

28 (2001) AHRLR 60 (ACHPR 2001).

Gambia.[29] The latter case established that the right to health was not limited to access to health care, but also included 'every other supporting treatment, management or service'[30] that promotes the best standard for 'everyone regardless of age, sex or gender'.[31]

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) articulates the meaning of the right to health with respect to women. It provides that state parties should take 'all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure ... access to healthcare services'.[32] It also recognises the importance of the provision of educational information for wellbeing and health.[33] Discrimination for the purposes of CEDAW is defined as 'any distinction, exclusion or restriction made on the basis of sex that has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, *irrespective of their marital status* ... of human rights and fundamental freedoms'.[34] While CEDAW is a landmark document because of its codification of women's rights in explicit terms, it falls short because of its vagueness and tendency to frame the needs of women solely in relation to men, without recognising the inherent heterogeneity of the category 'woman'.

Socio-political, economic and structural factors determine the extent to which women can realise their rights and freedoms.[35] It is critical to recognise that in heterosexist societies, where female personhood tends to be framed exclusively in terms of motherhood and the associated stereotypical heteronormative, gender roles, silences about the differences between women and the power hierarchy thus created often mean that 'othered' women, such as those who engage in same-sex amorous relationships, are further marginalised in ways that limit their equal access to and participation in the public sphere. This silencing of non-normative women is further aggravated by the construction of non-discrimination for same-sex practising individuals as a matter that hinges on non-interference with the right to privacy. Programmatically speaking, this facilitates heterosexism in public discourses about women's health because at its most minimalist construction, the right to non-discrimination on the basis of sexual orientation merely requires the state to respect the private space, without any consideration of how the very same principle can be used to ensure the full and equitable realisation of the

29 (2003) AHRLR 96 (ACHPR 2003) para 96.

30 V Balogun & E Durojaye 'The African Commission on Human and Peoples' Rights and the protection of sexual and reproductive rights' (2011) 11 *African Human Rights Law Journal* 380.

31 As above.

32 UN CEDAW Committee General Recommendations 19 & 20, adopted at the 11th session, 1992, art 12(1).

33 CEDAW Committee (n 32 above) art 10(h).

34 CEDAW Committee art 1 (our emphasis).

35 M Judge 'Invisibility in plain sight … lesbian women and HIV' (2008) March *ALQ: AIDS Legal Network* 10.

sexual health rights of counter-heteronormative women. Feminist legal scholars Oloka-Onyango and Tamale argue that women's rights are not simply a private affair, but also extend directly into the essential operations of the state and public sphere,[36] therefore, what may be required from the state is positive action as opposed to permissiveness.

The ways in which African states define and enforce women's health rights become crucial because identity construction is dependent on the negotiation and renegotiation of meanings over time.[37] Similarly, human rights function as 'powerful symbols'[38] in addition to being tools for the realisation of full citizenship by disenfranchised groups. The exclusion of 'othered' bodies in nation states' human rights discourses determines the extent to which citizenship can be accessed.[39] Klugman identified three requirements related to the concept of citizenship: the distribution of resources; the recognition of all human beings regardless of their non-conformity; and the availability of mechanisms for people to gain representation.[40] The erasure of non-normative identities has led scholars[41] to criticise the inherent heteronormativity of traditional definitions of citizenship and has led to 'sexual citizenship' advocacy to establish a counter-hegemonic discourse. Conceptually, sexual citizenship identifies how sexualities shape people's ability to access full citizenship,[42] and acknowledges that the 'private and intimate'[43] practices of sex form part of the realms in which healthy citizenship is constructed. The recognition of the former is particularly important in societies where hierarchies of gender and power work in unison to oppress women and exasperate their vulnerability to violence and disease.[44]

It is trite knowledge that citizenship and rights are mutually-dependent concepts; therefore sexual citizenship should be understood as referring to a status entailing a number of different sexual rights claims. Sexual rights were first put on the agenda at the

36 J Oloka-Onyango & S Tamale 'The personal is political or why indeed women's rights are human rights: An African perspective on international feminism' (1995) 17 *Human Rights Quarterly* 711.

37 K Plummer 'The social reality of sexual rights' in P Aggleton & R Parker (eds) *Routledge handbook of sexuality, health and human rights* (2010) 45-55.

38 Plummer (n 37 above) 49.

39 D Richardson 'The social construction of immunity: HIV risk perception and prevention among lesbians and bisexual women' (2010) 2 *Culture, Health and Sexuality: An International Journal for Research, Intervention and Care* 33-49.

40 B Klugman 'Race, class, gender and sexuality: Challenges for an inclusive citizenship' (2008) 39 *South African Review of Sociology.*

41 Corrêa *et al* (n 5 above) 155.

42 Plummer (n 37 above).

43 Oloka-Onyango & Tamale (n 36 above) 106.

44 J Oriel 'Sexual pleasure as a human right: Harmful or helpful to women in the context of HIV/AIDS?' (2005) 28 *Women's Studies International Forum* 392-404.

International Conference on Population and Development (ICPD),[45] and it is here that they were erroneously constructed as a sub-category of reproductive rights. The ICPD Programme of Action defined reproductive health as a state where people 'are able to have a satisfying and safe sex life'.[46] The ICPD went further in identifying reproductive health as being inclusive of sexual health, defined a necessary condition for 'the enhancement of life and personal relations'[47] and not merely requiring medical interventions related to reproduction and sexually-transmitted diseases. At the Fourth World Conference on Women, sexual rights took prominence and the common position of African states was in favour of the language to sexual rights. African representatives accepted the language of sexual rights because of its usefulness in addressing the impact of gender inequality on women's vulnerability to violence and their powerlessness in the face of HIV.[48]

Fundamentally, sexual rights do not create new rights; instead, they are understood as ensuring the implementation of existing rights to the terrain of sexuality.[49] This idea of sexual rights as being 'akin to fundamental human rights'[50] means that, conceptually, sexual rights can be related to other rights, such as the rights to information, education and health, while still requiring distinctive measures for their realisation. This understanding is reflected in how sexual rights are constructed in the Beijing Declaration, which states:[51]

> The human rights of women include their right to have *control over and decide freely and responsibility on matters related to their sexuality*, including sexual and reproductive health, *free of coercion, discrimination and violence*. Equal relationships between women and men in all matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences.

This paragraph is commonly referred to as the 'sexual rights paragraph',[52] because it establishes the most widely-accepted and understood framework for sexual rights. The aforementioned criticisms of CEDAW with respect to women's rights to health can be stated here too: Both the ICPD Platform for Action and the Beijing Declaration frame sexual health rights in reproductive terms and therefore tie them to heteronormative sexual practice. This implies

45 B Klugman 'Sexual rights in Southern Africa: A Beijing discourse or a strategic necessity?' (2000) 4 *Health and Human Rights* 149.

46 UN Population Fund (UNFPA) *Report of the International Conference on Population and Development,* Cairo, Egypt, 5-13 September 1994, 1995, A/CONF.171/13/Rev1, para 7.2.

47 As above.

48 Plummer (n 37 above) 151.

49 Plummer 152.

50 Corrêa *et al* (n 5 above) 393.

51 United Nations Beijing Declaration and Platform of Action, adopted at the 4th World Conference on Women, 27 October (our emphasis).

52 Z Hlatshwayo & B Klugman 'A sexual rights approach' (2001) 16 *Agenda* 14.

that the right to sexual health only applies to heterosexual women. To phrase this in other terms, this drafting error implies that non-normative women do not require the right to sexual health. When it is considered that the importance of the right to sexual health is discussed in the context of HIV/AIDS, it can be argued that this omission perpetuates the idea of 'lesbian immunity'[53] to sexually-transmitted diseases at the level of global norm construction. The need for the elaboration of sexual health and sexual health rights was noted by the Special Rapporteur on the Right to Health when (s)he stated that it was misguided to subsume sexual health rights under reproductive rights because of the fact that 'many expressions of sexuality are non-reproductive'.[54]

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)[55] was adopted to bolster the rights of women under the African Charter, and its most commendable features are its explicit reference to the sexual health rights of women as they relate to HIV and STIs, and its clearer articulation of the correlated obligations of state parties. Prior to this, the African regional system was a mess of declarations and commitments, which did little to empower women to hold their nation states accountable for the realisation of their sexual health rights.

The relevant provisions of the African Women's Protocol are articles 14(1)(d) and (e), which read:[56]

> States parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:
> ….
> (d) the right to *self-protection* and *to be protected* against sexually-transmitted infections, including HIV/AIDS;
> (e) the right to *be informed* on one's *health status* and on the health status of one's partner, particularly if affected with *sexually-transmitted infections,* including HIV/AIDS ...

The General Comments of the Special Rapporteur on the Rights of African Women[57] elucidate the meaning of the right to sexual health in the context of HIV/AIDS, in accordance with the Commission's mandate to 'formulate and lay down ... [persuasive] … principles and rules'.[58]

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53 SJ Fishman & EH Anderson 'Perception of HIV and safer sexual behaviours among lesbians' (2003) 14 *Journal of the Association of Nurses in AIDS Care* 52.

54 ESCR Committee, Special Rapporteur on the Rights to Health: Right to sexual and reproductive health, E/CN.4/2004/49 para 55.

55 African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003.

56 As above.

57 African Commission General Comments on arts 14(1)(d) & (e) of the African Women's Protocol, 6 November 2012.

58 Art 45(1)(b) African Charter.

One of the most striking features of the General Comments' understanding of the right to sexual health is how it is understood to speak to interactions between environmental (such as poor institutions), biological and behavioural factors and how they interact in the creation of women's vulnerability to HIV. This is most clearly shown through the recognition of the right of an individual to be informed about both their own sero-status and that of their partner,[59] and the way that the Commission has interpreted this right.

It has been argued that couples who embark on long-term sexual or romantic relationships or marry unaware of their partner's HIV status are a source of new HIV infections, and that the sero-negative partners in such discordant relationships are one of the largest and most vulnerable groups in Africa.[60] This flies in the face of popular presentations of promiscuity as being more correlated to risk of exposure than monogamy, and also highlights the importance of women's access to 'adequate, reliable, non-discriminatory and comprehensive information about their health'.[61] Studies conducted in Southern Africa have shown that the self-reported sero-positive status of lesbian and bisexual identified women is between 6,6 and 9,6 per cent,[62] which is an alarming sero-prevalence level for a 'no risk' group. It should be noted that, while self-reporting surveys are less statistically credible than studies, they do point to the fact that women who have sex with women are indeed affected by the HI-virus, and therefore require equitable access to sexual health rights.

The right to be informed about one's health status is applicable to all women irrespective of their marital status. Critics of the Women's Protocol argue that the rights therein continue to be framed in heteronormative terms, using the 'mothercentrism' of the provisions and their silence on same-sex rights as examples.[63] However, when one considers that the African Charter, in true patriarchal fashion, locates women's rights in the context of family rights, then it can be argued that the phrase 'irrespective of marital status' is a clever way of deconstructing a hegemonic womanhood through the utilisation of the words (read symbols) used to create it - women no longer have to conform to traditional values in order for their sexual health rights to be recognised. For non-normative African women, their unmarried

59 Hlatshwayo & Klugman (n 52 above).

60 De Cock *et al* (n 3 above) 709.

61 General Comments (n 57 above) para 14.

62 T Poteat *et al* 'Sexual practices, identities and health among women who have sex with women in Lesotho – A mixed-methods study' (2014) 16 *Culture, Health and Sexuality: An International Journal for Research Intervention and Care* 120; TG Sandfort *et al* 'Forced sexual experiences as a risk factor for self-reported HIV infection among Southern African lesbian and bisexual women' (2013) 8 *PloS one* e53552; H Wells & L Polders 'Gay and lesbian people's experience of the healthcare sector in Gauteng' http://www.out.org.za/index.php/library/reports?download=20:hiv-and-std-among-gays-and-lesbians (accessed 29 November 2013).

63 CEDAW Committee General Recommendations (n 32 above).

status is usually seen as a marker of their deviance. However, the recognition afforded to women regardless of their marital status leaves room for the emergence of 'disruptive' but viable performances of womanhood and female sexuality.[64]

The programmatic nature of the right to sexual health is reiterated by the fact that its realisation is tied to the ability of the state to create enabling conditions for the empowerment of women with respect to 'protection rights', and that these 'protection rights' include well-recognised and established rights – such as the rights to education, equality and dignity.[65] The principles articulated within the General Comments reflect deference to the well-established 'four-pronged' approach to state parties' obligations; namely, that state parties have to: respect,[66] protect,[67] promote[68] and fulfil[69] the sexual health rights within the Charter in accordance with the principles laid down in the General Comments.

The language of sexual health rights is more readily accepted than that of sexual rights, especially because of the challenges presented by HIV. However, the term has come to be recognised as an umbrella term in the field of sexuality,[70] primarily because sexual rights were constructed tools to challenge hegemonic ideas about sexuality and how they affected the self-ownership of the marginalised subject. To construct these tools, feminist activists simply attached the word 'sexual' to the pre-existing concepts of health and rights.[71] The promotion of sexual rights by focusing on sexual health is strategic in that it 'side-steps' engaging with 'progressive and conservative challenges around sexuality'.[72] However, it has been argued that this has also led to the limitation of sexual rights because popular human rights practice deploys rights on the basis of a violations model, as opposed to also focusing on 'positive rights to pleasure and enjoyment'.[73] Public silences about sexual health as pleasure and a focus on violations may be because of the highly-subjective nature of sexuality and the difficulties that would be encountered in articulating a right to pleasure in the form of law or policy.

The silence by the African Women's Protocol on the matter of sexual orientation presents a problem insofar as it fails to challenge 'hetero-hegemony' directly. However, a literal reading of the

64 V Reddy 'The queer politics of (homo)sexuality and matters of identity: Tentative notes in the context of HIV/AIDS' in Aggleton & Parker (n 37 above) 438.
65 General Comments (n 57 above).
66 General Comments para 21.
67 Para 22.
68 Para 23.
69 Para 24.
70 Corrêa *et al* (n 5 above) 113.
71 As above.
72 AM Miller 'Sexual but not reproductive: Exploring the junction and disjunction of sexual and reproductive rights' (2000) 4 *Health and Human Rights* 89.
73 J Horn 'Re-righting the sexual body' (2006) 6 *Feminist Africa* 8.

provisions of the Women's Protocol makes it difficult to deny the fact that the right to sexual health in the context of HIV/AIDS applies to *all* women, regardless of whether or not they comply to the essentialised construct of African womanhood. What the existence of the right to sexual health has meant for African WSW almost a decade after the enactment of the Protocol will be discussed in the forthcoming sections of this article

3 Methodology

The methodological framework used was a feminist virtual ethnography. This type of research is also referred to as internetnography[74] and ethnographies of cyber society.[75] Ethnography is a qualitative form of research that generally asks questions about social and cultural practices of groups, with the aim to gain an in-depth understanding of how individuals in different cultures and subcultures make sense of their lived reality.[76]

Lysloff[77] indicated how the internet could provide a new kind of materiality that has the potential to be the basis of a complex social network that can be interpreted as community. Ross[78] further argued that the internet provides the opportunity to grapple with one's sexuality in a way that was not previously available to marginalised sexualities, as it creates an additional stage to coming out with more assurance, namely, the possibility of online lurking which allows the chance to observe others' interactions and to reflect on one's own sexuality and desire. One can immerse oneself in aspects of the virtual culture, the language and practices, attitudes and beliefs, and try them out, so to speak, in a relatively safe environment before coming out in the 'real' world. Online networks can thus strengthen and reinvent community as it can serve to build bonds with the wider social world, whilst facilitating cultural empowerment.[79]

We spent on average two to four hours a day online as participant observers over a period of one year, and were guided by Abu-Lughod's[80] advice that ethnographies should ideally include an exploration of the tension between people's everyday experiences and the larger structures through which they are meant to make meaning

74 R Tapper 'Anthropology and (the) crisis' (2001) 17 *Anthropology Today* 13-16.

75 SG Jones (ed) *Cybersociety 2.0: Revisiting computer-mediated community and communication* (1998).

76 S Reinhars *Feminist methods in social research* (1992).

77 RTA Lysloff 'Musical community on the internet: An online ethnography' (2003) 18 *Cultural Anthropology* 233-63.

78 MW Ross 'Typing, doing, and being: Sexuality and the internet' (2005) 42 *The Journal of Sex Research* 349.

79 T Bosch 'Online coloured identities: A virtual ethnography' in A Hadland *et al* (eds) *Power, politics and identity in South African media. Selected seminar papers* (2008).

80 L Abu-Lughod 'Writing against culture' in RG Fox (ed) *Recapturing anthropology: Working in the present* (1991) 157-158.

of their lives as our focus in taking field notes, and over time revealed the prevalent norms and understandings in these spaces. Mbilinyi[81] argues that 'knowing is a complex process, heavily dependent on what questions are asked, what kind of knowledge is sought and the context in which cognition is undertaken'. This approach opened up an additional space to explore the meanings of non-heteronormative social media users' experiences, and helped to unpack and personify complicated and multifaceted realities being discussed.

Research questions were developed based on input from community members and adjusted according to comments received to assure that they adequately reflected the interest and concerns of participants. We also consulted with a medical doctor to ensure that the HIV/AIDS-related information we disseminated was correct. The urgency of medical consultation became clear when we realised that misinformation about risks related to WSW sex was widespread. To further gauge the discursive practices and ideas WSW held around the subject, we attempted to conduct focus group sessions, but these were largely unsuccessful. We realised that participants were far more likely to share experiences in anonymous online forums. To facilitate continued discussion, a version of this article will be published in the spaces we engaged with through this study to ensure a reflexive and on-going process.

3.1 Tools for analysis

Another area of focus has been to gain a greater understanding of the relationships between participants. Spending a lot of time on the site observing was extremely useful to gain knowledge on the particular group norms and understandings, and informed interpretations of identity performance.[82]

In addition to this, we also tried to be keenly aware of the different tools people adopt in their symbolic interactions with one another, including social languages, discourses, intertextuality and conversations.[83]

3.2 Data collection

Apart from closely following the discourses in the Facebook groups, Twitter conversations, African LGBTI-focused blogs, and microblogs (such as Tumblr), to arrive at a thick description; HOLAA! also ran parallel modes of data collection using the HOLAA! website,[84] to distribute a questionnaire comprised of a list of open-ended questions

81 M Mbilinyi 'Research methodologies in gender issues' in R Meena (ed) *Gender in South Africa* (1992).

82 L Kendall 'Recontextualising "cyberspace": Methodological considerations for online research' in S Jones (ed) *Doing internet research: Critical issues and methods for examining the net* (1999).

83 JP Gee *An introduction to discourse analysis: Theory and method* (2005).

84 http://www.holaafrica.org (accessed 31 October 2014).

that requested WSW on various social media platforms to anonymously share their experiences of HIV and STIs to be published as part of the 'HOLAA! Talks HIV & STIs' month of July. Over the study period, we were able to collect 54 completed questionnaires. Participants were also invited to send in material to be published on the site over the same period. The form was advertised on Facebook Groups for African LGBTI women as well as on the organisation's Twitter account. Through channels such as shares and retweets, the form managed to gain traction in diverse online spaces. Participants were from several countries, such as Namibia, Kenya, Zimbabwe, Nigeria and Ghana. However, the majority of respondents were South African, given the numerous active South African LGBTI groups in social media spaces. Nevertheless, the perceptions of WSW on the issue did not differ markedly among countries, which in itself is alarming when one considers that South Africa's democratic liberalism appears to have achieved little for the health rights of WSW. The majority of those who engaged in the online discussion stated that they were exclusively attracted to women or more attracted to women than men, whilst most reported to be sexually active. Relationship statuses varied from single to polyamorous. Information gathered from HOLAA! was difficult to disaggregate in terms of demographics because several stories were submitted anonymously. However, it was possible to get a broad perspective on the dominant discourse on HIV and STIs among LGBTI women in these online spaces.

4 Study limitations

It is essential to consider who defines research questions, because they influence the integrity and usefulness of findings, as well as individuals' willingness to participate freely and openly. However, in the process of doing the research for this article, we soon realised that research initiated from within a community is exceedingly hard to get into mainstream discussions, because acquiring the relevant ethical clearance to question people about their sexualities is prohibitively expensive for organisations such as HOLAA! that operate without funding. This is deeply worrying because research topics in the HIV/AIDS industry are indeed largely determined by donor organisations that appear to be mostly conservative and unsympathetic to the needs of WSW. It is therefore critical that avenues are created for people from affected communities to be the researchers and constructors of knowledge on their bodies and lived realities, rather than requiring an intermediary with money.

This study followed a snowball sampling approach, which raises questions about the representativeness of the sample, and additional studies following a more structured approach are therefore suggested. In addition, studies on internet users in the African context are scant, but 2013 statistics from Nielsen, a reputable South African research

company, indicate that internet users in the country are more likely to have tertiary education and a relatively high income compared to the general population, and the situation is likely to be the same in other African contexts.

Because of the relatively small size of this community, the effect may not be significant on the overall infection figures, but because the pandemic continues to disproportionally affect sub-Saharan Africa (approximately 70 per cent of all new HIV infections in 2012),[85] continuing to ignore it is probably ill-advised. This study's findings confirmed the findings of the 2013 UNAIDS report indicating that risky sexual behaviour is on the rise in several countries, such as Burkina Faso, Congo, Côte d'Ivoire, Ethiopia, Gabon, Guyana, Rwanda, South Africa, Uganda, Tanzania and Zimbabwe.

5 Data findings

Dominant discourses surrounding HIV and sexual health have managed to cloak issues pertaining to WSW in a silence that has facilitated a lack of information or the proliferation of misinformation. Since the 1990s, researchers[86] have highlighted the dearth of research on WSW transmission of HIV, and it is particularly worrying that our research, conducted 20 years later, still reflects similar findings to those encountered as early as 1992 that found that WSW demonstrate a lack of knowledge on safe(r) sex and HIV-preventative strategies.

This absence of a focus on WSW within HIV and STI programmes has allowed for the perception that WSW are less or not at risk of contracting STIs and HIV to proliferate within society, especially LGBTI communities. Few respondents indicated seeking and finding relevant information or care, indicating an extremely low level of adequate access to sexual health rights among participants.

During July 2013, HOLAA! published a blog post compilation of some of the anonymous submissions by African WSW on their experiences of HIV and STIs, which served as the most significant source for this study's data collection. Interactions of WSW were clearly outlined. One contributor to the post stated: 'We, myself and my queer lady friends, speak about it as something that doesn't happen to us.'[87] This quote was one that spoke to the experiences of other respondents, as this was reflected in various forms within other sources, including Facebook posts as well as within the compilation of anonymous submissions that were procured for the purposes of the aforementioned post. The data showed that 35 per cent of

85 UNAIDS Report on the global AIDS epidemic, November 2013 http://www.unAIDS.org (accessed 31 October 2014).

86 V Tallis 'Lesbians and AIDS' (1992) 15 *Agenda* 69.

87 Hub of Loving Action Africa (HOLAA!) 'HIV and me: African LGBTI women speak on HIV/AIDS Part 1' 11 July 2013 http://www.holaafrica.org (accessed 31 October 2014).

respondents felt that they were at risk of STIs and HIV which, coupled with the low risk at which they see themselves in terms of contracting HIV, shows how many felt they were at low levels of risk.

The idea of not having these conversations within the social space is reflected when one contributor stated that queer women viewed the issue 'at a distance'.[88] Another contributor mentioned: 'I guess you never feel anything for the disease or virus until you're hit with a very disturbing result that you too are infected.'[89] The reality that the matter was infrequently discussed widely within the female LGBTI community was repeatedly highlighted and several appeals were made for increased awareness.[90] Various respondents did state that they often did not speak on the issue (as seen in the above quotes), bypassing the idea as something that 'happened to other people'. Often women stated that they had not discussed the matter at length with their friends, and most indicated that information on safe sex practices and WSW was largely gathered from the internet and LBGTI organisations.[91]

5.1 HIV and same-sex couples

Knowledge on and participation in serotesting and safe(r) sex amongst couples were the exceptions among submitted narratives, although some did stress a strong focus on the need for safer practices and increased availability of relevant information and resources.

One narrative specifically described how a same-sex couple had tackled the issue of serodiscordance when a woman found out that her partner was HIV positive. The partner had disclosed her HIV status and the two proceeded to get tested together. The author tackled the issue of safe sex by stating: 'To be honest, I felt uncomfortable with having oral sex as we did not use protection (as usual).'[92] On Facebook, some level of engagement with safe sex was, however, evident, as some users mentioned getting tested often with their partners. One user stated: 'Safe sex is of utmost importance to me. I regularly get tested and make sure that whoever I'm having sex with is tested as well.'[93] When collating the responses, we found that 95 per cent of respondents stated that safe sex practices, which included testing, were important.

Nevertheless, several Facebook users indicated that they had engaged in sexual relations without considering safe sex or being tested. One claimed that she regarded asking a woman to be tested

88 HOLAA! 'HIV and me: African LGBTI women speak on HIV/AIDS Part 2' 12 July 2013 http://www.holaafrica.org (accessed 31 October 2014).

89 As above.

90 HOLAA! (n 87 above).

91 Anonymous 1 *Protected Facebook group 1*, March 2013 http://www.facebook.com.

92 Anonymous 'My girlfriend is HIV+ but we fight through' 18 July 2013 http://www.holaafrica.org (accessed 31 October 2014).

93 HOLAA! (n 88 above).

or to use protection as a form of 'disrespect'.[94] Disturbingly, the most prevalent narrative was that WSW who engaged in risky sexual behaviour did so because they had 'not thought' about the consequences of such behaviour, or that safety was of no concern in 'the heat of the moment'.[95]

5.2 Prejudice, sexual identity and infection

Several participants indicated their reluctance to be tested and/or to discuss safer sex or their health status because of the perception that 'real' lesbians should be unable to contract sexually-transmitted diseases. These responses, once again, highlighted the oppressive power of the dominant perceptions that WSW sex is not 'real' sex, the erasure and vilification of bisexual individuals in LGBTI circles as somehow more promiscuous and thus dangerous, as well as the lack of safe spaces and support to discuss experiences of sexual violence and rape. A contributor stated that 'it is very sad how lesbians contract these kinds of diseases and yes, there is a lot of discrimination for people living with HIV or STIs'.[96]

Another woman acknowledged:[97]

> Speaking out can be an issue as there is a big stigma in this community. Questions will be asked if you are really a lesbian or bisexual … The fear of being outcast [means] you die in silence.

In the story entitled 'Choosing life', the author recounted how lesbians could be excommunicated from the community if they came out as HIV positive.[98] She pleaded[99]

> to all the lesbians out there who are living with the virus and feel there is no one to talk because you are scared [of] how your fellow lesbians will take your HIV status, you are not alone but the key is to live a positive lifestyle. To all the lesbians, please stop judging us, we are living with the virus.

This notion was one that was also held by a number of other respondents, with some stating that one's sexual orientation would be questioned if they stated that they had the virus. These responses encapsulated the heightened prejudice within the WSW community and reflected that a substantial part of sexual identities are tied to sexual practices.

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94 South African lesbian group 2013 http://www.facebook.com.

95 Anonymous 2 *Protected Facebook group 1*, March 2013 http://www.facebook.com.

96 HOLAA! (n 88 above).

97 As above.

98 Lihle 'Choosing life: Getting tested and dealing with the results' 1 July 2013 http://www.holaafrica.org (accessed 31 October 2014).

99 As above.

5.3 Health workers

The collected data on experiences within the health sector mirrored literature on the subject, indicating that sexual orientation and gender non-conformity greatly affected an individual's ability to access health care and the quality of information received. This often resulted in two unfortunate effects: discomfort with revealing one's sexual orientation, and the consequent absence of information or the provision of inadequate information within the healthcare realm. Good practice when dealing with LGBTI clients includes neither avoiding sexual orientation issues, nor focusing solely on them when the client does not see it as pertinent to their problem. Inappropriate practice includes assuming that a client is heterosexual, indicating that a gay or lesbian identity is bad or inferior, and a lack of knowledge on issues of concern to LGBTI clients.[100] The shortcomings of the healthcare system were summarised by a participant who acknowledged: 'There is a lot of prejudice, I feel. And in the absence of this, there is a lot of misinformation.'[101] Of the respondents, 40 per cent stated that they had received their information from a clinic, with the majority seeking information either from the internet, an organisation or through friends. This showed that the healthcare system was not a place in which people could source information.

The limited protection of LGBTI people's confidentiality and rights to medical privacy is a critical and under-addressed concern. Participants in this study indicated pervasive heterosexism throughout their experiences with seeking health care. Discomfort was a common thread in the online narratives. One Facebook user claimed feeling 'nervous and scared' about being open about their sexuality.[102] Another stated that when they had engaged with a healthcare worker in Ghana, it had been 'really awkward'.[103] She further asserted that her confidence helped her to obtain decent treatment, but had she been 'shy', she felt they would have 'preached' to her. She explains:[104]

> I went after a non-consensual sex encounter with an ex-boyfriend but I didn't feel comfortable enough to tell the doctor, so I just told her he had infected me and she advised me to continue to stay in the relationship with him as that would be best.

100 American Psychological Association (APA) 'Guidelines for psychotherapy with lesbian, gay and bisexual clients' (2000) http://www.apa.org (accessed 31 October 2014).; BJ Liddle 'Therapist sexual orientation, gender, and counselling practices as they relate to ratings of helpfulness by gay and lesbian clients' (1996) 43 *Journal of Counselling Psychology* 394-401.

101 Respondent 1, African lesbian group, Facebook April 2013 http://www.facebook.com.

102 Respondent 1, Closed lesbian Facebook group, April 2013 http://www.facebook.com.

103 Respondent 1, African against homophobia Facebook group, March 2013 http://www. facebook.com.

104 As above.

She stated that there was continuous heteronormative rhetoric during the visit, as the sisters who helped her with her birth control needs asked her when she was to marry and advised her to stop taking birth control. This was a sentiment echoed by others across numerous groups, with some stating that experiences centred on ideas of heterosexual rituals and practices.

The common thread was that they had felt some degree of discomfort during their visits to healthcare facilities, with many choosing not to disclose their sexual orientation, fearing the reaction or merely finding it difficult to. Several also stated that their sexual orientation was not taken into account during their visit. One respondent spoke on how a health worker testing her for HIV had refused to recognise her relationship with her girlfriend and therefore refused to test them as a couple.[105] Of those respondents who spoke on their interaction with healthcare professionals, the majority spoke about the inability to engage with these issues within their communities due to the homophobic nature. Some had, however, reported having a positive experience with a healthcare worker, but this was in the private health sector.[106]

Another issue was the lack of information within the healthcare sector. Of those who had approached healthcare workers, few stated that they felt they had been well informed about their safe(r) sex needs.[107] Many felt that the questions they had been asked had not catered to their specific needs and the information that had been provided had been inadequate. One Facebook group member spoke to the ease at which she had managed to approach a local LGBTI organisation, having got very little help from her local general practitioner.[108] Another user stated that her interaction with the healthcare worker had been fine; however, she felt that knowledge on the sexual health needs of same-sex practising women was lacking.[109] Members of various groups felt that safe sex strategies spoke more towards heterosexual relationships, as most of them said that they were aware of 'straight safe sex strategies'. From the research we found that 79 per cent of those who responded on their experiences found that this information was not available to them through the healthcare system.

The dual nature of discomfort, misinformation and/or a lack of information have led some to refrain from visiting healthcare practitioners, and a certain 'anti-health practitioner' rhetoric has developed within communities.

105 Respondent 1, Friends of open closet April 2013 http://www.facebook.com.
106 Respondent 1, South African lesbians (SALES) April 2013 http://www.facebook.com.
107 Respondent 2, Closed Facebook group April 2013 http://www.facebook.com.
108 Respondent 1, Lesbians of the Western Cape April 2013 http://www.facebook.com.
109 African against homophobia Facebook group (n 103 above).

5.4 Misinformation meets no information: Effects on healthcare practices

One Namibian participant indicated that the taboo surrounding same-sex relationships amplified the stigma for those who sought WSW sexual protection measures.[110] Another noted that there were no targeted campaigns dealing with 'lesbian issues',[111] and this has led to high levels of misinformation about how HIV truly affects WSW. The idea of having no access to information was echoed when 46 per cent of respondents stated that they did not know where to get this information, having no knowledge of organisations that gave information or barrier methods. Of the ones who did have *some* access to information, they found that it was mainly over the internet, with 61 per cent saying that they got the information from the internet.

5.5 High-risk persons

This troubling phenomenon is encapsulated in the words of one woman from the HIV & Me HOLAA! post in which she says: 'I always thought we were the low-risk, especially me. I'm butch, never been with a guy.'[112] This speaks to a sentiment that came up repeatedly, that WSW hid themselves 'behind a false wall of protection'.[113] The idea of lesbian immunity is also prevalent within heterosexual communities. One woman confirmed that an HIV status would put one's sexual identity under suspicion when she said: 'Families will wonder: Why is she infected? Isn't she a lesbian?'[114] The lesbian immunity myth is reflected in the fact that 61 per cent of respondents identified bisexual women as forming part of the groups identified as being most at risk of contracting HIV as they interacted with men more. Furthermore, only 22 per cent of respondents stated that that lesbians fell under the label of 'high-risk group'. Most stated that heterosexual men and women, homosexual men and bisexual women were those who needed to be wary of HIV and STIs.

6 Data analysis

As the intensity of the HIV crisis has grown, public health campaigns have framed issues surrounding sexuality within discourses of rights and empowerment, which have heightened the profile of violent sex, and opened up spaces for public debates on performances of masculinity that are defined by violence. Recently, the focus has been overtly on what has problematically been termed 'corrective rape of

110 South African lesbians (n 106 above).
111 African against homophobia Facebook group (n 103 above).
112 As above.
113 As above.
114 As above.

lesbians'. However, at the same time, health discourses have also framed women who have sex with women as a low-risk group and, therefore, given the scale of the problem, very little attention has been paid to the risks faced by these women in public health campaigns.[115] In the contexts that form part of our study, homosexual bodies and practices are stigmatised, and it appears that, because women view themselves as not at risk of HIV and other STIs and highly at risk everywhere else, they are willing to regularly engage in risky practices. Despite being generally well-informed about the general risks, they do not feel that it is particularly relevant to their lives, or that sex itself is the one area where they need to worry about consequences. It could also be that they are well aware of the fact that they may be at risk or even infected, but are very reluctant to disclose this fact because it might expose them as not being 'real lesbians'. Furthermore, the high rates of sexual violence against lesbians and gender non-conforming women could further exacerbate HIV infection within this group.[116]

To understand how an individual's understanding of sexuality can be affected by hegemonic discourse, one has to problematise the idea of sexuality as something that is strictly innate and subjective and beyond the reach of social power dynamics. The HIV pandemic in Africa has been used to support the notion of a monolithic African sexuality,[117] resulting in the exoticisation of same-sex sexual practices. Particularly striking was the reference made to the differential risk between the 'sexual activities' of WSW and 'actual sex'. This construction of lesbian sex as 'play' reflects a trivialisation of female same-sex eroticism and implies an acceptance of the inherent social instability of this sub-group. It has been argued[118] that this construction of same-sex sexual activity as 'sex games', in relation to the perceived more authentic and serious act of heterosexual reproductive sexual practice, is something which is embedded within African cultural understandings of sexuality. In this context, this trivialisation works in the same way as silencing, in that it implies a taboo and undesirability, and perpetuates prejudice.

If one understands sexualities as 'emergent'[119] because the related meanings are continuously created and contested in the public space and within sub-communities, the most powerful influences on human sexuality are social norms.[120] Governmental discourses promote

115 M Mbali 'Gay AIDS activism in South Africa prior to 1994' in Reddy *et al* (n 4 above); I Meyer & ME Northridge (eds) *The health of sexual minorities: Public health perspectives on lesbian, gay, bisexual, and transgender populations* (2007).

116 Reddy *et al* (n 4 above); Wells & Polders (n 62 above).

117 M Epprecht *Heterosexual Africa? The history of an idea from the age of exploration to the age of AIDS* (2008).

118 As above.

119 Reddy (n 64 above).

120 S Kippax 'Safe sex: It's not as simple as ABC' in Aggleton & Parker (n 37 above) 184-192.

compulsory heterosexuality and further reinforce it through sub-regional and national strategic plans and policies, for example, the 2010-2015 SADC strategic plan.[121] It is therefore not surprising that those whose realities did not conform to this norm viewed HIV 'at a distance'.

References to 'heterosexual transmission' reflect a biomedical understanding of the sexual experience, which assumes that sexual desire, behaviour and identity all move in the same direction.[122] This has resulted in people with alternative sexualities viewing their identities as a safeguard against any and all STIs, including HIV.

6.1 Locating WSW in the HIV pandemic

The manner in which WSW locate themselves regarding HIV is multipronged. First, the false perception of 'lesbian immunity' to HIV[123] means that women affected by the virus are forced into a second closet because, as stated by one participant, 'speaking out can be an issue as there is a big stigma'. Therefore, biphobia tend to be widespread in this community because they are perceived to threaten lesbians' immunity from the disease.[124] However, several women who identify as lesbian indicated that the group was far from homogenous, and 'many … sleep with men … and engage in other risky sexual behaviour'.

Second, the assumption that sexual identity predicts sexual behaviour influences safer sex negotiations.

Third, a fear of marginalisation affects women's perceptions of safe(r) sex and the spaces where it is discussed. In this study, some safer sexual practices involved some or other level of behavioural modification. In some cases, this meant 'regularly get[ting] tested' and also ensuring that one knows the serostatus of one's partner, while in others it meant serosorting on the basis of perceived risk. There was, however, no correlation established between a knowledge of one's own serostatus and that of one's partner and the practice of safer sex. This is reflected most clearly in the anecdote relayed by a woman in a serodiscordant relationship, where the state of affairs made her feel 'uncomfortable with having oral sex'. However, she and her partner did not cease to engage in this activity, nor did they 'use protection'.[125] In another anecdote from a serodiscordant couple; the

121 Southern African Development Community (SADC) 2010-2015 *HIV and AIDS Strategic Framework* 2.1.

122 Corrêa *et al* (n 5 above) 135.

123 J Power *et al* 'Absent sexual scripts: Lesbian and bisexual women's knowledge, attitudes and action regarding safer sex and sexual health information' (2009) 11 *Culture, Health and Sexuality: An International Journal for Research, Intervention and Care* 67-81.

124 D Richardson 'Constructing sexual citizenship: Theorising sexual rights' (2000) 20 *Critical Social Policy* 105-135.

125 Protected Facebook group 1 (n 91 above).

seropositive woman wrote of her struggles with a seronegative partner who 'does not see the point of using protection'.

Another statement on the site was:[126]

> [i]f only everybody can make it a habit of visiting a doctor on a yearly basis and the VCT clinic occasionally. Knowing one's status is very important. Me and my partner always go to VCT every three months and this has helped a lot as I have become her best friend and alarm at the same time.

Matters of sexual health were deemed to be important, even by those within monogamous relationships, with some going for regular testing, thus realising that they too could be infected with HIV. However, and far more prominently, a pattern of 'not testing' was evident in the data, as reflected in the following statement: 'I have had sex with people before getting tested and don't think twice about it.'[127] Another lamented the lack of information amongst her peers, saying: 'In my experience, queer women are the most complacent and their general knowledge of STIs is dismal.'[128]

The data also revealed a hierarchy of testing, with far fewer people indicating taking STI tests than for HIV.

The reckless abandon, which appears to underpin lesbian and bisexual women's sexual practices, may reflect a form of resistance to the sexual hierarchies that exist within society. These hierarchies normatively assess sexual identities, behaviour and practices in an attempt to regulate whose sexuality can be portrayed as publicly acceptable.[129] Therefore, resisting the public, even if it is through mechanisms that are aimed at the reduction of the risk of transmission of HIV and STIs, WSW can be seen as engaging in attempts to 'normalise'.

Nevertheless, WSW do recognise their own risk, but in disorganised ways. Denial and ignorance work together in lethal ways to undermine the sexual health rights of WSW. The African Women's Protocol recognises the rights to equality, information and education and dignity as some fundamental determinants of the realisation of 'self-protection' rights to sexual health. However, the fundamental conditions for the realisation of the right to sexual health are interpreted as being dependent on the enabling socio-cultural environment that the state creates. The easiest way to determine the extent to which sexual health rights truly exist is an evaluation of the relationship WSW have with the public health system and how that affects their ability to access information related to safer sexual practices and health care when it is required.

126 HOLAA! (n 87 above).
127 HOLAA! (n 88 above).
128 As above.
129 Corrêa *et al* (n 5 above).

6.2 Locating WSW in health care

More than 50 per cent of participants have not visited a health clinic or consulted with a healthcare worker on sexual health. This sense of alienation from the public health system is directly correlated with the heterosexism women experience when they seek medical advice, which is compounded by the fact that health workers lack the necessary training to deal with the sexual health concerns of WSW.[130]

Considering these data in relation to the African Charter or those to sexual health under the African Women's Protocol, it is clear that a lack of information prevents WSW from accessing sexual health rights. However, advocating sexual rights for WSW on the basis of these violations and deprivations may not be an optimal response, particularly because of the protracted processes of state mechanisms. Therefore, the importance of emphasising positive sexual rights cannot be underestimated, because the preservation of hegemonic gender norms and order is regularly used to control and eliminate content that is seen to go against traditional values, particularly those that relate to the family, and women's roles. A focus on positive rights also has the effect of de-stigmatising alternative sexualities, and helps to call into question and challenge inimical discourses in the mainstream media, for instance, the deeply-troubling and persistent use of problematic language, such as the term 'corrective rape'.

Current public health practice limits the ability of this group to construct innovative and self-generated responses to HIV in the context of social positioning because of systematic deprivation of information. For WSW to exercise their agency and develop a set of negotiated practices that will act as 'community'-generated guidelines as to how risk will be mitigated, they must have access to information about sexual health risks and needs. Kippax[131] argues that prevention information is actively appropriated through talk and collective action, and it is this process that enables the construction of lasting and appropriate strategies to address the pandemic. However, WSW cannot 'self-protect' if states are not acting in ways to ensure that they are 'protected from' heterosexist discrimination and absent scripts about their lives, wants and needs.

7 Summary

The HIV pandemic clearly affects the lives of WSW. Within the African regional system, the right to sexual health has been provided for bar any consideration of a woman's marital status. While sexual orientation is not explicitly recognised as a ground for non-discrimination within the African system, the African Women's Protocol is understood to apply to *all* women. However, in spite of

130 Tallis (n 4 above).
131 Kippax (n 120 above).

these guarantees, our study showed that WSW had limited access to information packages that catered to their sexual health needs. This was particularly apparent in the anecdotes women shared about their experiences with healthcare practitioners and their perceptions of the healthcare system, and the fact that predominant discourses around HIV exclude WSW.

Participants who had discovered information about HIV/AIDS admitted to having done so through the internet and/or LBGTI-oriented organisations. The utility of the 'web space' in facilitating discussion between marginalised social actors and the dissemination of information has been illustrated by the findings of this study. However, this does not detract from the fact that queer female sexualities have been driven underground by silence. This *lacuna* in public health discourse has led to the perpetuation of the idea of 'lesbian immunity' in Sapphic spaces. This has resulted in both individual and community-level denial. This 'denialist' phenomenon is expressed most acutely by the disjuncture between professed knowledge of HIV/AIDS and the need for safer sex, and the ways in which women enact their sexual practices (which are often unsafe and based on unverifiable information).

The article has highlighted the importance of access to accurate, widely-available and relevant sexual health information, for the realisation of the right to sexual health. Although the article examines this in the context of WSW, it can be said to apply to all vulnerable women (for instance, sex workers). The creation of effective strategies for the mitigation of the pandemic can only come from collaboration between the public health system and affected communities, through the ways in which communities will interpret the available information and create their own set of prevention ethics. In order for this to occur, there has to be information, otherwise people at the margins of what is considered sexually 'good' will continue to be silenced into insignificance and therefore vulnerability to HIV.

8 Recommendations

Africa is in a unique position because the African Women's Protocol represents the first instance of the codification of the rights of women with respect to HIV and AIDS. This allows for the space to set global precedent in terms of tackling the notion of entrenching the rights of marginalised women within the realm, especially WSW.

Although the Women's Protocol has been ratified by most African states, the degree to which it is domesticated within these states will affect how effective it is, particularly for WSW who have little or no legal rights protection, let alone equitable access to health care. The manner in which the Women's Protocol will be applied largely depends upon the extent to which domestic courts are willing to integrate and utilise regional treaties to impact their laws and shape their policies. The impact of African regional mechanisms has been

extremely limited within domestic systems, which reveals that the African system 'has hardly made a dent',[132] and also pointing out the Europhilia of certain jurisdictions – which sees them readily applying international law over regional law.[133]

Another challenge is the Women's Protocol's explicit reference to sexual rights. It has been noted that, while African states were among the most ardent supporters of the language of sexual rights, during the Fourth World Conference on the Rights of Women, they also resisted the implications of these rights for sexual minorities.[134] Therefore, the manner in which the courts interpret the meaning of the provisions will determine how effective the Protocol would be. However, due to the universal and plain meaning of the word 'woman', it is clear that even the most formalist and literal approach cannot justify the deprivation of the rights of WSW. Therefore, questions will most likely turn on the definition of 'sex' and 'sexual'. It has already been outlined that predominant thinking does not view female same-sex sexual activity as sex *per se*, and this may influence how the courts interpret the provisions. This will especially be the case in states where same-sex consensual conduct is criminalised on the basis that it is 'unnatural carnal knowledge'.

Due to the highly-political nature of judicial decision making,[135] it remains doubtful that judiciaries in Africa will utilise the African Women's Protocol in order to guarantee the rights of WSW – particularly because of its inherent heteronormativity. Therefore, the Protocol is, arguably, most effective as a tool for activist mobilising, particularly when it comes to receiving research grants that will allow for increased research into the field and allow for the collection of significant information about WSW sexual practices, perceptions and seroprevalance.

The idea of utilising the African Women's Protocol as a means of activating awareness surrounding the rights of WSW should be coupled with the idea that the document itself be used as a framework on which these rights can be built. The activism and awareness building should seek to focus on the gaping holes present within various realms of knowledge, namely, within the healthcare sector as well as within communities. Once these are identified, they should seek to be enshrined within the Women's Protocol. Those seeking to ensure that WSW find a suitable space within the human rights health-based framework must ensure that these barriers are dealt with, as the proliferation of information is extremely important

132 J Oloka-Onyango 'Human rights and sustainable development in contemporary Africa: A new dawn, or retreating horizons?' (2000) 6 *Buffalo Human Rights Law Review* 39.

133 OC Okafor *The African human rights system:, Activism, forces, and international institutions* (2007).

134 Plummer (n 37 above).

135 P Lenta 'Constitutional interpretation and the rule of law' (2005) 16 *Stellenbosch Law Review* 272.

in making sure rights are realised. It is pertinent that advocacy efforts and, eventually, any influencing and changing of the African Women's Protocol will need to address this gap in knowledge, research and access to information.

Web 2.0 technologies are well suited to advocacy and political organisation, and are often used by activists to make connections, as they enable discussions on easily-accessible platforms that allow these discussions to become more visible and available to a greater audience of people. In countries with regressive gender systems, where certain topics – certainly alternative sexualities – are regarded as taboo, a democratic deficit is created, and those who are discriminated against can either take a passive accepting stance, or create parallel spaces for participation to build up the kind of social capital needed to address the hostility of their immediate environment.[136]

The internet space should, whilst being used as a tool for activism to further these rights, also be used as a means of ensuring that persons within communities potentially enjoy these rights by providing a platform of information. The sharing of information can bolster the work done by organisations in seeking to protect the rights of WSW when it comes to HIV and STIs. As misinformation or no information is a huge barrier to enjoying these rights, the online space can go a long way towards correcting this problem.

Furthermore, we found that young African women who do not subscribe to the hetero-norm use Web 2.0 tools to create a large number of extremely active groups where gender/sexuality topics are (often heatedly) discussed. In addition, these tools are used to organise offline social events, such as poetry events, parties and panel discussions. Organisations like HOLAA!, Inkanyiso, Buwa, CAL Secretariat, LEGABIBO, and the One in Nine campaign have been quite successful at using these tools to garner support and mobilise their members to take action against discrimination.

These tools are, however, not only used for advocacy and promotions against discrimination and violence, as several of the blogs, Facebook groups or pages and conversations on Twitter placed a lot of emphasis on positive sexuality rights. This goes against the usual trend of debates on sexuality rights that tend to focus mostly on negative sexuality rights, such as curbing exploitative pornography, the protection of children from harmful content, and female genital mutilation. The 'publicness' of these spaces is critical because it allows for these stories and contestations to count in a public way, and for community members to determine the course of discussions.

Because non-heteronormative people appear to be particularly active in social media spaces, with relevant groups rapidly

136 E Iskander 'Connecting the national and the virtual: Can Facebook activism remain relevant after Egypt's January 25 uprising?' (2011) 5 *International Journal of Communication*.

proliferating,[137] the potential to base behavioural interventions to reduce sexual risk behaviour and avert STIs and HIV seems substantial. A major benefit is that it allows users to create and publish content, share their experiences, build knowledge commons, and communities of practice around particular subjects.[138] This will seek to counter the problems of misinformation and the lack of information that hinders the enjoyment of rights.

The findings of this study suggest that, because the use of social media in Africa is increasing at an astonishing rate, this could provide an extremely effective and also cost-effective avenue to host much-needed social behaviour campaigns that can nurture subcultures of safety for marginalised groups who tend to gravitate to online space, because they feel unsafe offline. It further suggests that harmful information can also be reproduced at an alarming rate, as many seek to enter these spaces to seek advice that is not readily available elsewhere.

The article therefore bases its recommendations on the need to fill the information gap in order to bolster the realisation of rights. It recommends that activists use the online space as a means of pushing for the inclusion of WSW within the African healthcare rights realm, most specifically the African Women's Protocol. Online (and other) spaces should seek to further the idea that WSW should form a part of the conversation surrounding HIV and STIs in order to ensure that they enjoy the same protection enjoyed by other groups.

One focus of this advocacy should be on the lack of information that hinders the physical enjoyment of these rights, whilst also focusing on the lack of rights within the framework in general. The problem of the misinformation or lack of information should be identified as a barrier within society and the healthcare system. Advocacy for the formulation and further development of a rights-based document should seek to address this problem of misinformation and lack of information. It should be ensured that knowledge production and proliferation form an integral part of any initiatives surrounding WSW and HIV and STIs, as these form a part of the foundation on which people can base their enjoyment of rights.

Furthermore, it recommends the creation of numerous online spaces in which WSW can specifically discuss these matters within the African context. In addition to this, activists and feminist lawyers should be informed about the ways in which the Women's Protocol can aid in the furtherance of the health rights of WSW, as this would encourage them to integrate its provisions in their respective mobilisation and litigation strategies. Furthermore, this space can and should be supplemented by open-access research into matters

137 C Antonites & K Mugo '#FillThisSpaceIfYouAreAnAfricanWoman' (2014) 28 *Agenda*.

138 C Lampe *et al* 'Familiar Face(book): Profile elements as signals in an online social network' in *Proc CHI* (2007).

pertaining to WSW, produced within the medical and academic spheres. These spaces should be accessible and safe, ensuring anonymity, and should be linked to social media platforms, especially Facebook, which prove the most popular.

The creation of various spaces can eventually be brought together in a 'hub' that could act as a portal to information. We also recommend further research into matters producing knowledge that is easily accessible to these communities through these various online spaces. The creation of Facebook pages, Twitter accounts and a website on HIV/AIDS and STIs that speaks specifically to the needs of WSW within the African context can prove a powerful tool towards empowerment in terms of sexual reproductive rights, allowing them better access on the continent.

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Recent Publications

Sonia Cardenas *The chains of justice. The global rise of state institutions for human rights*

University of Pennsylvania Press (2014) 482 pages

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Since their formal creation in the 1940s, national human rights institutions (NHRIs) have moved very rapidly from the fringes to occupy a prominent space in human rights discourse. International human rights standards are important for securing and sustaining human dignity and, therefore, need to find concrete expression at the domestic level to be relevant. This goal inspired the United Nations (UN) to encourage states to consider the desirability of establishing NHRIs to advance the domestic promotion and protection of human rights. The desire of the UN in this regard has since been realised with the global proliferation of these institutions. The story about the emergence and remarkable diffusion of NHRIs across the globe is what Cardenas relays in her book *Chains of justice. The global rise of state institutions for human rights*.

Although the literature on NHRIs is impressive, Cardenas asserts that these institutions are still very much understudied. As an addition to the existing literature, Cardenas blends historical and legal perspectives to provide a highly informative account of the origin of NHRIs and the factors that influence states to concede to establishing these institutions even if they do not believe in their necessity. Therefore, for Cardenas, in addition to unravelling the intricate motives behind the creation of NHRIs by states in the face of widespread and continuing violations of human rights, the book seeks to fulfil three basic objectives: to offer a new perspective into the origins and influence of NHRIs; to instigate critical reflections about these institutions; as well as to contribute to the expanding discourse and debates on 'human rights, global diffusion, and state institutions'.

The book, which consists of 11 chapters, can be divided into three broad parts. The first part, which consists of the first four chapters, discusses the historiography of NHRIs, including their origin, design

and the motivations that influence states to create NHRIs. The second part, which spans the fifth to ninth chapters, presents specific case studies on trends of diffusion of NHRIs in different geographical regions, including Africa, the Americas, the Asia Pacific, as well as Europe. The third part, consisting of the last two chapters, digresses from the established central theme to consider practical criteria for assessing the effectiveness of NHRIs.

Cardenas starts off by depicting NHRIs as 'chains of justice' to signify and underscore their strategic importance as institutional mechanisms through which ordinary people can realise their quest for social justice and human rights from the state. However, she also posits that 'chains that connect can also be shackles of oppression', implying that NHRIs can be hurdles in the way of the effective realisation of human rights, especially when they are inactive or even become aligned with the state as instruments for social control in a democratic disguise. The book's dominant theme centers around the basic question: Why would states of every description, including the ones with poor human rights records, accede to the creation of NHRIs? Cardenas raises three puzzles from which she conceptualises basic answers to this question. She presents elaborate arguments on the historical, social, legal and political interplays or tendencies that inspire or influence states to voluntarily subject themselves to horizontal accountability through the creation of NHRIs within the logic of self-restraining states. The puzzles, which revolve around the concepts of institutional creation, institutional design and institutional influence, constitute the core of her critical exposition in the book.

Taking on the first issue of institutional creation, Cardenas takes the reader along a journey in time and space. She traces the evolution of NHRIs, from the period immediately after World War II to the present, and argues that it took over four decades, from the 1940s, for NHRIs to evolve from an emerging norm before crystallising in the 1960s. The Paris Principles were adopted in the 1990s as minimum standards to regulate the establishment and operation of these institutions. Since then, she concludes that NHRIS have not only diffused globally, but have further consolidated to what and where they are presently as free-standing agents in the international human rights system. However, she also adds nuances to the historical narrative with the argument that the concept of NHRIs is not an altogether original one, but mutations of other institutions that not only predate their existence, but also shape their design and functions. In this regard, she considers ombudsman agencies, government enquiry commissions, interracial bodies of the United States of America and international human rights institutions, such as the UN Human Rights Council, as the pathfinders or precursors to the NHRIs model.

Turning to the basic question regarding the reasons why states create NHRIs, Cardenas first uses the Roman god, Janus, as a metaphor to deconstruct the motivation of states and their hypocritical attitude towards human rights generally before advancing

three factors crafted under an ideological template that stands out as common reasons for the creation of NHRIs across the world. She contends that states are by their very nature 'Janus-faced' when it comes to the promotion and protection of human rights, being both preservers and violators of human rights. However, states do face periods of 'norm ambiguities', where the gap between international human rights standards and their human rights records and practices create serious tensions that call their human rights commitment into question. This ultimately compels them to create NHRIs, either by voluntary action or through pressure from existing norm diffusing agents. She argues that the three norm ambiguities that inexorably lead to the creation of NHRIs are the following: during times when states are making or designing new constitutions or post-conflict peace agreements (regulatory moments); when states are acting in response to or in compliance with external treaty obligations; and during periods of systemic abuse of human rights that make the appeasement of local and international critics highly desirable. Cardenas insinuates that the creation of most, if not all, of the existing NHRIs across the globe is causally linked to the influence of at least one of these three factors of normative ambiguity, a proposition she proceeds to prove, and convincingly too, with a descriptive, analytical and empirical analysis in the chapters on regional case studies.

While focusing on the reasons for the global diffusion of NHRIs, Cardenas again posits that this is a product of 'strategic emulation', whereby states strive to retain regulatory authority and power through appropriate institutional mechanisms that suit their strategic and social circumstances which, in this case, are NHRIs. Strategic emulation, she emphasises, 'is a fact of international and political life, no more, no less'. As a deliberate effort to establish this point, Cardenas extensively reviews the evolutionary history of NHRIs in over 159 countries, including countries that are still resisting the pressure to establish these institutions. She identifies regional trends in and the incentives for institutional creation and design, as well as the identifiable patterns of diffusion across time and space.

Interestingly, as the reader rambles through the numerous arguments the book offers on the interconnectivity between the concept of strategic emulation and the global diffusion of NHRIs, he or she is introduced to new vocabularies or even new forms for categorising NHRIs, such as trendsetters; early adopters; NHRIs created during regulatory moments; NHRIs motivated by appeasements; peace or post-conflict agreements; millennial leaders; latecomers; reluctant institutionalists; and rejectionist states. Apart from reinforcing the truth in some of the existing narratives on these institutions, the regional case studies reveal unchained thinking on theoretical assumptions that are often taken for granted. For instance, Cardenas discloses for the first time that the Republic of Benin was the first country in 1970 to establish a NHRI in Africa, a position and an achievement hitherto ascribed to Togo in some of the existing literature.

The book's penultimate chapter contributes ingeniously to the debate on assessing the effectiveness of NHRIs. Most often scholars have no clear parameters for assessing the performance of particular NHRIs and thus rush to conclusions that are not evidence-based. For instance, for some commentators, an NHRI is ineffective simply because it is not seen to be highly critical of the state or it is deficient in some relevant aspects of the Paris Principles. As Cardenas convincingly argues, an assessment of the effectiveness of NHRIs that does not focus on what they have done or are doing to achieve their basic purpose is incomplete. Since effectiveness is a measure of outcome and possible impact, it sounds more appropriate, as Cardenas proposes, to conceptualise the effectiveness of NHRIs in terms of their functions and in relation to each of the multiple activities they undertake across the various stages of accountability. This situation is dependent on the constancy of other important dynamics, such as institutional leadership, resource availability, institutional accessibility, and the domestic legal status of human rights. As she argues, expecting systemic impact to result directly from the individual complaints that they resolve is more often a losing proposition just as too much responsibilities could lead to unintended disappointments.

On balance, in *The chains of justice*, Cardenas achieves her objectives. Arguably, while there are several accounts of the historical origin, development and diffusion of NHRIs, none is as clearly and comprehensively penetrating as *The chains of justice*. Apart from being highly enlightening, the book, in my view, shapes and enlivens intellectual discourse on many issues in relation to NHRIs, including the reasons behind their global diffusion and why states create particular types of institutions to suit their social and political circumstances, even though NHRIs generally look the same in institutional design and functions. As well as the originality of the ideas she espouses, Cardenas's other strong points are in the depth of her research, the sheer volume of empirical evidence she uses to support her narratives and the simplicity of presentation that makes the book an interesting read for anyone in multi-disciplinary studies interested in a historical account of NHRIs. Arguably, some of the 'new' issues and arguments the book elaborately advances are not only thought-provoking but, as she predicted, will continue to generate further interest and scholarship for some time to come.

However, like every other good book, there are deficiencies that need to be corrected in subsequent editions. Certainly, the claim on page 35 of the book that Africa has only 28 NHRIs as of 2014 is not correct. Presently, Africa has over 40 NHRIs, which the case study on Africa (chapter five) correctly captures. Also NHRIs are presented on page 65 of the book as institutions created to 'implement' international human rights standards domestically. It is my humble view that this is contentious. Arguably, NHRIs do not bear any responsibility to implement human rights. Besides a lack of institutional capability, the legal duty to implement human rights

rests, inextricably, with states and not with NHRIs. The principal responsibility of NHRIs is to advance, facilitate or assist the state to implement human rights.

Furthermore, the description on page 71 of the book of NHRIs as 'principal' or 'agent' in relation to their composite mandate to protect and promote human rights, respectively, is confusing. The confusion is especially glaring when the social or legal perspective into which the principal and agency relationship feeds is not explained but left to the reader to figure out. Thus, there is a need to provide further explanations to clarify how, and in what way, NHRIs can play roles, either as 'principals' or as 'agents' in relation to the nature or type of function they perform.

Still further, on page 360 the book raises a fundamental point that NHRIs are not doing enough to challenge the material conditions that perpetuate social and economic injustice across the world, but unsatisfactorily terminates the argument on it in a few lines. The role of NHRIs in advancing states' accountability for social and economic rights implementation is a contemporary issue that deserves fuller consideration in a book of this nature.

Overall, *Chains of justice. The global rise of state institutions for human rights* is a very comprehensive, well-researched and valuable book that fills a gap in the existing literature on the evolution, creation and global diffusion of NHRIs. No doubt, the book will be very useful to a variety of readers, especially those interested in the history, and the role and relevance of NHRIs, such as human rights scholars, practitioners, professionals and students.

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- Use UK English.
- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN)
- Words such as 'article' and 'section' are written out in full in the text.
- Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; secs. No full stops should be used. Words in a foreign language should be italicised. Numbering should be done as follows:

  1
  2
  3.1
  3.2.1
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than 30 words should be indented and in 10 point, in which case no quotation marks are necessary.
- The names of authors should be written as follows: FH Anant.
- Where more than one author are involved, use '&': eg FH Anant & SCH Mahlangu.
- Dates should be written as follows (in text and footnotes): 28 November 2001.
- Numbers up to ten are written out in full; from 11 use numerals.
- Capitals are not used for generic terms 'constitution', but when a specific country's constitution is referred to, capitals are used 'Constitution'.
- Official titles are capitalised: eg 'the President of the Constitutional Court'.
- Refer to the *Journal* or http://www.chr.up.ac.za/index.php/ahrlj-contributors-guide.html for additional aspects of house style.

THE CENTRE FOR HUMAN RIGHTS
UNIVERSITY OF PRETORIA

The Centre for Human Rights, founded in 1986, is part of the Faculty of Law of the University of Pretoria. The main focus of the Centre is human rights law in Africa.

For full information on the Centre, see **www.chr.up.ac.za** or contact

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- 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 July 2014
Compiled by: I de Meyer
Source: http//www.africa-union.org (accessed 31 October 2014)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Algeria	01/03/87	24/05/74	08/07/03	22/04/03		
Angola	02/03/90	30/04/81	11/04/92		30/08/07	
Benin	20/01/86	26/02/73	17/04/97		30/09/05	28/06/12
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97		13/09/12	24/08/11
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70				
Chad	09/10/86	12/08/81	30/03/00			11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	
Congo	09/12/82	16/01/71	08/09/06	10/08/10	14/12/11	
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03*	05/10/11	16/10/13
Democratic Republic of Congo	20/07/87	14/02/73			09/06/08	
Djibouti	11/11/91		03/01/11		02/02/05	02/12/12
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02		27/10/09	
Eritrea	14/01/99		22/12/99			
Ethiopia	15/06/98	15/10/73	02/10/02			05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	10/01/11	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99	25/05/05	
Ghana	24/01/89	19/06/75	10/06/05	25/08/04*	13/06/07	06/09/10
Guinea	16/02/82	18/10/72	27/05/99		16/04/12	17/06/11
Guinea-Bissau	04/12/85	27/06/89	19/06/08		19/06/08	23/12/11

Kenya	23/01/92	23/06/92	25/07/00	04/02/04	06/10/10	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05			
Malawi	17/11/89	04/11/87	16/09/99	09/09/08*	20/05/05	11/10/12
Mali	21/12/81	10/10/81	03/06/98	10/05/00*	13/01/05	13/08/13
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03		
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	
Namibia	30/07/92		23/07/04		11/08/04	
Niger	15/07/86	16/09/71	11/12/99	17/05/04		04/10/11
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	01/12/11
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03*	25/06/04	09/07/10
Sahrawi Arab Democratic Rep.	02/05/86			27/11/13		27/11/13
São Tomé and Príncipe	23/05/86					
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04	
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06	
Sierra Leone	21/09/83	28/12/87	13/05/02			17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
South Sudan						
Sudan	18/02/86	24/12/72	30/07/05			19/06/13
Swaziland	15/09/95	16/01/89	05/10/12		05/10/12	
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06*	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	21/10/05	24/01/12
Tunisia	16/03/83	17/11/89		21/08/07		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	**54**	**45**	**47**	**27**	**36**	**23**

* Additional declaration under article 34(6)
Ratifications after 31 December 2013 are indicated in bold