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Editorial

This issue appears in a year during which human rights enjoy particular prominence globally, in Africa and at the domestic level.

In the United Nations (UN) system, a landmark has been reached: 50 years have passed since the adoption on 16 December 1966 of the two pillars of the UN human rights treaty architecture – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It is also 15 years since the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance was held in Durban, South Africa (where the Durban Declaration and Programme of Action was adopted).

Marking 30 years since the entry into force of the African Charter on Human and Peoples' Rights (African Charter), on 21 October 1986, the year 2016 is being celebrated as the African Union (AU) Year of Human Rights. Ten years have also passed since the African Court on Human and Peoples' Rights (African Court) started functioning.

At the domestic level in Africa, South Africa joins the circle of celebrations as well: It looks back at the adoption on 8 May 1996 of its current Constitution (the Constitution of the Republic of South Africa, 1996). Located in South Africa, as part of the Faculty of Law at the University of Pretoria, the Centre for Human Rights, where this *Journal* is edited and administered, similarly marks a milestone. It is 30 years since its establishment, in May 1986.

Articles in this issue cover a wide range of topics. The common denominator between these contributions is that they all locate their thematic concerns firmly in African soil.

The first three articles in this issue critically analyse elements of the African regional human rights system. Enabulele zooms in on the question of the hierarchy between regional human rights treaties and national constitutions. Earlier this year, in April, the Russian Constitutional Court ruled that it was 'impossible' to domestically implement a decision of the European Court of Human Rights because that decision (*Anchugoc and Gladkov v Russia*, European Court of Human Rights, 4 July 2013) conflicted with the Russian Constitution. The Russian Constitutional Court's decision is based on a legislative amendment, which granted Russia's highest court the competence to assess the compatibility with the Russian Constitution

of a European Court decision. Whatever the competence of any domestic court, it seems to us that an express refusal to give domestic effect to the European Court's decisions would conflict with article 27 of the Vienna Convention on the Law of Treaties. This provision contains the abiding and simple position that domestic law cannot be invoked to trump treaty obligations.

The second article, by Ndahinda, takes a close look at an aspect of the jurisprudence of the African Commission that has so far received mostly uncritical praise – the interpretation of indigenous peoples' rights. While the Commission's *Endorois* decision is a jurisprudential landmark, the notion of indigeneity ('indigeneness') remains controversial in Africa, and in need of further reflection and scrutiny.

In the third article, Jegede deals with the intersectionality between indigeneity and internal displacement, thereby bringing into play another AU human rights treaty, the AU Convention for the Protection and Assistance of Internally-Displaced Persons (also referred to as the 'IDP' or 'Kampala' Convention).

The subsequent two contributions focus on the human rights implications of two global frameworks – the International Criminal Court (ICC) (by Schwartz) and a UN soft law instrument, the UN Guiding Principles on Internal Displacement (by Adeola).

Turning to the domestic level, the next four articles (by Chirwa, Rautenbach, Namakula and Mpanga) deal with various aspects of human rights in a number of African states, mostly applying a comparative methodology.

Two more conceptual contributions complete the line-up of articles. Rafudeen provides some reflections on the nature of human rights; Spies argues for the use of *amicus curiae* briefs in litigation on a domain where African customary law and human rights may be in conflict.

The 'Recent Developments' section sheds light on judgments by the highest courts in two Southern African countries in which the judiciary has for some time now been an important bulwark against executive excesses: in Swaziland and Zimbabwe.

The editors wish to thank the independent reviewers mentioned below, who so generously assisted in ensuring the consistent quality of the *Journal*: Fola Adeleke; Romola Adeola; Daphine Agaba; Usang Assim; Victor Ayeni; Elsje Bonthuys; Danwood Chirwa; Oagile Dingake; Bonolo Dinokopila; John Dugard; Willemien du Plessis; Charles Fombad; Leon Gerber; Serges Kamga; Anton Kok; Thulani Maseko; Benyam Mezmur; Joel Modiri; Michèle Morel; Jamil Mujuzi; Melanie Murcott; Godfrey Musila; Laurie Nathan; Kate O'Regan; Marcos Orellana; Karabo Ozah; Ann Skelton; Hennie Strydom; Johan van der Vyver; Stefan van Eck; and Karin van Marle.

Incompatibility of national law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say?

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Summary

This article considers the effect of a declaration by the African Court on Human and Peoples' Rights that a municipal law is incompatible with the provisions of the African Charter on Human and Peoples' Rights in light of the decision of the African Court in Tanganyika Law Society & Another v Tanzania. It argues that such a decision should have implications for all parties to the African Charter, especially those states that are also parties to the African Court Protocol. The article recognises that this effect is not automatic as the decisions of the Court are denied this expected effect under municipal law by several factors, one of which is the hostility of municipal institutions to an international court judgment that seeks to nullify the established municipal legal status quo.

Key words: *incompatibility; African Court; African Charter; Tanganyika Law Society; African Commission*

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1 Introduction

The African Court on Human and Peoples' Rights (African Court) is a judicial institution established as one of the enforcement mechanisms of the African Charter on Human and Peoples' Rights (African Charter).¹ The African Charter² is the principal human rights instrument of the African Union (AU). It has been ratified by 53 of the 54 states of the AU; only South Sudan was yet to ratify it as at the time of writing.³

Since the African Court came into being in 2004, there has been very little opportunity to test the responses of member states to adverse judgments delivered in favour of individuals, as the Court has delivered only four final judgments⁴ of the total of 20 cases it has so far finalised.⁵ Two factors account for this. The first is the failure of respondent states to make the declaration required under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) to grant individuals the right to invoke the jurisdiction of the Court against them; the second is the failure of applicants to exhaust domestic remedies.

The purpose of establishing the African Court, as clearly set out in the Preamble and article 2 of its Protocol, is to contribute to the implementation of the safeguards of the African Charter. This it would do in two significant ways, the first being through findings of specific instances of a violation of rights guaranteed to individuals by the Charter; and the second through findings of incompatibility of the laws of member states with the provisions of the Charter.⁶ The latter category is more complicated and poses much more difficulty of satisfaction, especially if the incompatible provisions are of a constitutional nature. Satisfaction in respect of this category would require the affected state to amend or repeal the law or laws that have been found to be incompatible with the African Charter. It also has

1 See the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted June 1998, entered into force January 2004.

2 Adopted 27 June 1981, entered into force 21 October 1986, CAB/LEG/67/3/Rev. 5; reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 29.

3 <http://www.achpr.org/instruments/achpr/ratification/> (accessed 8 February 2016).

4 The cases are Application 009/2011 *Tanganyika Law Society & Another v Tanzania* (consolidated with *Mtikila v Tanzania* Application 011/2011); Application 013/2011 *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v the Republic of Burkina Faso*; Application 004/2013 *Lohe Issa Konate v Burkina Faso*; Application 005/2013 *Alex Thomas v Republic of Tanzania*. See <http://en.african-court.org/#finalised-cases> (accessed 4 February 2016.)

5 As above.

6 M Mutua 'The African human rights court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342 362 (differentiating cases of specific violations from those that expound the African Charter).

ramifications for states that were not parties to the case in which the finding of incompatibility was made if they are parties to the Constitutive Act of the AU, the African Charter and the African Court Protocol. It will in some ways, albeit restricted, have ramifications for state parties to the African Charter and the Constitutive Act that are yet to ratify the Court Protocol. Significantly, however, such a finding may negatively affect the choice of states that are considering ratifying the African Court Protocol.

In *Tanganyika Law Society & Another v Tanzania*,⁷ the African Court had its first exposure to the problem of satisfaction of a judgment declaring the law of a state incompatible with a provision of the African Charter. Using this case as a focal point, the article is aimed at showing that it is possible to hold all state parties to both the Charter and the African Court Protocol bound by the general principles in a judgment in which the law of a state party is declared incompatible with the Charter. As a result, all state parties to both instruments maintaining similar laws are, by the jurisprudential weight of the judgments of the African Court, under an obligation to amend their laws with a view to bringing them in tune with the authoritative interpretation of the Charter by the Court.

2 Access to the African Court on Human and Peoples' Rights

The African Court is a continental human rights court established by the Organisation of African Unity (OAU) (now AU) in article 1 of the African Court Protocol. The Protocol has now been ratified by 30 states: Algeria; Benin; Burkina Faso; Burundi; Cameroon; Chad; Congo; Comoros; Côte d'Ivoire; Gabon; The Gambia; Ghana; Kenya; Lesotho; Libya; Malawi; Mali; Mauritania; Mauritius; Mozambique; Niger; Nigeria; Rwanda; Sahrawi Arab Democratic Republic; Senegal; South Africa; Tanzania; Togo; Tunisia; and Uganda.⁸

Article 5 of the Protocol provides for three routes through which the African Court may address human rights claims made under the African Charter. The first is through article 5(1)(a), which allows the African Commission on Human and Peoples' Rights (African Commission) to submit claims on behalf of individuals. The second is through articles 5(1)(b) and (d), under which a state may submit 'disputes ... concerning the interpretation and application of the

7 n 4 above. See O Windridge 'A watershed moment for African human rights: *Mtikila & Others v Tanzania* at the African Court on Human and Peoples' Rights' (2015) 15 *African Human Rights Law Journal* 299-328.

8 See list of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (accessed on the AU website <http://www.au.int> (accessed 31 May 2016)). This information was last updated 1 April 2016.

Charter',⁹ either as a purely interstate claim under article 5(1)(b) or one arising from the violation of the Charter rights of a national of the claimant state by the respondent state under article 5(1)(d). To the latter kind of claim, the restriction in article 34(6) of the Protocol is irrelevant.

The third is through article 5(3), which allows individuals and non-governmental organisations (NGOs) to directly seize the African Court against a state party to its Protocol, subject to article 34(6) of the Protocol by which, unless a state makes a declaration permitting it, the Court lacks jurisdiction to receive cases filed against the state by individuals and NGOs. Out of the 30 states that have so far ratified the Protocol, only seven states – Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania – have made the article 34(6) declaration.¹⁰ This has so far diminished the role of individuals as 'the principal guardians of the legal integrity'¹¹ of the African Charter, as a continental instrument, given the fact that without individual litigants, there would hardly be cases presented to the Court.

3 *Tanganyika Law Society & Another v Tanzania*

In this case, the applicants brought separate applications before the African Court on the claim that Tanzania had, through certain amendments to its Constitution, violated its citizens' right of association, namely, the right to participate in public or governmental affairs, among others. The applications were later consolidated.

The applicants prayed the African Court to declare that Tanzania was in violation of, *inter alia*, articles 10 and 13(1) of the African Charter. Article 10(1) provides for freedom of association, while article 13(1) provides for the right of every citizen to participate freely in the government of his or her country. Based on these provisions, the applicants urged the Court to direct the respondent to put the necessary constitutional, legislative and other measures in place to give effect to the rights contained in the aforementioned provisions and to report compliance to the Court within a 12-month period. In its defence, the respondent argued that the prohibition of

9 Art 3(1).

10 See n 8 above; <http://en.african-court.org/> (accessed 13 May 2016). Rwanda, however, withdrew its declaration on 29 February, 2016. The notice of withdrawal was contained in a press statement issued by the Rwandan Ministry of Justice. See http://www.minijust.gov.rw/fileadmin/Documents/Photo_News_2016/Clarification2.pdf (accessed 13 May 2016).

11 D Starr-Deelen & B Deelen 'The European Court of Justice as a federator' (1996) 26 *Federalism and the European Union* 81-84; dissenting opinion of SAB Akuffo, BM Ngoepe and EN Thompson JJ in Application 001/2008 *Michelot Yogogombaye v Republic of Senegal* para 16 (observing that art 36(4) is at odds with the 'objective, language and spirit of the Charter' as it disables the African Court from hearing applications brought by individuals against a state that has not made a declaration); J Mubangizi & A O'Shea 'An African Court on Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 256-264.

independent candidacy in Tanzania was dependent on the social needs of the country, based on its historical reality, and that the restriction was a means for avoiding absolute and uncontrolled liberty.

To adequately deal with the issues raised, the African Court also considered the limitations in articles 27(2) and 29(4) of the African Charter. The former provides that '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest'; the latter places a duty on individuals '[t]o preserve and strengthen social and national solidarity, particularly when the latter is threatened'.

In its judgment, the African Court produced a long and detailed reasoning, part of which is stated below. The Court began by noting that the rights guaranteed under article 13(1) are individual rights which are not intended to be enjoyed only in association with some other individuals or groups of individuals, such as political parties.¹² The Court therefore reasoned that the pertinent question was whether an individual's right was in jeopardy and not whether he can enjoy the right as member of an association. Accordingly, the Court held that a requirement that a candidate must belong to a political party before he or she is able to participate in the governance of Tanzania derogates from the rights enshrined in article 13(1) of the African Charter.¹³

There was, however, the question of whether the decision to exclude independent candidacy was justified as a necessary derogation from the right in article 13(1) within the permissive provisions of article 27 of the Charter. To determine this question, the Court distinguished the *Tanganyika* case from the decision of the Inter-American Court of Human Rights in *Castañeda Gutman v Mexico*,¹⁴ which was heavily relied upon by Tanzania. Here, the Inter-American Court acknowledged that the permission or prohibition of independent candidacy could be justified by different social needs, such as expanding and improving participation and representation in the management of public affairs or for the purpose of strengthening political organisations as essential instruments of democracy. It was held that Mexico was justified in the registration of candidates exclusively through political parties in response to the compelling social needs, based, *inter alia*, on diverse historical, political and social grounds, and the need to create and strengthen the party system as a response to historical and political reality,¹⁵ particularly that the applicant had the option either to be sponsored by a political party without necessarily joining that party or to form his own political

12 *Tanganyika Law Society* (n 4 above) para 98.

13 *Tanganyika Law Society* para 99.

14 6 August 2008 Ser C 184.

15 *Castañeda Gutman* (n 14 above) paras 192-193.

party and that the requirements for forming political parties were not arduous.¹⁶

Distinguishing this case, the African Court reasoned that, unlike the finding of the Inter-American Court in *Castañeda Gutman v Mexico*, no other option existed for citizens desirous of seeking political offices in Tanzania without first becoming members of, and be sponsored by, a political party.¹⁷ The African Court accepted the view that the right to stand for election should not be limited unreasonably by requiring candidates to be members of any or a specific political party.¹⁸

Consequently, the Court held that the jurisprudence regarding restrictions on the exercise of rights has developed the principle that every 'formality', 'condition', 'restriction' or 'penalty' imposed must be a restriction of general application that is necessary in a democratic society and is reasonably proportionate to the legitimate aim pursued.¹⁹ Furthermore, the Court accepted the view that the impact, nature and extent of any restriction of rights must be weighed against the legitimate state interest serving a particular goal and that the legitimate interest must be 'proportionate with, and absolutely necessary for the advantages which are to be obtained'.²⁰

The African Court took the firm view that there was nothing in Tanzania's arguments to show that the restrictions on the exercise of the right to participate freely in the government of the country by prohibiting independent candidacy fell within the permissible restrictions set out in article 27(2) of the African Charter. The Court declared that the restriction on the exercise of the right to seek elective office by the prohibition of independent candidacy is not proportionate to the alleged aim of fostering national unity and solidarity.

Importantly, the Court found that the prohibition violated the right of the general populace to 'choose' as well as the right of an office seeker to 'freely participate' in the electoral processes. On the right to 'choose', the Court declared, based on article 27 of the Vienna Convention on the Law of Treaties (VCLT) of 1969,²¹ that the African Charter imposes an obligation on Tanzania 'to make laws in line with the intents and purposes of the Charter'²² and that the restriction of the electorates' choice of candidates to those chosen by political parties 'is an unnecessary fetter that denies to the citizen the right of direct participation, and amounts to a violation'.²³ Concerning the right to free participation, the Court declared that the prohibition also

16 As above.

17 *Tanganyika Law Society* (n 4 above) para 107(3).

18 *Tanganyika Law Society* paras 17 & 107(3).

19 *Tanganyika Law Society* para 106(1).

20 *Tanganyika Law Society* paras 106(1), (2) & 107(1).

21 Art 27 provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

22 *Tanganyika Law Society* (n 4 above) para 110.

23 As above.

violated the rights of citizens to freely participate in the government of the country and that, by requiring individuals to belong to a political party before seeking electoral office, the respondent violated the right to freedom of association.

4 Legal implications for Tanzania and other states

As stated earlier, a decision of incompatibility stands on a higher pedestal to, and is set on a wider range of application than a decision that simply finds a violation of the right of an individual. It carries implications for all the states over which the Court has jurisdiction if they are also parties to the interpreted instrument and, to some extent, affects states that are parties to the interpreted instrument but not parties to a court's protocol, where the court that made the interpretation is established under the regime of the interpreted instrument. This is what constitutes the difference between an interpretation of the African Charter given by the Economic Community of West African States (ECOWAS) Community Court of Justice (ECCJ),²⁴ for instance, and that given by the African Court. It is not debatable that the decisions of the latter are more integral to the African Charter than those of any other court that also interprets and applies the Charter. However, the African Court has stated that it has no appellate jurisdiction over cases already decided by domestic, regional and similar courts.²⁵

The importance of incompatibility findings, such as that in the *Tanganyika* case, is underscored by the uniform application of the African Charter across all state parties. Respect for an incompatibility finding across state parties brings about the unity of application of the Charter. When particularised to the state against which it was made, the Charter regime would be diminished by a vertical and horizontal discordant application of the Charter. There would remain disparate judicial interpretations of, and unregulated legislative constraints on, the Charter across member states and between member states and the African Court. Using the *Tanganyika* case as example, how can it be explained that independent candidacy is incompatible with the African Charter in Tanzania but not incompatible in Nigeria, Zambia and Sierra Leone?²⁶ Zambia and Sierra Leone are yet to ratify the Court Protocol. The consequence of such disparity would be that uniformity and certainty would be replaced by 'jurisprudential/

24 Protocol A/P1/7/91 as amended by Supplementary Protocol A/SP 1/01/05.

25 Application 001/2013 *Ernest Francis Mtingwi v Malawi* para 14.

26 All three states constitutionally prohibit independent candidacy in such a way that totally excludes an individual who is not a member of a political party from the process. See secs 65(2)(b), 106(d) and 131(c) of the Constitution of the Federal Republic of Nigeria, 1999; art 34 of the Constitution of Zambia; and art 41 of the Constitution of Sierra Leone Act 6 of 1991.

interpretational chaos'²⁷ as 'each state party ... [will] have its own level of protection based on their respective domestic laws'.²⁸

An assertion that interpretations adopted by the African Court in a case have implications for third parties may on the face of it appear problematic and novel. However, it states nothing new when the binding effect of the Court's judgment is differentiated from its 'continuing applicability'²⁹ as an authoritative interpretation of the African Charter that 'ensure[s] recognition of a situation at law'³⁰ which, once established, 'the legal position ... cannot again be called in question in so far as the legal effects ensuing therefrom are concerned'.³¹ Without a doubt, the rule that decisions are binding upon the parties only, being an 'intransgressible'³² principle of both municipal law and international law, applies in full force to decisions of the African Court. Apart from its status as a general principle of law recognised by civilised nations under article 38(1)(c) of the Statute of the International Court of Justice (ICJ),³³ it is expressly provided for under article 59 of the same Statute.³⁴ But the rule that judgments are binding upon the parties only cannot be exhaustive of all the uses to which judgments could be put, nor does it block the reformatory power of the reasoning contained in a judgment within the sphere of the jurisdiction of the court that delivered it.

If we take a closer look at the ICJ, we see a segregated system that is based upon optional clause declarations,³⁵ special agreements,³⁶ and compromissory clauses in treaties in force.³⁷ The implication of the jurisdictional structure of the ICJ is that, notwithstanding that its Statute is an integral part of the United Nations (UN) Charter and thus as obligatory as the Charter itself, the jurisdiction of the Court is segmented according to the jurisdictional base(s) through which the Court exercises its jurisdiction over any particular state.³⁸ In other

27 *Scanlen & Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009) para 115.

28 As above.

29 *Northern Cameroons (Cameroon v United Kingdom) Preliminary Objections* (1963) ICJ Reports 15 37.

30 *Interpretation of Judgments Nos 7 and 8 (the Chorzow Factory)* PCIJ Series A 13 20.

31 As above.

32 *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 226 257 para 79.

33 See CC Joyner 'UN General Assembly resolutions and international law: Rethinking the contemporary dynamics of norm creation' (1981) 11 *California Western International Law Journal* 445 454 (stating that art 38 is 'the most convenient and concise statement regarding the sources of international law').

34 See *Land and Maritime Boundary between Cameroon and Nigeria Preliminary Objections* (1998) ICJ Reports 275 292 para 28; *East Timor case (Portugal v Australia)* (1995) ICJ Reports 90.

35 Art 36(2).

36 Art 36(1).

37 As above.

38 *Mavrommatis Palestine Concessions Judgment 2* (1924) PCIJ Ser A 2 11-15; *Armed Activities on the Territory of the Congo, Democratic Republic of Congo v Rwanda* (2006) ICJ Reports 6 39 para 88 (holding that 'its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them').

words, although states are generally parties to the Statute of the Court by reason of being parties to the UN Charter, they must be compartmentalised within one or sometimes more of these jurisdictional bases³⁹ and this is the only means of forming the 'consensual bond'⁴⁰ required for the Court to be able to exercise jurisdiction over a state in any particular case. Contextually, a state cannot sue another state under the optional clause system, except if that state has, itself, deposited an optional clause declaration which engages that of the other state.⁴¹ The same consideration applies to the even more restrictive compromissory clauses in treaties in force and special agreements, which are limited to the specific treaty (in the case of the former) or dispute (in the case of the latter) for which this jurisdiction was given.

These jurisdictional segmentations, the rule that judgments are binding on the parties only and the attitude of states towards compliance with the dispositive part of its decisions⁴² notwithstanding, the ICJ establishes legal standards for states and consistently develops international law through its decisions.⁴³ Remarkably, the advisory jurisdiction of the Court, which is generally not binding on any state,⁴⁴ has made an even greater impact.⁴⁵

This has also been shown to be true of decisions of the European Court of Justice (ECJ). Using the preliminary reference procedure of the ECJ as an example, it has been shown that rulings given by the

39 *Electricity Company of Sofia and Bulgaria* Series A/B No 77 Preliminary Objection (14 April 1939) 76 (declaring that its jurisdiction could be based on a multiplicity of agreements between states).

40 *Right of Passage over Indian Territory (Portugal v India)* Preliminary Objections ICJ Rep 1957, 125, 291 para 25.

41 *Certain Norwegian Loans (France v Norway)* (1957) ICJ Reports 9 23; *Fisheries Jurisdiction case (Spain v Canada)* (1998) ICJ Reports 423 453 para 46 ('since two unilateral declarations are involved in the conferment of jurisdiction under article 36(2), jurisdiction is conferred upon the court only to the extent to which the declarations coincide in conferring it').

42 See AP Llamzon 'Jurisdiction and compliance in recent decisions of the International Court of Justice' (2007) 18 *European Journal of International Law* 815.

43 See *Aegean Sea Continental Shelf (Greece v Turkey)* (1978) ICJ Reports 3 17-18 para 39 (acknowledging, notwithstanding art 59, that it was evident that any pronouncement of the Court may have implications in relations between states other than Greece and Turkey); separate opinion of Judge Gros in *Barcelona Traction Light and Power Co Ltd (Belgium v France)* Second Phase (1970) ICJ Reports 3 267 para 1 (noting the 'importance of the case from the point of view of its consequences on the law applicable to international economic relations').

44 Advisory opinions are binding only when such an effect is conferred by treaty. See Part VIII, sec 30 of the Convention on the Privileges and Immunities of the United Nations (General Convention) of 13 February 1946 1 United Nations Treaties Series 15; *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal Advisory Opinion* (1973) ICJ Reports 166 172 para 14; *Judgment of Administrative Tribunal of the ILO upon Complaints Made against UNESCO Advisory Opinion* (1956) ICJ Reports 77 84.

45 Examples are the *Reservations to the Convention on the Prevention or Punishment of the Crime of Genocide Advisory Opinion* (1951) ICJ Reports 15; *Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion* (1949) ICJ Reports 174; and so on.

ECJ) are applied not only by the national court that made the reference, but also by all national courts in the EU before which the same question arises.⁴⁶

Therefore, the binding effect of a decision is one thing (this goes to the actual decision – the *depositif*), its authoritative effect as precedent is another (this goes to the reasoning adopted) and is much wider than its binding effect. Neither the fact that decisions are binding on the parties nor *res judicata* detracts from the recognition that judgments of a court ‘have great bearing’⁴⁷ for non-parties to the case in which they were given, especially when given by a court created under an instrument that is binding as between the parties to the case and non-parties.⁴⁸ While directly binding on the respondent state only, the jurisprudence of international courts have a certain contagious characteristic that reaches farther than the actual decision in a case, either through the internalisation of the interpretation adopted in the decisions into the interpreted instrument within the regime of the court and/or its eventual (albeit gradual) jurisprudential internationalisation outside the regime of the court and the interpreted instrument.

For the purpose of this discussion, the internalisation of interpretation occurs horizontally and vertically. It occurs horizontally at the level of the international court that gave the interpretation, and vertically at the level of the municipal law through case law and legislation. At the level of the international court, the interpretation may become internalised as a result of the high margin of certainty of repetition in future cases, even when the court has not had a second bite at it,⁴⁹ or through consistency of application.⁵⁰ Such repeated application has the ability of embedding the interpretation into the

46 FG Jacobs ‘Judicial dialogue and the cross-fertilization of legal systems: The European Court of Justice’ (2003) 38 *Texas International Law Journal* 547 549.

47 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* Preliminary Objections (2008) ICJ Reports 412 435 para 71.

48 As above.

49 *Croatia v Serbia* (n 47 above) 429 para 54 (holding that parties cite previous decisions of the ICJ ‘as precedents to be followed in comparable cases’); G Fitzmaurice ‘Some problems regarding the formal sources of international law’ in *Symbolae Verzijl* 153 172 reproduced in M Koskenniemi (ed) *Sources of international law* (2000) 57 (noting that parties cite precedent as ‘something which the tribunal cannot ignore [as] the tribunal ... will not usually feel free to ignore a relevant judicial decision’).

50 Koojamas J *Separate opinion in legality of use of force (Serbia and Montenegro v United Kingdom)* (2004) ICJ Reports 1307 1369, para 10 (declaring that ‘[c]onsistency is the essence of legal reasoning’).

instrument for states within the court's regime to be binding on all parties.⁵¹ For:⁵²

When a dispute settlement organ has been empowered to interpret authoritatively a legal regime and when its judgments become an integral part of that regime ... then its judgments necessarily have an effect *erga omnes partes contractantes*.

It is therefore fitting to argue that the elucidation of African Charter obligations by the African Court becomes internalised for parties to the Court Protocol to acquire a compulsory character as part of the obligations they undertook to fulfil in article 1 of the Charter. This will be easier, but not necessarily achieved through the jurisprudential integration of principles of interpretation adopted by the Court into municipal law by national courts. It also could occur through legislative incorporation where the judgment is regarded as norm creating by all state parties, to the extent that the legislature incorporates it into the state's laws by either positive acts or negative acts that acknowledge the normative quality of the interpretation.⁵³

It is essential to acknowledge the difference between a general elucidation of African Charter obligations from one that specifically finds that a municipal law is incompatible with the Charter when considering the possibility of jurisprudential integration and in assessing its likely impact under municipal law. This must turn on the nature of the law – constitutional or legislative act – found to be incompatible with the Charter and the sphere – national or international – in which the issue is raised. For incompatibility involving ordinary legislation, it appears that the law of many state parties to the African Court Protocol has a general direction towards allowing municipal courts to rely on interpretations of the African Court to trump the incompatible legislation either by clear constitutional provisions⁵⁴ or by precedent.⁵⁵ When it involves

51 R Flaminio 'Judicial reach: The ever-expanding European Court of Justice' (2012) 175 *World Affairs* 55 (observing that 'once the existence of the court is recognised by the member states, its decisions must be as well').

52 CPR Romano 'The proliferation of international judicial bodies: Pieces of the puzzle' (1998-1999) 31 *New York University Journal of International Law and Politics* 709 737.

53 P Tangney 'The new internationalism: The cession of sovereign competences to supranational organisations and constitutional change in the United States and Germany' (1996) 21 *Yale Journal of International Law* 395 406 (suggesting that the ECJ plays a prominent role in interpreting and enforcing the treaties because 'all member states accept that ... ECJ opinions ... are supreme and trump any conflicting national legal provisions').

54 The constitutions of some member states give applicable treaties a status superior to ordinary legislations; art 87 of the Constitution of Côte d'Ivoire 2000; art 190 the Constitution of Rwanda 2003; and so on.

55 In Nigeria, the Constitution is silent on the status of incorporated treaties *vis-à-vis* legislative acts. However, in *Abacha v Fawehinmi* [2001] 1 NWLR (Pt 662) 228 289, the Nigerian Supreme Court held that the legislation by which the Charter was incorporated into Nigeria 'is a statute with international flavour', which must trump any other statute except the Constitution, and that the Charter possesses 'a greater vigour and strength' than any other domestic statute.

constitutional incompatibility, jurisprudential integration is inconceivable,⁵⁶ and only legislative incorporation can give effect to the incompatibility ruling as this entails constitutional amendment.

From the viewpoint of international law, however, it does not matter what law is incompatible. The result is the same – the state is duty-bound to bring its laws in sync with its international obligation by eliminating the incompatibility.⁵⁷

Internalisation beyond the court's or an instrument's regime occurs, not on the basis of any obligation, but on the sheer strength of persuasion that a decision possesses. This is in addition to the general tendency of courts and lawyers to enrich judicial reasoning with solutions adopted elsewhere through the process of 'judicial dialogue and cross-fertilisation'.⁵⁸ This also has both horizontal and vertical aspects.

The vertical aspect occurs either through the cascading of the principle to national systems through the regime of another international court or through the incorporation of the principle into their legal orders by national courts. Thus, national courts or even states outside the regime of a court and the instrument being interpreted may be influenced by the 'legal credibility'⁵⁹ of the interpretation to adopt the interpretation as the correct interpretation of the instrument or similar instrument (as the case may be) in their domestic and diplomatic dealings.

On the other hand, the horizontal aspect arises by the acceptance of the interpretation as authoritative by other international courts whether or not they share competence over the same instrument. In the *Tanganyika* case, the African Court relied on the persuasive force of cases decided by the European Court and the Inter-American Court on the European Convention on Human Rights and Fundamental Freedoms of 1950, and the American Convention on Human Rights of 1969, to which the parties to its Protocol are by no means connected.⁶⁰ In *Interights, ASADHO & Disu v Democratic Republic of Congo*,⁶¹ the African Commission internalised and applied a principle

56 Some constitutions expressly require constitutional amendment for constitutionally-incompatible international law to be effective municipally; art 86 of the Constitution of Côte d'Ivoire; art 79 of the Mauritanian Constitution; etc. Other constitutions achieve this effect indirectly by their supremacy clause; sec 1(2) of the Ghanaian Constitution 1992; sec 4 of the Gambian Constitution 2002.

57 *Treatment of Polish Nationals*, PCIJ series A/B 44 24 (holding that a state cannot adduce as against another state its own constitution to evade its treaty obligations).

58 Jacobs (n 46 above) 556.

59 Joint Declaration of Vice-President Renjeva, Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby JJ in *Legality of use of force* (n 50 above) 1356 para 12.

60 See part III above; also, citing the Australia case of *Commonwealth v Tasmania* (1983) 158 CLR 1; Jacobs (n 46 above) 549 (demonstrating that ECJ rulings have an influence on courts outside the EU).

61 Communications 274/03 & 282/03.

adopted by the ECOWAS Court on the right to liberty to a case involving the Republic of Congo,⁶² which is not even entitled to ratify the ECCJ Protocol, let alone anticipate proceedings before the Court.

It is fitting to expect that decisions of the African Court would serve as interpretative notice to such regional courts as the ECCJ and East African Court of Justice (EACJ),⁶³ which interpret the African Charter⁶⁴ with, arguably, more jurisdictional strength over their respective community members than the African Court has over AU members.⁶⁵ Essentially, these courts could internalise the interpretation adopted by the African Court and, once that occurs, such interpretation achieves its potential for a wider application.

Account is also taken of the fact that the African Charter gives parties no choice on the jurisdiction of the African Commission. As a result, interpretations adopted by the African Court are potentially applicable to all parties to the Charter through the Commission. Although the jurisprudential relationship between the African Commission and African Court is still developing, it is expected that the Commission would defer to the jurisprudence of the Court.

Drawing from the foregoing, decisions of the African Court, as a judicial institution of the AU, are able to have implications beyond the states that are directly bound by them, to affect all state parties to the African Charter, whether or not they are also parties to the Protocol of the African Court. It is, therefore, possible for a finding of incompatibility made by the Court to benefit from a wider application as an authoritative interpretation of the Charter. It may be gathered from what has been said above that it is only a matter of degree; the effect the Court's authoritative interpretation of the Charter should have on parties to both the Charter and its Protocol as distinguished from parties to the Charter only. This is so when considered alongside article 3(h) of the Constitutive Act of the AU, to which all state parties to the African Charter are also parties. Under article 3(h), state parties undertook to 'promote and protect human and peoples' rights in accordance with the African Charter'. It is thus possible to argue that it is part of the role of the African Court, as an institution set up by the

62 n 61 above para 70 (the principle was that adopted in ECW/CCJ/APP/04/07 *Manneh v The Gambia*).

63 Art 9 of the Treaty for the Establishment of the East African Community of 30 November 1999, as amended in 2006 and 2007. Though yet to have human rights jurisdiction due to arts 27(1) and (2), it has been exercising that jurisdiction indirectly; *Emmanuel Mjawasi & Others v The Attorney-General of the Republic of Kenya*, Reference 2, judgment of 28 September 2011. See also A Possi 'Striking a balance between community norms and human rights: The continuing struggle of the East African Court of Justice' (2015) 15 *African Human Rights Law Journal* 192.

64 Both courts apply the African Charter: See art 4(g) of ECOWAS Revised Treaty of 24 July 1993, which incorporates the African Charter into the Revised Treaty of ECOWAS by reference. See *SERAP v Federal Republic of Nigeria and Universal Basic Education Commission* ECW/CCJ/APP/08/08 para 28; *Plaxeda Rugumba v Secretary-General of the EAC & Attorney-General of Rwanda*, Ref 8 of 2010 EACJ para 23.

65 They are the judicial organs of their respective communities to which individuals have unimpeded access.

AU for the purpose of assisting states to fulfil their obligations, to protect the fundamental human rights enshrined in the Constitutive Act of the AU.⁶⁶ The African Court cannot but be, at least from the viewpoint of the AU, the final authority in the interpretation of the African Charter.⁶⁷

This appears quite an expected outcome. For Mutua, the Court should seek to expound on the Charter and make law that would guide African states in developing legal and political cultures that respect human rights by creating a body of law with precedential value to guide and deter African states from future misconduct by modifying their behaviour.⁶⁸ Oder also believes that '[t]he African Court's judgments will have a wider impact, beyond the country against whom an application has been brought'.⁶⁹

The obligation to cure the incompatibility found to exist by the African Court in the *Tanganyika case* should, therefore, not be viewed as an obligation limited to Tanzania. The case has latent obligatory jurisprudential ramifications for all parties to the African Court Protocol while, at the same time, it is capable of influencing non-state parties to the Protocol who are parties to the African Charter and the Constitutive Act.

In taking a broad view of the uniform application of interpretations adopted by the African Court, account is taken of the fact that the African Commission had variously made incompatibility findings which did not have the effects envisaged here.⁷⁰

Without being overly dismissive, the recommendations of the African Commission were never designed to have a direct effect on the behaviour of state parties.⁷¹ This is so because the Commission is 'a quasi-judicial body with no binding powers'⁷² and which addresses

66 See *Plaxeda Rugumba* (n 64 above) para 23.

67 This is not to say that the Court could sit on appeal over a matter already decided by any other regional court in Africa. See *Mtingwi v Malawi* (n 25 above).

68 Mutua, (n 6 above) 362.

69 J Oder 'The African Court on Human and Peoples' Rights' order in respect of the situation in Libya: A watershed in the regional protection of human rights?' (2011) 11 *African Human Rights Law Journal* 495 506.

70 See *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003); *Scanlen v Zimbabwe* (n 27 above) para 125.

71 G Bekker 'The African Court on Human and Peoples' Rights: Safeguarding the interests of African States' (2007) 51 *Journal of African Law* 151 171.

72 Romano (n 52 above) 721. Also see EG Nalbandian 'The challenges facing the African Court of Human and Peoples' Rights' (2007) 1 *Mizan Law Review* 75 88; F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 *American Journal of International Law* 1 2 (noting that the Commission is 'a quasi-judicial supervisory body').

its recommendations to the Assembly of Heads of State and Government.⁷³ Its recommendations are thus in a different position to decisions of the African Court in that the latter have the force of finality, and this greatly enhances their ability to integrate into the African Charter regime in comparison to that of the Commission.⁷⁴

5 Practical difficulties

The hope that the African Court could promote an African-wide human rights standard through its jurisprudence may be hampered by several difficulties discussed below.

5.1 Limited ratification/optional declaration

Since the African Court is established for the purpose of enhancing the safeguards of the African Charter, its jurisdictional reach ought to be as far-reaching as the Charter itself, so that no state party to the Charter is exempt from the jurisdiction of the Court. If this had been achieved, decisions of the Court on incompatibility against a state should serve as notice to all other state parties that they must abolish similar legislation to resolve the incompatibility and so bring their laws in sync with the decisions of the Court. Although they cannot be affected by decisions to which they were not parties, it is sufficient that the African Court would take a similar view of their own legislation when brought before the Court, and this would be a costlier choice for states.

A major difficulty, one that would continue to plague the African Court, therefore, is the fact that it cannot exercise any form of jurisdiction over many of the parties to the Charter because of their failure to ratify its Protocol as '[a] treaty does not create either obligations or rights for a third state without its consent'.⁷⁵ This would mean that the *Tanganyika* case does not put duties on Zambia and Sierra Leone that prohibit independent candidacy because they are yet to ratify the African Court Protocol.

73 See N Enonchong 'The African Charter on Human and Peoples' Rights: Effective remedies in domestic law?' (2002) 46 *Journal of African Law* 197 (arguing that the Assembly of Heads of State and Government, to which the Commission submits its recommendations, cannot convert the recommendations into binding decisions).

74 CS Martorana 'The new African Union: Will it promote enforcement of the decisions of the African Court on Human and Peoples' Rights?' (2009) 40 *George Washington International Law Review* 583 599 (noting that 'because the absence of an enforcement provision in the Charter was arguably its greatest weakness, the [African Court] Protocol's provision for binding orders shows the greatest promise').

75 Art 34 of the VCLT; JI Charney 'Universal international law' (1993) 87 *American Journal of International Law* 529 534 (declaring that '[c]learly, its consent is required before a state is bound by treaty obligations. The state must accept such an obligation voluntarily ... Third states cannot be bound by treaty obligations without their consent.')

Even for states that have ratified the African Court Protocol, the reach of decisions of the Court as precedent in comparable cases is rendered almost non-existent by the restriction on the access of individuals as a result of the failure of states to make the optional declaration. This limits the chances of the Court of reaffirming the decision against Nigeria.

There is, however, the possibility of judicial application of the case to Nigeria and Sierra Leone by the ECCJ and Zambia by the EACJ at the instance of individuals.

Failing application at the instance of individuals, there remains the unlikely event of another state party suing either as an interested party, for the purpose of enhancing the safeguards of the African Charter across all state parties in fulfilment of the reciprocal obligations of state parties, or in the exercise of its right to diplomatic protection. This could be through the African Commission.⁷⁶ However, as has been observed, '[b]oth these mechanisms have so far languished in desuetude' because African states are unwilling to bring human rights claims against another African state and, except for three cases,⁷⁷ the Commission is generally unwilling to refer cases to the African Court.⁷⁸ Remarkably, the only case that has been finalised of the three cases brought by the Commission was dismissed for a lack of diligent prosecution.⁷⁹

5.2 Norm of a different order

From the viewpoint of international law and, more so, from that of municipal law, the African Court, as it stands, belongs to a completely different order to the municipal order of member states.⁸⁰ As a result, the finality of the Court's decisions⁸¹ and the undertaking by state

76 D Juma 'Provisional measures under the African human rights system: The African Court's order against Libya' (2012-2013) 30 *Wisconsin International Law Journal* 344 350 (noting that in view of the 'qualified access of individuals and non-governmental organisations, the African Commission is currently the main pathway to the African Court').

77 Application 004/2011 *African Commission on Human and Peoples' Rights v Great Socialist Republic of Libyan Arab Jamahiriya*; Application 006/2012 *African Commission on Human and Peoples' Rights v Kenya*; Application 002/2013 *African Commission on Human and Peoples' Rights v Libya*. See generally Juma (n 76 above)

78 CC Jalloh '*Michelot Yogogombaye v Republic of Senegal*' (2010) 104 *American Journal of International Law* 620 624.

79 *African Commission on Human and Peoples' Rights v Libyan Arab Jamahiriya* (n 77 above) para 26(b) (noting that the applicant failed to pursue the application).

80 A Stemmet 'A future African Court for Human and Peoples' Rights' (1998) 23 *South African Yearbook of International Law* 233 235 (noting that '[b]y becoming party to an international instrument creating a supra-national tribunal, states accede to the establishment of a new level of jurisdiction'); *San Michele v High Authority* 4 Judgment 98 1965, cited in ML Volcansek 'Impact of judicial policies in the European Community: The Italian Constitutional Court and European community law' (1989) 42 *The Western Political Quarterly* 575, wherein the Italian Constitutional Court recognised two jurisdictions: one Italian and another EU, 'whose organs are admittedly placed in separate juridical spheres'.

parties to comply with its decisions, are insufficient to translate them into enforceable court decisions within the normative order of member states, nor will its judicial powers as an international court necessarily induce compliance under municipal law. In other words, although engaging the international responsibilities of member states, the binding nature of the decision of an international court alone does not lead to compliance.⁸²

This duality has consequences for states that have ratified the African Court Protocol and made the optional declaration as they still have to surmount the practical difficulties that are naturally attendant upon the translation of international norms into legally-enforceable municipal norms. These difficulties are even more pronounced when an obligation seeking municipal enforcement arises from the decision of an international court that challenges a municipal legal *status quo*, predicated on a constitutional instrument. This is more so when the treaty establishing the African Court lacks a clearly-defined municipal application, and this invariably means that the Court, itself, is in need of a defined municipal status. The implications of this are far-reaching; first, for the enforcement of the decisions of the Court within municipal legal systems and, second, to the capacity of the interpretation of the African Charter by the Court to command the positive responses of the organs of member states, whether or not they were also parties to the proceedings in which the interpretation was given.⁸³

In the emerging international legal regime of the AU, given that there is no legal correlation between the African Court and the legal systems of state parties, the relevant questions a national judge may ask when prayed to enforce a judgment of the African Court or to take account of its precedent are the following: Is the African Court Protocol recognised under our laws?⁸⁴ Am I under any obligation to take account of the judgments or jurisprudence of the African Court?

If these questions are answered in the negative, the municipal court would decline jurisdiction. In at least two cases, decisions of the ICJ have been discountenanced by municipal courts on the ground that article 94 of the UN Charter, in terms of which state parties to the

81 Art 28(2) African Court Protocol.

82 Juma (n 76 above) 351.

83 Volcansek (n 80 above) 569 583 (arguing that '[t]he legitimacy accorded to community law is directly related to the level of compliance in a national judicial system'); Possi (n 63 above) 202 (arguing that '[i]nternational judges ... are more likely to become expansionist law makers where they are supported by interlocutors and compliance constituencies, including government officials, advocacy networks, national judges and administrative agencies').

84 F Viljoen 'Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa' (1999) 43 *Journal of African Law* 1 (noting that '[i]t is unlikely that judicial institutions will make findings based on the provisions of the African Charter if the Charter is not regarded as part of domestic law'). The same principle applies to the African Court Protocol; it requires domestic status to properly function within the legal systems of member states.

Charter undertook to enforce the judgment of the ICJ, was not domestically applicable in the forum states.⁸⁵

This undefined municipal legal status of the African Court creates a legitimacy problem and an obstacle to the acceptance of its decisions,⁸⁶ as well as 'dilute[s] or weaken[s] the[ir] effect',⁸⁷ especially in cases of the nature being discussed where a decision of the Court conflicts with municipal law of a constitutional status. The typical response of state parties, as already indicated by Tanzania in its response to the judgment in *Tanganyika Law Society*,⁸⁸ is that the judgment of the Court is wrong because it runs contrary to prevailing municipal law.⁸⁹ It is illusory to assume that national judges would reason otherwise, especially in the Court's present state of development⁹⁰ and the limited ratification of its Protocol by the signatory states.

One way of surmounting this problem is by demonstrating a clear willingness to imbue the Court 'with unparalleled transnational power'⁹¹ in African Charter affairs, both in theory and in practice, and in recognition of the competence ceded to the Court.⁹² It is thus

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- 85 The United States Supreme Court case of *Jose Ernesto Medellin v Texas* (2008) 128 *Supreme Court Reporter* 1346 (refusing to respect the decision of the ICJ in *Avena and Other Mexican Nationals (Mexico v United States of America)* (2004) ICJ Reports 12 36 para 40); the Italian Constitutional Court case of *Repubblica Italiana in Nome Del Popolo Italiano or Italian Republic in the Name of the Italian People* Italian Constitutional Court Judgment 238/2014. This English summary of the judgment was provided by Francesco Messineo in <https://dl.dropboxusercontent.com/u/39082100/Italian%20Constitutional%20Court%20Judgment%20238-2014.pdf> (accessed 10 October 2014) (refusing to respect *Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening)* (2012) ICJ Reports 99); the Ghanaian Supreme Court case of *Republic v High Court (Commercial Division) Accra, Ex parte Attorney-General Civil Motion J5/10/2013* (Supreme Court, Ghana, 2013), http://www.pca-cpa.org/Supreme%20Court%20Decision9703.pdf?fil_id=2336 (accessed 24 January 2016) (refusing to enforce a decision of the International Tribunal for the Law of the Sea because the United Nations Convention on the Law of the Sea is not domestically applicable in Ghana).
- 86 Volcansek (n 80 above) 583 (arguing that '[I]legitimacy of law and of the law-giver go far in explaining why and how policies are implemented by courts').
- 87 Lord Bingham of Cornhill in *R v Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant)* [2004] UKHL 26 para 20.
- 88 n 4 above.
- 89 Application 011 of 2011 *Rev Mtikila v Tanzania* Ruling on Reparation para 43.
- 90 In *Solange I*, decision of 29 May 1974 37 *BVerfGE* 271 [1974] CMLR 540, the German Constitutional Court ruled that '[a]s long as the integration process has not progressed so far that community law also receives a catalogue of fundamental rights ... of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the [German] Constitution', it would decide for itself whether community law would be supreme. This position was subsequently abandoned by the Court in *Solange II*, decision of 22 October 1986 73 *BVerfGE* 339 378 (holding that ECJ had achieved a certain minimum quantity of protection of basic rights and had developed sufficient institutional architecture through case law for the protection of individual rights).
- 91 Flamini (n 51 above) 55.
- 92 P Kelly 'The International Court of Justice: Crisis and reformation' (1987) 12 *Yale Journal International Law* 342 343 (stating that 'the acceptance of compulsory jurisdiction requires the surrender of an element of sovereignty').

essential for state parties to be prepared to adopt legislative reforms⁹³ to remove constitutional impediments to the ability of the Court to thrive. State parties may enact legislation directing municipal courts to take decisions of the Court into account in matters relating to its competence⁹⁴ in the absence of strong reasons to act otherwise. This would also mean a clear obligation that 'primary and subordinate legislation must be read and given effect in a way that is compatible'⁹⁵ with the standard set by the Court, as far as it is possible to do so, and that the legislature is itself prepared to legislatively support a supranational interpretation of the African Charter, including changing the law to conform to standards established by the Court, as far as it is possible to do so.

It is worth mentioning that some legal grounds already exist that may be explored by national courts to follow decisions of the African Court in some African states, such as South Africa and Tanzania. Section 233 of the Constitution of South Africa directs courts, when interpreting any legislation, to prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law. In Tanzania, the courts are mandated to construe existing law 'as may be necessary to bring it into conformity with' the provisions of the Bill of Rights.⁹⁶ Based on this provision, the African Charter has been held to be included in the Bill of Rights of which courts are to take cognisance.⁹⁷ These provisions are, to some extent, comparable to article 2 of the United Kingdom's Human Rights Act of 1988, under which '[a] court or tribunal determining a question which has arisen in connection with a European Convention right must take into account any ... judgment' of the European Court of Human Rights. Drawing from the differences of opinion on the true import of this provision on the weight to be accorded to judgments of the European Court by courts in the United Kingdom,⁹⁸ it is difficult to be very optimistic that South African⁹⁹ and Tanzanian courts would interpret the relevant provision

93 *Exchange of Greek and Turkish Populations* Advisory Opinion PCIJ Ser B 10, 20 (the PCIJ recalling the 'self-evident' principle, 'according to which a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken').

94 See RKM Smith 'Notes' (2003) 97 *The American Journal of International Law* 664 664 for insights into the relationship between judgments of the ECJ and UK courts following the entry into force of the UK Human Rights Act 1998.

95 As above.

96 Sec 5(1) of the Constitution (Consequential, Transitional and Temporal Provisions) Act 16 of 1984, which took effect in March 1988.

97 *DPP v Pete* [1991] LRC (Const) 553 565 cited in Viljoen (n 84 above) 14.

98 See 'The UK and the European Court of Human Rights' (2012) 83 *Equality and Human Rights Commission Research Report* 115.

99 It is worth reiterating that occasions for South African courts to interact with decisions of the African Court are limited by its failure to make the requisite declaration to permit individuals to bring claims against it at the Court.

in favour of the supremacy of the decision of the African Court over established municipal law positions.

5.3 Unsettling municipal jurisprudence

There is also the difficulty that arises from the fact that the African Charter, having long been given effect to within the municipal realm of state parties, may already have acquired certain settled case law which may be narrower than, and incongruous to, the interpretation the African Court adopts. The interpretation under municipal law of the African Charter, being only an 'element in the mosaic of different constitutional provisions'¹⁰⁰ within the domestic legal order of state parties, influenced by local circumstances, may differ considerably from an interpretation based on the Charter alone.¹⁰¹ No doubt problems would arise if 'a higher level of protection were to be established by the Court, or if it should strike balances between competing rights that differ from those established by the domestic courts'.¹⁰²

This possibility heightens the potential for conflict between the courts of the two spheres¹⁰³ and creates a defensive and repulsive altitude on the part of national courts. Backed by the principle of sovereignty and constitutional supremacy, national courts, except by clear legal authorisation, would naturally defer to local statutes and maintain the established case law,¹⁰⁴ particularly where the case law implements a constitutional provision or where the jurisprudence of the international court ruptures the constitutional division of power.¹⁰⁵

The obstinate posture of national courts over constitutional matters is, understandably, quite commonly shared by all legal systems. The fact is that states as well as their judiciaries dislike being told what to do by an international judicial body. The success rate of the European Court of Justice and the European Court of Human Rights

100 G Ress 'The effect of decisions and judgments of the European Court of Human Rights in the domestic legal order' (2005) 40 *Texas International Law Journal* 359 376.

101 As above.

102 Stemmet (n 80 above) 236.

103 Stemmet 235 (arguing that the 'the creation of a supra-national legal system inevitably carries the seeds of possible conflict with domestic legal systems').

104 As above.

105 Tangney (n 53 above) 397 (arguing that '[t]he judiciary is the final bulwark against fundamental revisions of the constitution outside the amendment process and that the judiciary ensures that separation of powers is protected and that no competences necessary for the judiciary and legislature to perform their constitutional roles are delegated').

notwithstanding, opposition against the intrusive effects of their judgments in the municipal realm of member states is still evident.¹⁰⁶ In this regard, Lord Hoffmann once noted that there was something fundamentally wrong with an international court seeking to impose common solutions on national legal systems. Arguing that it was a basic flaw, he questioned ‘the concept of having an international court of human rights to deal with the concrete application of those [human] rights in different countries’.¹⁰⁷ To Hoffmann, ‘unlike the Supreme Court of the United States or the supreme courts of other countries performing a similar role, the [European Court of Human Rights] lacks constitutional legitimacy’.¹⁰⁸

It is nonetheless important for state parties to come to terms with the fact that the African Court is an international court having the competence to apply the African Charter in its treaty character, free from the influences that limit its application within their municipal spheres. The African Court is neither bound by the narrow interpretation of Charter rights by municipal courts, nor can it be expected that it would adopt an interpretation narrower than the interpretation of municipal courts. It has a duty to maintain the ‘basic premise of international human rights law [which] is that certain standards must be constant across national borders, and governments must be held accountable to these standards’.¹⁰⁹ It is thus incumbent on municipal courts to align their case law with the jurisprudence of the African Court on articles of the African Charter with a view to a broad and consistent application of the Charter across national boundaries.¹¹⁰ Municipal courts should accept the ‘powerful logic in saying that authoritative interpretations of ... [Charter] rights by the ... [African Court] should generally be treated as authoritative in the domestic legal system as well’.¹¹¹

106 See LL Hoffmann ‘The universality of human rights’, Judicial Studies Board Annual Lecture, London, 19 March 2009 para 24 (noting that the member states of the Council of Europe did not subscribe to uniformity of the application of the abstract rules of human rights in each of their countries); *Repubblica Italiana in Nome Del Popolo Italiano* (n 85 above) 24 para 2 (affirming the court’s constitutional obligation to determine the compatibility of laws with the Constitution).

107 Hoffmann (n 106 above) para 25.

108 Hoffmann para 38.

109 *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) para 48.

110 G Martinico ‘Is the European Convention going to be “supreme”? A comparative constitutional overview of ECHR and EU law before national courts’ (2012) 23 *European Journal of International Law* 401 409 (noting that ‘[m]ore generally, consistent interpretation is a typical doctrine of multilevel systems’).

111 P Sales ‘Strasbourg jurisprudence and the Human Rights Act: A response to Lord Irvine’ (2012) 2 *Public Law* 253 261-262.

Otherwise, as Nwauche noted about the possibility of there being as many as 15 national interpretations of ECOWAS law and the African Charter by the courts of the 15 states making up ECOWAS,¹¹² we would be having such variations across the 53 state parties to the Charter. The fact, for instance, that the 1999 Nigerian Constitution does not protect socio-economic and cultural rights,¹¹³ which are protected by both the Ghanaian Constitution of 1992 and the African Charter, is a direct pointer to the prevalence of national variations were national courts and constitutions to be the controlling factors.¹¹⁴

Having agreed to the African Charter, irrespective of the fact that it exemplifies 'a case where regional standards have been set above existing individual domestic standards',¹¹⁵ it is unacceptable for the parties to seek to narrow its application to them by constitutionally excluding the enforceability of Charter rights.

The actualisation of the cession of the competence of finality to an international court in practice does not come easily, as municipal institutions and political actors often find it difficult to accept what may be perceived as an overbearing interpretation of an international instrument by an international court. Nevertheless, resistance, such as already indicated by Tanzania,¹¹⁶ to a competence already granted by state parties to an international court is a function of the initial shock that judicial institutions and political actors need to absolve in an emerging system which permits an international court to hold national governments accountable.

5.4 The local circumstances factor

There is also the difficulty that arises from the local circumstances that prevail in different states and which highlight the peculiarities of each of them. These circumstances may arise in the form of peculiar legal traditions, religious orientations, cultural, ethnic and historical diversities, stages of economic, and social and democratic developments, among others.

The need to take local circumstances into account when deciding on whether to follow what municipal actors may consider an overstated *ratio* of an international human rights court is commonly shared by supranational legal systems. This has severally resonated in decisions of courts of the United Kingdom in relation to the European Court. The European Court, for its part, understands that there is a

112 ES Nwauche 'The ECOWAS Community Court of Justice and the horizontal application of human rights' (2013) 13 *African Human Rights Law Journal* 36.

113 See *SERAP v Federal Republic of Nigeria* (n 64 above), where the ECCJ held Nigeria bound by socio-economic rights, notwithstanding that they are non-justiciable under the Nigerian Constitution.

114 See Nwauche (n 112) 36.

115 AB Akinyemi 'The African Charter on Human and Peoples' Rights: An overview' (1985) 46 *The Indian Journal of Political Science* 208 238.

116 *Mtikila v Tanzania* (Reparation) (n 89 above).

certain 'margin of appreciation'¹¹⁷ that should be allowed to municipal courts.

In *R (on the Application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*,¹¹⁸ Lord Slynn declared that domestic courts should follow the 'clear and constant' jurisprudence of the European Court, but that it should do so only 'in the absence of some special circumstances'. In the same case, Lord Hoffmann doubted whether a decision of the European Court, which led to a result that was 'fundamentally at odds with the distribution of powers under the British Constitution', should be followed.¹¹⁹ For Lord Mance, section 2 of the Human Rights Act of 1998, which requires English courts to 'take into account' European Court decisions, cannot be the basis for following decisions that are inconsistent with some fundamental substantive or procedural aspect of English law, and which reasoning appears to overlook or misunderstand some arguments or point of principle of English law.¹²⁰ In another case, Lord Philips said that, although the requirement to 'take into account' the European Court jurisprudence would 'normally result' in the domestic court applying principles that are clearly established by the European Court, there would be occasions where the domestic court has concerns as to whether a decision of the European Court sufficiently appreciates or accommodates particular aspects of the domestic process. In such circumstances, Lord Philips would allow domestic courts to decline to follow the decision and give reasons for the refusal, as this is likely to give the European Court the opportunity to reconsider the particular aspect of the decision that is in issue, 'so that there takes place what may prove to be valuable dialogue' between domestic courts and the European Court.¹²¹

Local circumstances thus may justify the adoption of certain laws by the legislature or certain case law by national courts which, taken in isolation, could be said not to be in conformity with African Charter obligations. Thus, in order to correct inequalities among the ethnic or geographical divisions of its population, a state may adopt laws to favour some groups over others, to make it easier for the favoured groups to gain employment or school placements than the other groups. Municipal courts may also skew its case law in the same direction. While this, in itself, results in unequal treatment, it may be justified by the local circumstances of a state where the favoured

117 Stemmet (n 80 above) 242 (noting that the principle of the margin of appreciation was developed by the European Court and the European Commission of Human Rights to allow the domestic legal systems and the European Convention to coexist without undue tension).

118 [2003] 2 AC 295 para 26.

119 *R v Secretary of State* (n 118 above) para 76; *R v Horncastle* [2010] 2 AC 373; [2009] UKSC 14.

120 *Doherty v Birmingham City Council* [2009] 1 AC 367 para 126.

121 *R v Horncastle* (n 119 above) para 11.

group had suffered segregation over a long period of time but not in another where there has not been a similar experience. 'Local circumstances' is, therefore, a strong factor that may affect a uniform interpretation of the African Charter, and it is one that the African Court cannot simply ignore without backlashes. The African Court should therefore be careful not to treat every objection by states' organs as a battle-line, without seeking to understand the local circumstances behind a particular law, insofar as the law does not seek to 'override ... or undermine fundamental rights guaranteed by ... the Charter'.¹²² Where an alternative exists, the African Court should avoid 'a ruling [that] could throw the domestic human rights regime into disarray'¹²³ at the complaint of an individual if the regime works well for the majority and for the peace and unity of the state.

The aim of a system-wide approach should, therefore, be that of complementarity and dialogue and not of subordination of national courts to the African Court. Jealous of their jurisdiction, national courts would denounce an international system they consider to be in competition with national jurisdiction. As another writer puts it, '[t]he more acceptance that judges at the national level perceive about their own place in political power sharing, the more likely they are to implement transnational norms'.¹²⁴ It is therefore essential to forge a healthy partnership that allows national courts some liberty to refuse to follow the jurisprudence of the African Court with reasons after 'taking account' of it. Such refusal should be a form of feedback mechanism to the Court and an invitation for a reconsideration of its established standard in the light of the objections raised by municipal courts. In *R v Horncastle*,¹²⁵ the refusal of both the British Court of Appeal¹²⁶ and the Supreme Court to follow the jurisprudence of the Chamber of the European Court in *Al-Khawaja & Tahery v United Kingdom*,¹²⁷ goaded the Grand Chamber of the Court to robustly reconsider the aspect of the decision that was in issue in *Al-Khawaja*.¹²⁸

It is only through this kind of dialogue and feedback that the African Court can, in partnership with national courts, develop consensus towards a uniform human rights standard for the continent. In gradually building consensus, however, the Court must not let itself be cowed into allowing the interests of states and the initial resistance of municipal courts to determine its jurisprudential directions. After all, it was such initial resistance that gave the European Court the opportunity to proclaim the supremacy of EU

122 *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 64.

123 Stemmet (n 80 above) 235.

124 Volcansek, (n 80 above) 583.

125 n 119 above.

126 [2009] EWCA Crim 964.

127 (2009) 49 EHRR.

128 Applications 26766/05 & 22228/06.

laws in *Costa v ENEL*,¹²⁹ where the initial negative posture of the Italian Constitutional Court towards EU treaties led the ECJ to proclaim that the European Economic Council (now the EU) Treaty was 'an integral part of the legal system of the member states' and embodied laws that 'could not ... be overridden by domestic legal provisions'.¹³⁰

The African Court will particularly have to stand its ground if it were to reverse certain relics of established African cultural ethos, such as the subjugation of the rights of women, which still reflects in municipal laws across African states. It is hoped that the African Court would develop an acceptable model of relationship that would further its purpose without placing itself at the mercy of national preferences or making itself too alien to 'customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine'.¹³¹ It should exercise its mandate to develop 'a truly African conception of human rights and an African human rights jurisprudence'¹³² in a way that respects and preserves the morality of African society. The Court cannot simply 'copy and paste' the jurisprudence of the European and the Inter-American systems and expect its decisions to be well received.

5.5 Claw-back clauses

Claw-back clauses are provisions in the African Charter that permit member states to enact rules and regulations limiting or setting conditions for the enjoyment of the rights safeguarded by the Charter.¹³³ They are formulated in the Charter in such phrases as 'except for reasons and conditions previously laid down by law';¹³⁴ 'necessary restrictions provided for by law';¹³⁵ 'subject to law and order';¹³⁶ 'within the law';¹³⁷ and so forth.

Although the desirability of these clauses often has been questioned and fears expressed that they 'permeate the African Charter and permit African states to restrict basic human rights to the maximum extent allowed by domestic law',¹³⁸ the local circumstances factor, it would appear, is the purpose that the 'claw-back clauses' in the Charter are designed to serve, if kept within defined limits. This is because they do have the merit of allowing the African Court to appreciate and respect a certain domain of sovereign competence by

129 Case 6/64 *Costa v ENEL* [1964] 3 CMLR 425; ECR 585.

130 *Costa* (n 129 above) 593.

131 Stemmet (n 80 above) 240 (urging the African Court to follow the example of the ECJ by minimising a possible conflict with the widely-divergent domestic legal orders of state parties).

132 Bekker (n 71 above) 157.

133 Martorana (n 74 above) 596.

134 Art 6.

135 Art 11.

136 Art 8.

137 Art 9.

which a member state could regulate its affairs. They could, therefore, serve as tension absorbers and may have enhanced the willingness of African states to participate in the African Charter regime. Its usage, if it is such as to render a Charter right non-existent or to set onerous conditions for its enjoyment by states, should be struck down by the African Court as a violation of the Charter.

The African Commission has always set limits to claw-back legislation. The Commission had declared that claw-back clauses should not serve the purpose of a general restriction on rights, as this would 'diminish public confidence in the rule of law and are often counter-productive';¹³⁹ also that '[n]o situation [not even a claw-back clause] justifies the wholesale violation of human rights'.¹⁴⁰ In *Scanlen & Holderness v Zimbabwe*, the Commission declared that the phrase 'within the law' required a consideration of 'whether the restrictions meet the legitimate interests, and are necessary in a democratic society',¹⁴¹ and that the phrase 'within the law' as 'employed in the Charter cannot be divorced from the general concept of the protection of human rights and freedoms'.¹⁴² In totality, however expressed in the African Charter, the Commission has established that claw-back clauses cannot derogate from the overall obligations of member states under the Charter.¹⁴³

Nevertheless, the presence of claw-back clauses in the African Charter is a clear invitation to state parties to give effect to the rights in respect whereof derogation is permitted in a manner that suits their national interests and local circumstances. It may therefore be possible that no two claw-back legislations adopted by states to regulate the same right in the Charter are the same, although they serve the same end of regulating the exercise of the right contained in a particular article of the Charter.

It would appear that the African Court took the need to judge every claw-back legislation individually into cognisance in *Tanganyika Law Society*. A careful reading of the case would reveal that the jurisprudence of the Court did not favour total prohibition. The Court appears to accept that a prohibition will be valid if it does not result in

138 Mutua (n 6 above) 358. Also see AE Anthony 'Beyond the paper tiger: The challenge of a human rights court in Africa' (1997) 32 *Texas International Law Journal* 511 518; GJ Naldi 'Limitation of rights under the African Charter on Human and Peoples' Rights: The contribution of the African Commission on Human and Peoples' Rights' (2001) 17 *South African Journal on Human Rights* 109; R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667 692.

139 *Media Rights Agenda & Others v Nigeria* (n 122 above) para 65.

140 As above.

141 n 27 above para 112.

142 As above.

143 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000); *Aboubacar v Ghana* (2000) AHRLR 124 (ACHPR 1996).

denying a candidate the right to stand for elections without being a member of, or sponsored by, a political party.¹⁴⁴

In holding that a particular exception meets the conditions or standards, the African Court would also have to be vigilant enough to ensure, in the case of prohibition of independent candidacy, for instance, that irrespective of the existence of the accepted alternative, the system is not operated in such a way as to obliterate that alternative on technical grounds.¹⁴⁵ It is, therefore, for the Court to develop broad guiding principles in its own jurisprudence by which each claw-back legislation will have to be judged on its own terms. So long as a claw-back legislation falls within the four corners of the principles, in theory and practice, it should escape a declaration of incompatibility. The ultimate aim should be to ensure that the clauses do not allow derogation that so strikes at the root of an African Charter right as to set it 'aside'¹⁴⁶ or 'nullify the very rights and liberties they are to regulate',¹⁴⁷ as this would surely 'defeat the purposes of codifying certain rights in international law and, indeed, the whole essence of treaty making'.¹⁴⁸

6 Conclusion

As a permanent international court and the prime mechanism for the interpretation and enforcement of the African Charter, *Tanganyika Law Society & Another v Tanzania* is only the first of many instances where the African Court would find provisions of municipal law, including constitutional texts, incompatible with the African Charter. Now is the time for state parties to the Charter to recognise the huge obligation placed on them by the African Court Protocol and to support the Court to lead the way towards a uniform continental interpretation and application of the Charter. A uniform application of the Charter by the national courts of member states and the African Court would engender jurisprudential harmony as well as promote judicial economy by reducing the desire of individuals to have recourse to the Court as a result of its more favourable jurisprudence. It would also make it possible for all parties to the African Charter to generally observe the same level of Charter obligations.

To achieve coherence and strengthen the standing of the African Court, state parties should be encouraged to make constitutional changes towards accommodating the Court within their legal

144 See 5-6 of this article.

145 See *Media Rights Agenda & Others v Nigeria* (n 122 above) paras 55-57; *Scanlen & Holderness v Zimbabwe* (n 27 above) paras 90-91; also see F Hoffmeister 'Podkolzina v Latvia App No 46726/99' (2003) 97 *American Journal of International Law* 3.

146 *Media Rights Agenda & Others v Nigeria* (n 122 above) para 66.

147 *Tanganyika Law Society* (n 4 above) para 109.

148 *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 40.

systems. Such constitutional changes would allow the dualist states to domesticate the African Court Protocol and the monist states to publish the Protocol as a law of the land. Legislative actions would integrate the Court into the legal systems of state parties and ensure a proper line of normativity that allows municipal actors to generally defer to the Court in the interpretation of the Charter as well as in the enforcement of its decisions.

It is to be expected that there will be the real initial difficulty of how to maintain a balance between the innovative interpretation of African Charter articles by the African Court and the diverse interpretations the articles receive across state parties. Important as this is, there is no illusion that the right balance is in the offing. It is even more realistic to note that the balance cannot be achieved under the current system that lacks the needed municipal legal framework recognising the status of the Court in member states. The failure of member states in this regard gives their patently unwilling courts a valid reason, from the municipal law viewpoint, to ignore both the actual decisions and jurisprudence of the Court. Intrinsicly, the African Court has a huge role to play: It must seek to build consensus as it incrementally gains legitimacy and trust with every decision it renders, but this will be impossible unless it remains focused and jurisprudentially consistent.

In the final analysis, when all the factors discussed so far are considered alongside the weak AU mechanism that lacks sufficient funds and incentives to compel obedience to African Court decisions, it cannot be said that the Court has the final say yet.

Peoples' rights, indigenous rights and interpretative ambiguities in decisions of the African Commission on Human and Peoples' Rights

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Summary

The evolving jurisprudence of the African Commission on Human and Peoples' Rights displays ambiguities in interpretations of the peoples' rights provisions of the African Charter on Human and Peoples' Rights. The article comparatively examines the Endorois and Southern Cameroon decisions adopted in 2009 in an effort to uncover the challenges faced by the African Commission in contextually applying peoples' rights provisions of the African Charter to particular collectives. In the Endorois case, the Commission made a positive finding on violations of applicants' claims of violations of their collective rights as an indigenous people. Conversely, in the Southern Cameroon case, the Commission made a negative finding on the applicants' arguments for remedial secession, using more or less the same collective rights provisions of the African Charter. The article contextualises the two cases in critically examining the African Commission's legal reasoning in both decisions.

Key words: *indigenous; peoples; African Commission; jurisprudence; ambiguities*

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1 Introduction

More than three decades since the adoption of the African Charter on Human and Peoples' Rights (African Charter),¹ uncertainty persists over the boundaries of applicability of 'peoples' rights provisions codified in the instrument. In 2009, the African Commission on Human and Peoples' Rights (African Commission) concluded its deliberations in two important communications that extensively invoked the peoples' rights provisions of the African Charter. In *Gunme & Others v Cameroon*,² the African Commission found numerous violations of applicants' rights by the respondent, but made a negative finding about their central claims for self-determination in the form of secession. In the second case, presented in the name of members of the Endorois community against Kenya (*Endorois case*),³ the African Commission found violations of numerous collective rights. The Commission further made an unambiguous pronouncement regarding the identity of the Endorois as constitutive of an indigenous people. The *Endorois* decision has been celebrated widely as a landmark achievement in vindicating indigenous rights on the African continent.⁴ However, in these two and prior cases, the African Commission's interpretation of peoples' rights in the African Charter raises concerns over a lack of consistency and clarity.

The article discusses the *Endorois* and *Southern Cameroon* decisions with a particular focus on the African Commission's legal reasoning on the applicability of the peoples' rights provisions of the African Charter to particular collectives. These decisions are analysed against the backdrop of the work of the African Commission over the last two decades in promoting the recognition and protection of indigenous peoples' rights within African states. Moreover, the analysis builds on the available rich body of literature on the contentious meaning of people(s) under international law and, specifically, under the African Charter.⁵ The inquiry examines the legal reasoning in *Endorois* and *Southern Cameroon* and goes beyond positivistic arguments by digging into the socio-historical and political realities underpinning the legal contentions adjudicated by African Commission in the two cases.

1 OAU Doc CAB/LEG/67/3 Rev 5; reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 29.

2 (2009) AHRLR 9 (ACHPR 2009) (*Southern Cameroon case*).

3 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois case*).

4 For some relevant analyses of the decision, see K Sing'Oei 'Engaging the Leviathan: National development, corporate globalisation and the Endorois' quest to recover their herding grounds' (2011) 18 *International Journal on Minority and Group Rights* 515; G Lynch 'Becoming indigenous in the pursuit of justice: The African Commission on Human and Peoples' Rights and the Endorois' (2012) 111 *African Affairs* 24.

2 Peoples' rights as indigenous rights in the *Endorois* case

2.1 Facts of *Endorois* in a nutshell

The *Endorois* case before the African Commission dealt with the eviction (the Kenyan government refers to relocation) of some 400 Endorois families from the area around Lake Bogoria (formerly Lake Hannington), after the area was gazetted in 1973 as a national park. In negotiating the resettlement process, the Kenyan authorities promised fertile lands to resettled families, compensation and a share of revenues and jobs generated by the game reserve. The Kenyan Wildlife Service – the authority directly responsible for the relocation – also promised 3 150 Kenyan Shillings (around 30 British pounds at the time) per family for the resettlement, but only 170 allegedly received the money.⁶ The petition was presented in the name of not only the 400 expelled families, but the entire Endorois community, and claimed to represent some 60 000 people.⁷ Since their eviction, members of the affected community had unsuccessfully initiated numerous actions aimed at seeking redress for their loss. They appealed to Kenyan authorities, including to then President Daniel Arap Moi, and, as political remedies proved unsuccessful, equally unsuccessful legal actions were initiated in Kenyan courts. More than three decades after the gazetting of their lands, the legal contentions over the eviction of members of the Endorois community were submitted on their behalf to the African Commission.

2.2 Collective identity of the Endorois

The communication was presented on behalf of the Endorois community by the Nairobi-based Centre for Minority Rights Development (CEMIRIDE) and London-based Minority Rights Group International (MRG). The applicants alleged violations of several provisions of the African Charter guaranteeing collective rights or individual rights with a collective dimension, including the right to practise religion (article 8); the rights to property (article 14); to culture (article 17(2)(3)); the right to free disposition of natural resources (article 21); and the right to development (article 22). In

5 For some relevant literature, see RN Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *The American Journal of International Law* 80; K M'Baye *Les Droits de l'Homme en Afrique* (1992) 183; UO Umozurike *The African Charter on Human and Peoples' Rights* (1997) 52; F Ouguergouz *La Charte Africaine des Droits de l'Homme et des Peuples: Une approche juridique des droits de l'homme entre tradition et modernité* (1993) 131; P Alston 'Peoples' rights: Their rise and fall' in P Alston (ed) *Peoples' rights* (2001) 127; J Donnelly 'Third generation rights' in C Brölmann et al (eds) *Peoples and minorities in international law* (1993) 119. See also F Viljoen *International law in Africa* (2012) 219.

6 *Endorois* (n 3 above) paras 7-8 & 110.

7 *Endorois* paras 3-8.

their submissions, the applicants ingeniously supported their case under the African Charter with relevant African Commission jurisprudence. Using the generous permissibility under the African Charter system to draw inspiration from domestic, regional and international human rights law and jurisprudence in interpreting African Charter provisions, they invoked numerous landmark rulings on indigenous collective rights.⁸ Since the Endorois represent one among more than two dozen communities in Kenya claiming an indigenous status,⁹ the African Commission specifically elaborated on regional, international and domestic rulings of relevance to indigenous rights.

2.2.1 The Endorois as a(n indigenous) people

In examining the merits of the case, the African Commission found that the Endorois constituted a people, an indigenous people, and were entitled to invoke the collective rights provisions of the African Charter.¹⁰ The legal reasoning over the Endorois as an indigenous people betrays an ambiguous marriage between the interpretative and the promotional mandates of the African Commission. The unequivocal application of peoplehood and indigeneness to the Endorois raised questions that remained unanswered in the decision. To avoid reductionist or essentialist constructions of the Endorois identity, one needs to contextually examine their claims against the backdrop of socio-political and historical dynamics in colonial and post-colonial Kenya.

The lack of terminological uniformity in references to the Endorois, the Tugen and the Kalenjin throughout the African Commission's decision displays either a disregard for the historicity of these collective attributes, or a lack of analytical and terminological rigor. The Endorois are described in some sections of the communication as a 'clan' of the Tugen (sometimes *Tungen*¹¹) 'sub-tribe', which itself is part of the Kalenjin 'tribe'.¹² However, elsewhere the communication refers to the Endorois as a sub-tribe or a clan of the Tugen tribe.¹³ Hence, while the term 'clan' is used only in reference to the Endorois; 'sub-tribe' is used for both the Endorois and the Tugen.¹⁴ The same applies to the concept of tribe, used in reference to both the Tugen and the Kalenjin.¹⁵ Elsewhere, the *Endorois* decision is referred to as

8 *Endorois* paras 71-135.

9 Human Rights Council 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen: Mission to Kenya' UN Doc A/HRC/4/32/Add.3 (2007) para 5.

10 *Endorois* (n 3 above) paras 144-162.

11 *Endorois* para 159 n 71, 175 & 179.

12 *Endorois* paras 142, 145, 146 & 161.

13 *Endorois* paras 3(1), 140 & 270. Confusingly, paras 175 and 179 refer to the 'four Tungen tribes'.

14 *Endorois* para 270 refers to contentions by the respondent state that '[t]he Baringo and Koibatek Country Councils are not only representing the Endorois, but other clans of the Tugen tribe, of which the Endorois are only a clan' (my emphasis).

'this judgment'.¹⁶ These errors and considerations clearly suggest that the deliberations about and the drafting of the *Endorois* decision could have received better attention.

In submissions to the African Commission, Kenya contended that the Endorois could not be regarded as a people since they were only a clan of the Tugen sub-tribe, the latter being itself part of the larger Kalenjin tribe or group.¹⁷ The state invoked linguistic and other similarities between the various clans making up the Tugen (sub-) tribe.¹⁸ In essence, Kenyan authorities disputed the autonomous existence of the Endorois as a cultural and socio-political community distinct from the related Tugen and Kalenjin groups, and challenged the applicants to prove the contrary. Arguably, the position of the government was in line with the 1989 and 1999 official censuses that included tribal/ethnic data whereby only the Kalenjin were listed as one of more or less 43 ethnic communities constituting the population of Kenya.¹⁹ The African Commission's ruling that the Endorois constituted a distinctive identity did not answer the above, more than semantic, considerations (as will be discussed in the next section).

Moreover, the decision leaned on the subjective criteria of self-identification by the Endorois and their relative marginality in reaching the conclusion that they were both a people and indigenous. In reaching the conclusion that the Endorois are an indigenous people, the African Commission rehearsed the mantra of indigenous collective rights norms, jurisprudence and discourses as elaborated by national and regional systems (particularly the Inter-American human rights system), and international institutions or networks.²⁰ Since 1999, the African Commission has initiated an active campaign aimed at securing the recognition and protection of indigenous peoples' rights by African states.²¹ Proponents of this dynamic sought to invoke the 'peoples' rights' provisions of the African Charter in drawing the world's attention to the plight of claimant indigenous peoples.²²

15 *Endorois* paras 3 n 1, 140, 270, 142, 145, 146 & 161. The vagueness of terminological usage can further be found in references to the Kalenjin group as in para 3 n 1.

16 *Endorois* para 203 (n 107). Judgments are rendered by courts and have a binding effect, while quasi-judicial bodies, such as the African Commission, take decisions to be implemented in good faith by state parties.

17 *Endorois* paras 140-142 (discrepancies in terminological use will be analysed below).

18 *Endorois* para 142.

19 For relevant analyses, see V Golaz 'Recensements et catégories ethniques: Les enjeux politiques de la croissance démographique kényane' (2006) 40 (3) *Canadian Journal of African Studies* 426; V Golaz 'Les enjeux ethniques des recensements: le recensement de 1989 au Kenya' (1997) 67 *Politique Africaine* 113. On Kenya's ethnic identities, see W Ng'ang'a *Kenya's ethnic communities: Foundation of the nation* (2006). The 2009 results of the population census with ethnic data had not yet been released at the time the case was decided.

20 In *Endorois* (n 3 above) paras 147-161 and 186-234, the decision extensively quotes from the Inter-American decisions on indigenous rights. For more on this, see sec 2.3.4.

Composed essentially of members of (former) hunter-gatherers and pastoralist communities, but also some (small-scale) farmers and fishers, communities enrolled in the global indigenous movement claim historical marginality as well as an attachment to ancestral lands and lifestyles threatened by the modernisation project of the post-colonial state. The import of the indigenous rights legal framework in the African human rights regionalism, with a determinant role played by the Copenhagen-based International Work Group for Indigenous Affairs, was a result of a dynamic of globalisation of this form of identification since the early 1980s.²³ The promotion of indigenous rights within African human rights regionalism became an integral part of the African Commission's agenda, ever since the establishment of its Working Group on Indigenous Populations/Communities in Africa in 2000.²⁴

Remarkably, the indigenous rights narrative in the *Endorois* decision contrasts with the language of the *Ogoni* decision rendered in 2001 where the African Commission found violations of the applicants' collective rights as a people without any recourse to indigenous rights precepts.²⁵ Since both groups are enrolled in the global indigenous movement²⁶ and indigenous rights are not, after all, explicitly recognised in the African Charter, the focus on the indigenous attributes of the Endorois can only be read against the background of ongoing efforts by the African Commission to promote this particular legal framework on the continent.

2.2.2 On the peoplehood attribute: Endorois, Tugen or Kalenjin?

The undeniable legitimacy of the Endorois' demand for redress for land spoliation does not preclude an examination of their identity claims under the lens of identity politics in Kenya. Early colonial anthropology made limited reference to the Endorois as a specific identity. In fact, studies have struggled to clearly differentiate

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- 21 Under art 45 of the African Charter, the African Commission is entrusted with a mission to 'promote, protect and interpret the rights in the African Charter'. For more on this, see FM Ndahinda *Indigeness in Africa: A contested legal framework for empowerment of 'marginalized' communities* (2011) and relevant references therein.
 - 22 African Commission and International Working Group for Indigenous Affairs (IWGIA) *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (2005) 72-78.
 - 23 For an elaboration thereon, see FM Ndahinda 'Historical development of indigenous identification and rights in Africa' in R Laher & K Sing'Oei (eds) *Indigenous people in Africa: Contestations, empowerment and group rights* (2014) 24; Ndahinda (n 21 above) 55-82.
 - 24 African Commission 'Resolution on the Rights of Indigenous Populations/Communities in Africa' Fourteenth Annual Activity Report (2000), African Commission/Res 51(XXVIII)00.
 - 25 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*Ogoni* case).
 - 26 As evidenced by the African Commission and IWGIA *Indigenous peoples in Africa: The forgotten peoples? The African Commission's work on indigenous peoples in Africa* (2006) 16.

members of what used to be known as Nandi-speaking groups before they became 'Kalenjin'.²⁷ It is documented that "'Kalenjin" is 'a corporate name for the 'Nandi-speaking tribes'²⁸ adopted since the mid-1940s and early 1950s and popularised by elites from these communities. Prior to the adoption of the federative Kalenjin identification, studies are in many ways vague in their attempts to establish historical linkages and differences between the various 'Nandi-speaking' and, to some extent, neighbouring groups. The difficulty to delineate – territorially, linguistically and socio-politically – the various sub-units of the Nandi/Kalenjin community is rooted in the inherent dynamism of identification with a particular ethno-cultural community.²⁹ More generally, relevant historical and ethno-anthropological studies have displayed the fluidity of boundaries of ethno-cultural identification.³⁰

According to the 2009 population census, the Kalenjin are the third largest ethno-cultural group in Kenya – next to the Kikuyu and the Luhya – with a total population of 4 967 328 people.³¹ A combined reading of different sources provides the following main 'tribal' subdivisions of Kalenjin: Kipsigis (Lumbwa); Nandi (Chemgal); Tugen (Kamasia or Tuken); Marakwet (Marakweta); Keiyo (Elgeyo); Pokot (Suk); Terik (Nyangori or Elgon); Sebei (Sabaot); and Ogiek.³² These sub-units, generally referred to as Kalenjin *tribes* or *sub-tribes*, are further divided into several clans each.³³ This classification is far from

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- 27 For relevant literature, see GWB Huntingford 'Tribal names in the Nyanza and Kerio provinces, Kenya colony' (1930) 30 *Man* 124; JEG Sutton 'Denying history in colonial Kenya: The anthropology and archeology of GWB Huntingford and LSB Leakey' (2006) 33 *History in Africa* 293.
- 28 M Omosule 'Kalenjin: The emergence of a corporate name for the "Nandi-speaking tribes" of East Africa' (1989) 27 *Genève-Afrique* 73.
- 29 See GWB Huntingford *The Nandi of Kenya: Tribal control in a pastoral society* (1953) 1; GWB Huntingford *The Southern Nilo-Hamites* (1953) 10 91; JEG Sutton 'Archeology and reconstructing history in the Kenya highlands: The intellectual legacies of GWB Huntingford and Louis SB Leakey' (2007) 34 *History in Africa* 297.
- 30 See BJ Berman 'Ethnicity, patronage and the African state: The politics of uncivil nationalism' (1998) 97 *African Affairs* 305; R Cohen 'Ethnicity: Problem and focus in anthropology' (1978) 7 *Annual Review of Anthropology* 379; G Wellfish 'The question of ethnic identity: An ethnohistorical approach' (1959) 6 *Ethnohistory* 321; D Welsh 'Ethnicity in sub-Saharan Africa' (1996) 72 *International Affairs* 477.
- 31 See the data from the Kenya National Bureau of Statistics, <http://www.knbs.or.ke/Census%20Results/Presentation%20by%20Minister%20for%20Planning%20revised.pdf> (accessed 2 September 2013). According to 1989 and 1999 censuses, they represented 2 458 000 and 3 466 000 people respectively. Golaz (n 19 above) 427 elaborates on the manipulation of these figures by authorities in favour of the then President Moi's Kalenjin community.
- 32 See http://www.kalenjin.net/newsite/index.php?option=com_content&view=section&id=6&Itemid=196 (accessed 7 May 2013).
- 33 See http://www.kalenjin.org/index.php?option=com_content&view=section&id=6&Itemid=196 (accessed 11 June 2013); S Tornay 'Le test des triades dans l'étude des nomenclatures de parenté' (1969) 39 *Journal de la Société des Africanistes* 84.

authoritative: It is subject to alternative groupings or nomenclatures.³⁴ The status of tribe or ethnicity is attributed to the Kalenjin community as a whole or to the sub-units grouped therein, depending on whether the identification stresses commonalities or differences. In 2002, Anderson deplored the fact that Kalenjin history had received 'only slight scholarly attention, and what research has been conducted has focused in the main upon Nandi and Kipsigis, with a concentration upon precolonial history ... and the impact of colonial conquest'.³⁵

As contended by Kenyan authorities before the African Commission, existing ethnographic data considers the Endorois as one of the clans of the Tugen people.³⁶ Other Tugen clans are the Arror, the Samor(r), the Lembus and the Pokor.³⁷ Like the Tugen, other (sub-) tribes of the Kalenjin are each equally divided into several clans and age sets.³⁸ Generally, most of these clans or (sub-) tribes of the Kalenjin can be demarcated territorially, linguistically and, indeed, culturally.³⁹ Yet, only some of these identities are currently more active than others in asserting their differences *vis-à-vis* fellow Kalenjin. For instance, alongside the Endorois, the Sabaot, the Pokot and the Ogiek are equally involved in a global indigenous rights movement that essentially advocates special protection of particular groups on grounds of differential socio-cultural characteristics.⁴⁰ In an ever-dynamic context, like Kenya, whereby national identity, clan, sub-tribe, tribe or communities regrouping several tribes are all notions in constant renegotiation, a clear determination of what exact societal unit constitutes a people indigenous to a specific territory is more than challenging.⁴¹

2.2.3 Ethnicity and indigenous identification in Kenya

Ethnic politics have been an integral part of the Kenyan socio-political landscape since the creation of the first political organisations in the

34 See G Lynch 'Courting the Kalenjin: The failure of dynasticism and the strength of the ODM wave in Kenya's Rift Valley province' (2008) 107 *African Affairs* 542; JA Distefano 'The precolonial history of the Kalenjin of Kenya: A methodological comparison of linguistic and oral traditional evidence' unpublished PhD thesis, University of California/Los Angeles, 1985 32 *et seq.*

35 DM Anderson *Eroding the commons: The Politics of ecology in Baringo, Kenya 1890-1963* (2002) 17-18.

36 *Endorois* (n 3 above) para 92; MO Makoloo *Kenya: minorities, indigenous peoples and ethnic diversity* (2005) 17; Anderson (n 35 above) 58 *et seq.*

37 Makoloo (n 36 above) 17.

38 See Huntingford *The Southern Nilo-Hamites* (n 29 above) 26; Ng'ang'a (n 19 above) 307; Anderson (n 35 above) 23.

39 Ng'ang'a (n 19 above) 307.

40 See UN Doc A/HRC/4/32/Add.3, 26 February 2007 para 5.

41 G Lynch 'Negotiating ethnicity: Identity politics in contemporary Kenya' (2006) 107 *Review of African Political Economy* 49.

run-up to the country's independence.⁴² During the 1950s and 1960s, elites active in local and national politics engineered the unity of communities with ethno-cultural affinities in moves intended to boost their ethnic competitiveness at local and national stages.⁴³ Conversely, the 1990s witnessed a 'marked tendency in Kenya for communities to emphasise the fact that they are distinct'.⁴⁴ In fact, members of Kalenjin communities were collectively identified or identified themselves with elites that most benefited from more than two decades of the rule of the Tugen-Kalenjin President Daniel Arap Moi from 1978 to 2002.⁴⁵

The prevalence of contemporary indigenous rights activism in Kenya's Rift Valley province should be examined against the backdrop of the politics of belonging that predates the country's accession to independence. The Kalenjin-Maasai-Turkana-Samburu communities – once known as Kamatusa – have aggressively used different platforms to ensure their recognition as the authentic natives of the Rift Valley.⁴⁶ They have constantly portrayed members of other communities, such as the Kikuyu living in the province but whose 'homelands' are in other provinces, as invading foreigners. Before they started framing their claims using the global language of the indigenous rights struggle for survival, political elites from the Rift Valley advocated *majimboism* (coined from *Majimbo*, the Swahili word for regional administrative entities) as the appropriate 'basis for a devolved constitutional arrangement that would protect smaller "minority" communities from the dominance of larger communities'.⁴⁷ *Majimboism* did not simply promote a decentralisation of power from Nairobi to the regions, but rather some form of federalism based on ethnicity.⁴⁸ The most radical consequences of the implementation of *majimboism* would be for 'all those who find themselves in the [regions] other than those in which their ancestors were living in 1895 when Kenya was born to return to the [regions] of their ancestors and abandon property without compensation'.⁴⁹

42 DM Anderson "'Yours in struggle for Majimbo". Nationalism and the party politics of decolonisation in Kenya, 1955-64' (2005) 40 *Journal of Contemporary History* 547; International Crisis Group (ICG) *Kenya in crisis* (2008) 37.

43 See Golaz (n 19 above) 426; Golaz (n 19 above) 113; Omosule (n 28 above) 76.

44 Lynch (n 41 above) 54. See also SN Ndegwa 'Citizenship and ethnicity: An examination of two transition moments in Kenyan politics' (1997) 91 *The American Political Science Review* 599; JM Klopp "'Ethnic clashes" and winning elections: The case of Kenya's electoral despotism' (2001) 35 *Canadian Journal of African Studies* 473.

45 Anderson (n 42 above) 550; C Thomas 'Le Kenya d'une élection à l'autre Criminalisation de l'Etat et succession politique (1995-1997)' 1997 *Les Etudes du CERI*.

46 GK Adar 'Assessing democratisation trends in Kenya: A post-mortem of the Moi regime' (2000) 38 *Commonwealth and Comparative Politics* 117; Ndegwa (n 44 above) 599.

47 Anderson (n 42 above) 547.

48 L Hughes 'Malice in Maasailand: The historical roots of current political struggles' (2005) 104 *African Affairs* 215.

Since the Kenyan struggle for independence, political debates have been characterised by a constant quest for a suitable constitutionalism.⁵⁰ National political processes have been described as having undergone phases of 'Africanisation', 'Kenyanisation' (known also as 'Kikuyunisation') and 'Kalenjinisation'.⁵¹ The lack of coherence, inclusiveness and accountability has somehow resulted in an institutionalisation of ethnicity as a legitimate source of representation.⁵² After half a century of failed attempts to institute a state structure consisting of a federation of ethnicities, Rift Valley political operatives have found in the indigenous rights framework a powerful source of legitimacy in their efforts to shelter 'ancestral territories' against perceived invasions from members of non-native communities. The perceived lack of sufficient protection against invasions by members of other groups, coupled with ethnic politics, were the main grounds for the negative vote of all the Kalenjin-dominated constituencies on the proposed Kenyan Constitution backed by 67 per cent of the national population during the 4 August 2010 referendum.⁵³

2.3 Substantive violations of the Endorois' rights by Kenya

2.3.1 Temporal applicability of the African Charter

The African Commission found violations of all provisions invoked by the applicants. Since the communication invoked violations that took place over a long period of time, starting from a time before the entry into force of the African Charter, the African Commission needed to address the temporal applicability of the instrument. Central to the applicants' case was the eviction from ancestral lands around Lake Bogoria since the 1973 gazetting of the area as a game reserve.⁵⁴ The sequence of facts as summarised in the communication focuses on the adverse consequences of the creation of the Lake Bogoria Game Reserve for the Endorois community. The applicants further extended

49 Ndegwa (n 44 above) 611, quoting the *Citizens Coalition for Constitutional Change Circa 1995. Summary of the Report of Caucus I*.

50 Klopp (n 44 above) 473; Ndegwa (n 44 above) 599.

51 Makoloo (n 36 above) 25. See also D Rothchild 'Kenya's Africanisation programme: Priorities of development and equity' (1970) 64 *The American Political Science Review* 737; R Southall & G Wood 'Local government and the return to multi-partyism in Kenya' (1996) 95 *African Affairs* 501.

52 See UN Doc A/HRC/4/32/Add.3 26 February 2007, paras 21-22, whereby communities complained to the UN Special Rapporteur on Indigenous Rights that they lacked political representation due to a dispersed habitat across different administrative and electoral units.

53 For more on this, see <http://www.bbc.co.uk/news/world-africa-10876635> (accessed 6 September 2013) and M Mutua 'Why the tribe could kill the constitution' *Daily Nation* 4 September 2010.

54 *Endorois* (n 3 above) paras 2-3.

their claims for redress to their eviction from the Mochongoi forest.⁵⁵ The Kenyan government argued that the eviction from the Mochongoi forest – renamed Ol Arabel forest⁵⁶ – took place in 1941 under colonial administration.⁵⁷ The Kenyan authorities further contended that this particular claim was not part of the issues addressed by domestic courts and could, therefore, not be addressed in first instance by the African Commission.⁵⁸

The Commission agreed with the applicants that 'Lake Bogoria and the Monchongoi [*sic*] forest are central to the Endorois' way of life and, without access to their ancestral land, the Endorois are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors'.⁵⁹ The African Commission decision requested the Kenyan government, among others, to (a) recognise the Endorois' ownership of, and restitute, their ancestral land; and (b) grant them 'unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle'.⁶⁰

Clearly, the acts of eviction, the non-payment of adequate compensation and initial restrictions to access to or use of the gazetted areas surrounding Lake Bogoria took place before 1992 when the African Charter entered into force for Kenya following its ratification of the instrument. Undoubtedly, the various restrictions to access to or use of ancestral lands adversely affected and continue to affect the Endorois and might, arguably, be interpreted as constitutive of 'continuous violations'.⁶¹ However, a closer examination of the case and of the decision shows that the awarded remedy (land restitution, the recognition of land ownership and unrestricted access to ancestral land) challenges acts that mainly took place prior to the entry in force of the African Charter. A revealing example is the African Commission's finding under article 8 of the African Charter that the forced eviction of the Endorois from ancestral lands constituted a violation of their right to religious freedom,⁶² despite the fact that the actual act of eviction was completed by the time of the entry in force of the African Charter.⁶³

55 In the African Commission decision, the name of the forest is spelt as Mochongoi (paras 77, 78, 132, 143, 167, 182, 223, 226 & 297); Monchongoi (paras 6, 73, 74 & 156) or Muchongoi (paras 179 & nd 223).

56 *Endorois* (n 3 above) paras 143, 179, 180 & 223.

57 *Endorois* paras 179 & 182.

58 *Endorois* paras 105-112, 175-177, 203 & 224.

59 *Endorois* para 156.

60 *Endorois* para 298(b).

61 On temporal applicability of the African Charter and an interesting case submitted to the African Commission by an applicant from Kenya ruled inadmissible for invoking violations that took place prior to the entry into force of the instrument, see F Viljoen, 'Admissibility under the African Charter' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002) 76-77.

62 *Endorois* (n 3 above) para 173.

63 *Endorois* paras 3-11 & 19.

The theory of applicability of the African Charter to continuous violations does not explain how the instrument can be used retrospectively to determine violations of an instrument not in force at the time of the facts. The decision suggests that it is possible to invoke the protective mandate of the African Charter in respect of facts that took place any time in the past, as long as one proves that they have contemporary repercussions that may be interpreted as (continuous) violations of the instrument. As far as the applicability of the African Charter is concerned, there appears to be no difference between the eviction of the Endorois by Kenyan authorities since the 1970s and the Maasai moves by British authorities at the beginning of the twentieth century, since the latter are still central to contemporary indigenous discourses of the Maasai in Kenya.⁶⁴ If the latter were to be considered as continuous violations of the African Charter, there would be virtually no temporal limits to the notion of continuous violations, as the list of historical wrongs with contemporary repercussions is potentially endless.

2.3.2 Freedom of religion and the Endorois' beliefs

The African Commission relied on submissions by, and testimony of, the applicants in finding a violation of their freedom of religion through a denial of access to the reserve.⁶⁵ It failed to elaborate on the contemporary significance of the Endorois' traditional religious practices. More specifically, the religious dimension of rituals such as circumcision, marriage and initiation is not self-evident. In spite of local variants, many traditional African societies hold these customary rituals.⁶⁶ The commendably broad interpretation of freedom of religion by the African Commission was nonetheless unconvincingly applied to the *Endorois* case. Since the pre-colonial, but mostly during the colonial and post-colonial eras, many African societies have adhered to institutionalised religions originating from other continents, such as Christianity and Islam.⁶⁷ The domestication of these other forms of beliefs in some cases tolerated the subsistence of traditional beliefs but, in many others, was accompanied by the

64 On the Maasai moves, see L Hughes *Moving the Maasai: A colonial misadventure* (2006).

65 *Endorois* (n 3 above) para 173.

66 See WA Norton 'Customs of Central and South Africa: Some notes and comparisons' (1914) 14 *Journal of the Royal African Society* 81-87; EK Silverman 'Anthropology and circumcision' (2004) 33 *Annual Review of Anthropology* 419; GWB Huntingford 'Miscellaneous records relating to the Nandi and Kony tribes' (1927) 57 *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* 417.

67 For some relevant literature, see AA Weinreb 'First politics, then culture: Accounting for ethnic differences in demographic behaviour in Kenya' (2001) 27 *Population and Development Review* 437.

erosion of the latter.⁶⁸ Accordingly, these considerations should have dictated a deeper examination by the African Commission of the contemporaneous reality of the Endorois community's traditional practices, their religious character and the sacredness of reserve sites. Such in-depth examination is even more vital in light of the retreating boundaries between myth and reality in reconstructions of the Endorois' historical settlement around Lake Bogoria.⁶⁹

2.3.3 Land and cultural rights of the Endorois

Land rights are central to the communication since, besides compensation for their losses, the applicants before the African Commission primarily sought the restitution of their land, 'with title and clear demarcation'.⁷⁰ The Commission found that the eviction of the Endorois and the denial of their access to ancestral land represented violations of both relevant Kenyan laws and the applicable provisions of the African Charter relating to land rights. Under Kenyan law applicable at the time of the eviction, the land occupied by the Endorois was considered as trust land and administered by the Baringo and Koibatek County Councils for the benefit of the traditional occupants.⁷¹ The facts of the case clearly show that the Kenyan authorities did not comply with established procedures for the alienation of trust land, namely, registration to a person other than the County Council or an Act of Parliament providing for the County Council to set apart an area of trust land,⁷² and full compensation of the affected persons.⁷³ Drawing from the facts of the case, it was argued – and not disputed – by the respondent that the land was not formally set apart before gazetting.⁷⁴ Moreover, the African Commission rightly found that the payment of some 3 150 Kshs to only 170 of the 400 evicted families some 13 years after the eviction could not be considered appropriate compensation.⁷⁵

Provisions of Kenyan law on trust land invoked by applicants referred to occupation of, rather than right to property over, the land. The trust land was administered by the Council for the benefit of the persons ordinarily resident on that land (in this case the Endorois).⁷⁶ Rather than being mere beneficiaries, the African Commission determined that the Endorois enjoyed a property right over ancestral

68 See M Wright 'African history in the 1960s: Religion' (1971) 14 *African Studies Review* 439 for an early overview of literature on religion in Africa.

69 See Anderson (n 35 above) 299.

70 *Endorois* (n 3 above) para 22.

71 *Endorois* paras 88 & 103-108.

72 *Endorois* paras 69 & 105-108.

73 *Endorois* para 105 (n 82) on legal requirements for setting apart the land.

74 *Endorois* paras 177, 178 & 224.

75 *Endorois* para 230.

76 *Endorois* para 88.

lands prior to their eviction.⁷⁷ It further determined that, even after the eviction in blatant violation of applicable Kenyan and international legal standards, the land never ceased to be the property of the Endorois.⁷⁸

Another provision invoked by applicants – article 17(2) of the African Charter – provides for the freedom of individuals to participate in the cultural life of the community to which they belong, while article 17(3) of the Charter imposes a duty on states to promote and protect the morals and traditional values recognised by the community. In the *Endorois* decision, culture was defined as ‘the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups’.⁷⁹ Since the African Commission had already determined in preceding paragraphs that the Endorois constituted a distinct, indigenous people, it reached the following conclusion under articles 17(2) and (3).⁸⁰

By forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, the Respondent State have [*sic*] created a major threat to the Endorois’ pastoralist way of life. It is of the view that the very essence of the Endorois’ right to culture has been denied, rendering the right, to all intents and purposes, illusory.

The correlation between culture and pastoralism as *the* way of life of the Endorois is clearly inspired by the work of the African Commission and, mostly, the International Working Group for Indigenous Affairs (IWGIA) whose 2005 joint report on Indigenous Populations/Communities listed communities historically characterised by primary reliance on hunting-gathering and pastoralist lifestyles.⁸¹ Historical and anthropological research on ‘fundamentally’ pastoralist East African communities – including the Kalenjin – suggests that for ages many of them had adhered to mixed modes of production combining pastoralism with agriculture.⁸² In fact, the African Commission’s decision in the *Endorois* case referred to the applicants’ claim that, for centuries, the community had ‘constructed homes on the land, cultivated the land, enjoyed unchallenged rights to pasture, grazing, and forest land, and relied on the land to sustain their livelihoods’.⁸³ The analysis lacks some depth in creating a link between the sole pastoralist mode of production and a violation of the freedom to participate in the cultural life of the community. Since the forced

77 *Endorois* para 184.

78 *Endorois* para 209.

79 *Endorois* para 241.

80 *Endorois* para 251.

81 See more generally African Commission and IWGIA (n 22 above).

82 See R Mace et al ‘Transitions between cultivation and pastoralism in sub-Saharan Africa’ (1993) 34 *Current Anthropology* 363; HK Schneider et al ‘Economic development and economic change: The case of East African cattle’ (1974) 15 *Current Anthropology* 259.

83 *Endorois* (n 3 above) para 184 (my emphasis). See similar references in paras 87 and 189.

removal from fertile lands to semi-arid areas deprived the applicants of lands suitable for cultivation, one wonders whether this also constitutes a violation of the right to participate in the cultural life of the community.

2.3.4 Control of natural resources and the right to development

The African Commission invoked its jurisprudence in *Ogoni* in finding a violation of article 21 of the African Charter on the right of peoples to 'freely dispose of their wealth and natural resources'. The Commission reached a positive finding of a violation of article 21 of the African Charter. Relying on relevant case law of the Inter-American Court of Human Rights (Inter-American Court) interpreting the right to property,⁸⁴ it concurred with the latter that the right of indigenous or tribal communities over traditionally-used and occupied lands covers traditionally-used natural resources essential for the survival of members of that community.⁸⁵

The decision in the *Endorois* case has also been hailed for the positive finding of a violation of the right to development.⁸⁶ The African Commission lamented the fact that evicted families were not compensated with other suitable lands for grazing and that the resulting exploitation of their lands affected their access to clean water.⁸⁷ In reaching this finding, the Commission underscored the lack of effective consultation with and participation by the Endorois in the process of establishment, as well as in the management of the game reserve.⁸⁸ The examination of the violation of the right to development of the Endorois revolved around references to doctrinal and jurisprudential interpretation of the requirement for governments to obtain free, prior and informed consent of indigenous peoples before taking important decisions affecting their lives, and around the precariousness of their living conditions after the resettlement on

84 *Endorois* paras 257-266. Invoked cases of the Inter-American Court are *Case of the Saramaka People v Suriname* (28 November 2007); *Sawhoyamaya Indigenous Community v Paraguay* (29 March 2006) and *Case of Yakyé Axa Indigenous Community v Paraguay* (17 June 2005). The tremendous influence of the jurisprudence of the Inter-American Court is exemplified by the fact that 'Saramaka(s)' appears 71 times in the decision and, in some cases, numerous paragraphs (257-266) are dedicated to the case.

85 *Endorois* (n 3 above) para 260.

86 Human Rights Watch 'Kenya: Landmark ruling on indigenous land rights' 4 February 2010, <http://www.hrw.org/en/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights> (accessed 7 July 2015). The author celebrates the 'first ruling of an international tribunal' on this particular right. The African Commission is neither a tribunal nor was it making a finding for the first time of a violation of the right to development since such a finding was made in *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004) para 95.

87 *Endorois* (n 3 above) para 288.

88 *Endorois* paras 279-281, 289 & 297.

inhospitable lands.⁸⁹ Moreover, a violation of the Endorois' right to development is inferred from community deprivation as a result of the eviction, and the lack of fair compensatory alternatives offered by the government. The African Commission found that the Kenyan state did not fulfil its obligation of creating favourable conditions for the Endorois' development.⁹⁰

3 Secession and self-determination of Southern Cameroon

3.1 Contentious decolonisation of Northern and Southern Cameroon

The root causes of the Southern Cameroonians' attempts to secede from the Republic of Cameroon epitomise the identity crisis of more than one African state.⁹¹ The Kamerun Protectorate became a German possession upon the partition of Africa during the Berlin Conference in 1884-1885.⁹² Article 119 of the Covenant of the League of Nations dictated that defeated Germany had to renounce all 'rights and titles over her overseas possessions',⁹³ including the Kamerun Protectorate. The territory was divided into French and British possessions administered under the mandate system of the League of Nations and, later, the trusteeship system of the United Nations (UN).⁹⁴ The larger part of the partitioned territory, French Cameroon, was 'incorporated into the French colonial empire as a distinct administrative unit separate from neighbouring French Equatorial Africa'.⁹⁵ The Northern and Southern Cameroon territories, administered by Britain, consisted of 'two narrow non-contiguous

89 *Endorois* paras 279 & 290 (where the African Commission deplored the fact that '[t]he respondent state did not obtain the prior, informed consent of all the Endorois before designating their land as a game reserve and commencing their eviction'); 291, 293 & 296.

90 *Endorois* para 298. On the substance of the right to development, see A Sengupta 'On the theory and practice of the right to development' (2002) 24 *Human Rights Quarterly* 837; P Alston 'Making space for new human rights: The case of the right to development' (1988) 1 *Harvard Human Rights Yearbook* 3.

91 See A Hughes 'Decolonising Africa: Colonial boundaries and the crisis of the (non) nation state' (2004) 15 *Diplomacy and Statecraft* 833.

92 P Konings 'The Anglophone Cameroon-Nigeria boundary: Opportunities and conflicts' (2005) 104 *African Affairs* 278.

93 Covenant of the League of Nations (Versailles Treaty, 28 June 1919), LNTS Vol 1, Geneva 1920.

94 As above. See also AA McPheeters 'British Cameroons development program and self-determination' (1960) 21 *Phylon* 367.

95 Konings (n 92 above) 278.

regions bordering Nigeria and stretching from the Atlantic coast to Lake Chad'.⁹⁶

Contemporary politics of secession by Southern Cameroon are rooted in administrative structures instituted during roughly three decades of British rule over the territory. The French-administered Cameroon gained independence on 1 January 1960 as *La République du Cameroun* (as often referred to by Southern Cameroonian activists to stress its French roots).⁹⁷ In the same year, the neighbouring British colony and protectorate of Nigeria achieved independence on 1 October 1960 and adopted a federal structure. Two UN-supervised plebiscites were conducted in Northern Cameroon on 11-12 February 1961 and in Southern Cameroon on 1 October 1961 to determine the decolonisation fate of these territories.⁹⁸ These referenda resulted in a choice by a substantial majority of the people of Northern Cameroon to 'achieve independence by joining the independent Federation of Nigeria',⁹⁹ while the people of Southern Cameroon decided to join the Republic of Cameroon. The Republic of Cameroon petitioned the International Court of Justice (ICJ), challenging the validity of the process of decolonisation of Northern Cameroon.¹⁰⁰ It claimed to have suffered an injustice as a result of 'the attachment of the northern part of Cameroons to a state other than the Republic of Cameroon'.¹⁰¹ However, since the application did not pursue the invalidation of the result of the plebiscite by either the ICJ, the United Kingdom or Nigeria, or that the UN could be held responsible at the time of the application for a violation of a trusteeship agreement that had ceased to exist, the case was somewhat inconclusive.

The dynamics that followed the reunification of Southern Cameroon with the Republic of Cameroon are central to the Anglophone-Francophone divide.¹⁰² Advocates for autonomy or secession of Southern Cameroon retrospectively denounce the

96 As above. See also *Case concerning the Northern Cameroons (Cameroon v United Kingdom)*, Preliminary Objections ICJ (2 December 1963) (1963) ICJ Reports 21; JR Stevenson 'Case concerning the Northern Cameroons (*Cameroon v United Kingdom*), Preliminary Objections' (1964) 58 *American Journal of International Law* 489.

97 Stevenson (n 96 above) 489-490. See also <http://www.southerncameroonsig.org/> (accessed 13 July 2014) Southern Cameroons claims.

98 *Northern Cameroons* case (n 96 above) 21. See also B Flemming 'Case concerning the Northern Cameroons (*Cameroon v United Kingdom*), Preliminary Objections' (1964) 2 *Canadian Yearbook of International Law* 215.

99 United Nations General Assembly 'The future of the trust territory of the Cameroons under the United Kingdom administration' GA Res 1608 (XV), UN GAOR, 994th plenary meeting 21 April 1961 para 2(a).

100 *Northern Cameroons* case (n 96 above) 15-40. See also DHN Johnson 'The Case Concerning the Northern Cameroons' (1964) 13 *International and Comparative Law Quarterly* 1143.

101 *Northern Cameroons* case 32.

102 See P Konings & FB Nyamnjoh 'The Anglophone problem in Cameroon' (1997) 35 *The Journal of Modern African Studies* 207.

reunification process.¹⁰³ Stark claims that feelings of marginality of Southern Cameroon within the Nigerian federation prior to the plebiscites and resentment against economic dominance of Igbos were instrumental in the choice to join the Republic of Cameroon.¹⁰⁴ The initial association of the two territories took the form of a federal republic consisting of two states, known as West Cameroon and East Cameroon.¹⁰⁵ The political leadership of the French-speaking Republic of Cameroon manoeuvred to abolish the federal structure and achieved this through a controversial national referendum held on 20 May 1972.¹⁰⁶ Under an administrative remapping of the territory still in place, the former territory of Southern Cameroon covers the southwest and northwest provinces of a unitary Cameroonian state.¹⁰⁷

Advocates for autonomy or independence of Southern Cameroon argue that, under President Ahidjo, their region was subjugated by linguistically Francophones, regionally northerners, religiously Muslim and ethnically Fulani elites.¹⁰⁸ After President Ahidjo was succeeded in November 1982 by Paul Biya – from the mainly Christian central-southern part of former French Cameroon – ‘the political and cultural rights of the Anglophones were not restored’.¹⁰⁹ The Anglophones’ political activism for independent statehood took shape in the 1980s, but their demands were ignored and some of the activists – such as Fon Gorji Dinka – harshly repressed.¹¹⁰ Their political struggle gained visibility and intensity when the country initiated a process of political liberalisation following geopolitical changes and a democratisation process that accompanied the fall of the Berlin Wall in 1989.¹¹¹ Their recriminations against the Republic of Cameroon – listed in the 2-3 April 1993 Buea Declaration – revolved around violations of the terms of reunification and the socio-political and economic

103 C Anyangwe *Imperialistic politics in Cameroon: Resistance and the inception of the restoration of the statehood of Southern Cameroonians* (2008) 33 [http://southerncameroonsig.typepad.com/ig/2005/07/African Commission_communica.html#more](http://southerncameroonsig.typepad.com/ig/2005/07/African_Commission_communica.html#more) (accessed 14 July 2014). See also Konings & Nyamnjoh (n 102 above) 207; NF Awasom ‘Negotiating federalism: How ready were Cameroonian leaders before the February 1961 United Nations Plebiscites?’ (2002) 36 *Canadian Journal of African Studies* 425.

104 FM Stark ‘Federalism in Cameroon: The shadow and the reality’ (1976) 10 *Canadian Journal of African Studies* 425.

105 Stark (n 104 above) 423.

106 Stark 440.

107 D Eyoh ‘Conflicting narratives of Anglophone protest and the politics of identity in Cameroon’ (1998) 16 *Journal of Contemporary African Studies* 249.

108 Anyangwe (n 103 above) 34; Eyoh (n 107 above) 255-257; E Anyefru ‘Paradoxes of internationalisation of the Anglophone problem in Cameroon’ (2010) 28 *Journal of Contemporary African Studies* 85; Konings & Nyamnjoh (n 102 above) 211.

109 Hughes (n 91 above) 857; M Krieger ‘Cameroon’s democratic crossroads, 1990-4’ (1994) 32 *Journal of Modern African Studies* 606.

110 E Anyefru ‘Cyber-nationalism: The imagined Anglophone Cameroon community in cyberspace’ (2008) 6 *African Identities* 257.

111 See Anyefru (n 108 above) 86; Konings & Nyamnjoh (n 102 above) 211.

marginalisation of Southern Cameroon.¹¹² Demands shifted from increased political participation to autonomy and, eventually, independence.¹¹³ An organisation called Southern Cameroon National Council held a contested 'signature referendum' in September 1995 which overwhelmingly supported the independence of the territory.¹¹⁴ Some four years later, on 30 December 1999, the organisation proclaimed 'the revival of the independence and sovereignty of the Southern Cameroons'.¹¹⁵ Complementarily to their political activism, judicial institutions were also seized of adjudicating claims for autonomy or independence.

3.2 Judicial quest for recognition of Southern Cameroon's independence

3.2.1 Proceedings before the Nigerian High Court

In February 2002, Kevin Ngwang Gunme and 11 others took their case for self-determination and independence before the Federal High Court of Nigeria in Abuja.¹¹⁶ In justification of their rather peculiar case before a Nigerian Court, the applicants invoked articles 1 and 20 of the African Charter (respectively on the undertaking to give effect to rights, freedoms and duties enshrined in the Charter and on the right to self-determination) and article 2(3) of the Charter of the United Nations (UN) (on peaceful resolution of disputes). Following an elaborate enumeration of violations of their rights by the Republic of Cameroon, the applicants requested the Court to (i) declare and order that Nigeria has – and should exercise – a legal duty to place before the ICJ and the United Nations General Assembly (UNGA) and to ensure diligent prosecution to conclusion, the claim of the people of Southern Cameroon to self-determination and their declaration of independence; (ii) issue a perpetual injunction restraining Nigerian officials from treating or continuing to treat Southern Cameroon as part of the Republic of Cameroon.¹¹⁷ The Court made a positive ruling on the admissibility of the case.¹¹⁸ However, proceedings were stayed following an agreement between the parties that the Federal

112 Anyefru (n 108 above) 88.

113 Anyefru 87-88. See also L Sindjoun 'Le champ Social Camerounais: Désordre Inventif, Mythes Simplificateurs et Stabilité Hégémonique de l'État' (1996) 62 *Politique Africaine* 64.

114 *Southern Cameroon* (n 2 above) (Submissions by Applicants in Communication 266/2003, Submissions by the Applicants, para 139; [http://southerncameroon.sig.typepad.com/ig/images/African Commission.pdf](http://southerncameroon.sig.typepad.com/ig/images/African%20Commission.pdf) (accessed 15 July 2010)).

115 *Southern Cameroon* paras 119-120.

116 *Gunme & Others v Attorney-General of the Federal Republic of Nigeria*, Suit FHC/ABJ/CS/30/2002, Ruling of 5 March 2002, <http://southerncameroon.sig.typepad.com/abuja.pdf> (accessed 14 July 2013) 2.

117 *Southern Cameroon* (n 2 above) paras 59-65. See also N Enonchong 'Foreign state assistance in enforcing the right to self-determination under the African Charter: *Gunme (sic) & Others v Nigeria*' (2002) 46 *Journal of African Law* 246 *et seq.*

118 *Gunme & Others v Attorney-General of the Federal Republic of Nigeria* (5 March 2002), Enrolment of Order 13.

Republic of Nigeria shall (i) institute a case before the ICJ on the regularity of the termination of the United Kingdom trusteeship over Southern Cameroon and the ensuing reunification with the Republic of Cameroon; and (ii) shall take any other measures as may be necessary to place the case of the people of Southern Cameroon for self-determination before the UN General Assembly and any other relevant international organisations.¹¹⁹ More than a decade later, there appears to be no evidence that Nigeria followed up on its promise. Less than one year after the ruling by the Federal High Court of Nigeria in Abuja, the case for self-determination and independence of Southern Cameroon was taken before the African Commission.

3.2.2 The *Southern Cameroon* case before the African Commission

On 9 January 2003, Kevin Mgwanga Gunme and 13 others filed a complaint before the African Commission against the Republic of Cameroon alleging that, for decades, the inhabitants of Southern Cameroon were the victims of discrimination, socio-political and economic marginalisation as well as the denial of the right to self-determination and independent statehood.¹²⁰ Before examining the substance of the African Commission's decision in the case, a few details are worth mentioning. First, the title of the decision refers to the communication as *Kevin Mgwanga Gunme et al v Cameroon*, in reference to the first listed name of the 14 applicants. However, the text of the Submissions by the Applicants in Communication 266/2003 to the African Commission refers to Dr Kevin Ngwang Gumne.¹²¹ It is not quite clear how Ngwang Gumne in the complaint became Mgwanga Gunme in the decision. Second, the decision by the African Commission repeatedly refers to 'Southern Cameroon' (without 's') while the official name of the territory as reproduced in the petitioners' complaint and other sources is 'Southern Cameroons'.¹²²

As in the case before the Federal High Court of Nigeria in Abuja, the applicants presented the case on behalf of the entire population of Southern Cameroon, claimed to represent six million people.¹²³ In support of their case for independence, they invoked violations by the Cameroonian state of several provisions of the African Charter.¹²⁴ Under articles 19 and 20 of the African Charter – freedom from

119 As above.

120 *Southern Cameroon* (n 2 above) paras 1-20.

121 See *Dr Gunme & Members of the SCNC and SCAPO v Cameroon*, Communication 266/2003, Submissions by the Applicants, para 139, [http://southern.cameroonsig.typepad.com/ig/images/African Commission.pdf](http://southern.cameroonsig.typepad.com/ig/images/African%20Commission.pdf) (accessed 15 July 2013).

122 See eg *Southern Cameroon* (n 2 above) paras 1, 2, 3, 4, 5 & 6.

123 *Southern Cameroon* para 4. Eyoh (n 107 above) 268 claimed (in 1998) that the north west and south west provinces of Cameroon were inhabited by 1 237 400 and 830 000 people respectively. If these figures were accurate, a population of six million in 2003 when the application was filed before the African Commission would mean that, in just five years, the population had tripled.

domination, peoples' rights to self-determination and the rights of colonised people to break the chains of their subjugation – the applicants characterised Cameroonian rule over Southern Cameroon as a 'forceful annexation'¹²⁵ or an 'occupation and assumption of a colonial sovereignty'.¹²⁶ They contended:¹²⁷

The Southern Cameroons was ... under British rule from 1858 to 1887, and then from 1915 to 1961, a total period of nearly 80 years. That long British connection left an indelible mark on the territory, bequeathing to it an Anglo-Saxon heritage. The territory's official language is English. Its educational, legal, administrative, political, governance and institutional culture and value systems are all English-derived.

From the above quotation, it is clear that the applicants before the African Commission built their case for independence around a purported 'cultural distinctiveness', arising from a shared colonial experience rather than a common historical identity pre-dating German and British colonisation. It is a fact that the territory formerly known as Southern Cameroons is inhabited by dozens of ethnic communities that were not politically united prior to their colonial subjugation by Germany and Britain.¹²⁸ In the words of Konings and Nyamnjoh, quoting Sindjoun:¹²⁹

Anglophone identity can actually only be claimed by inhabitants belonging to one of the territory's 'autochthonous' ethnic groups, a distinction which tends to exclude immigrants from Southern Cameroons citizenship ... and which makes being 'anglophone' more of a geographic and administrative reality than a cultural one.

3.2.3 Legal findings of the African Commission

The African Commission found numerous violations of the African Charter by the Republic of Cameroon. The refusal to register companies established by Southern Cameroonians on account of language was found to be a violation of article 2 of the African Charter prohibiting discrimination.¹³⁰ The African Commission held that killings by the police during violent suppressions of peaceful demonstrations and deaths in detention as a result of the bad conditions or ill-treatment in prisons constituted violations of article 4 of the African Charter on the right to life, the inviolability of the

124 *Southern Cameroon* para 19. The applicants invoked violations of articles 2, 3, 4, 5, 6, 7(1), 9, 10, 11, 12, 13, 17(1), 19, 20, 21, 22, 23(1), 24 and 26 of the African Charter.

125 *Southern Cameroon* paras 6, 7, 73 & 151.

126 *Southern Cameroon* para 152.

127 Submissions by Applicants in Communication 266/2003, para 11.

128 As rightly noted in VT le Vine *The Cameroon Federal Republic* (1971) 45, there are no updated censuses – and, thus, no authoritative sources – documenting ethno-linguistic groups in Cameroon. However, the author suggested that there were 'more than 136 identifiable linguistic groupings in East Cameroon and about 100 vernaculars in West Cameroon'.

129 Konings & Nyamnjoh (n 102 above) 217-218.

130 *Southern Cameroon* (n 2 above) paras 102 & 108.

human being and the integrity of the person.¹³¹ Similarly, cases of detention without trial followed by release, and also the violent suppression of demonstrations and/or unlawful arrest and detention of demonstrators were respectively found to be in violation of article 6 of the African Charter on the right to liberty and to the security of one's person, and article 11 on freedom of assembly.¹³² The transfer of arrested individuals from Southern Cameroon to Francophone Cameroon for trial by military tribunals and trials of others in civil law courts without interpreters were found to be in violation of the due process guarantees under article 7(1) of the African Charter.¹³³ Acts of torture and amputation and the denial of medical treatment amounted to violations of article 5 of the African Charter prohibiting, among others, torture and cruel, inhuman or degrading punishment and treatment.¹³⁴ The African Commission also found that the lack of independence of the Cameroonian judiciary violated article 26 of the African Charter. Following a positive finding of violations of several provisions of the African Charter on individual rights, the Commission concluded that Cameroon violated its obligation under article 1 to guarantee the rights, freedoms and duties enshrined in the instrument.¹³⁵ The Commission was unable to find violations of article 3 (equality before the law), article 9 (the right to receive and disseminate information), article 10 (freedom of association), article 12 (freedom of movement), article 13 (the right to participate in the public life of the country) and article 17 (rights to education and to participation in the cultural life of the community) since the applicants did not elaborate thereon or support their claims.¹³⁶

Under peoples' rights provisions of the African Charter invoked by the applicants (articles 19-24), the African Commission found only a single violation. It ruled that the relocation of business enterprises and the location of economic projects to Francophone Cameroon violated article 19 (on peoples' rights to equality and their freedom from domination) since it had a negative effect on the economic life of Southern Cameroonians.¹³⁷ However, the Commission found no violations of Southern Cameroonians' rights to freely dispose of their wealth and natural resources (article 21), to peace and security (article 23(1)) and to a general satisfactory environment (article 24) because, it was ruled, the applicants had failed to submit evidence in support of their allegations.¹³⁸ Moreover, under article 22, the African Commission reiterated the obligation of a state to use its resources in the best way to ensure the progressive realisation of the right to

131 *Southern Cameroon* paras 110-112.

132 *Southern Cameroon* paras 115-120 & 134-138.

133 *Southern Cameroon* paras 121-131.

134 *Southern Cameroon* paras 113-114.

135 *Southern Cameroon* para 213.

136 *Southern Cameroon* paras 109, 132-133 & 139-149.

137 *Southern Cameroon* paras 151-162.

138 *Southern Cameroon* paras 204, 207 & 208.

development, but laconically determined that the inability of a state to 'reach all parts of its territory to the satisfaction of all individuals and peoples' cannot, in itself, be deemed to be a violation of the right to development.¹³⁹

Following a more elaborate reasoning, the African Commission also did not find a violation of the right to self-determination (article 20) at the heart of the communication. International norms and jurisprudence as well as academic literature have elaborated on the right to self-determination with its internal dimension (within the boundaries of a state) and external dimension (breaking away from a state).¹⁴⁰ A reading of the substantive claims by the applicants in the *South Cameroon* case clearly shows that they sought to exercise external self-determination in the form of secession from the Republic of Cameroon. Under article 20 of the African Charter, the African Commission found that the inhabitants of Southern Cameroon could legitimately claim to be a people since they identified themselves as such and shared 'numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection, and political outlook'.¹⁴¹ The Commission examined at length the self-determination claims of the applicants on the basis of events postdating the entry into force of the African Charter.¹⁴² Reiterating its previous position held in *Katangese Peoples' Congress v Zaire*,¹⁴³ the Commission ruled that it was obliged to uphold the territorial integrity of the respondent state as secession was not 'the sole avenue open to Southern Cameroonians to exercise the right to self-determination'.¹⁴⁴ The African Commission unequivocally suggested that the applicants should consider alternative options, such as autonomous rule in the form of self-government, confederacy or

139 *Southern Cameroon* para 206.

140 For relevant analyses, see J Summers *Peoples and international law: How nationalism and self-determination shape a contemporary law of nations* (2007); J Crawford 'The right to self-determination in international law: Its development and future' in Alston (n 5 above) 7; J Klabbers & R Lefeber 'Africa: Lost between self-determination and *uti possidetis*' in C Brölmann et al (eds) *Peoples and minorities in international law* (1993); SF van den Driest *Remedial secession. A right to external self-determination as a remedy to serious injustices?* (2013).

141 *Southern Cameroon* (n 2 above) paras 178 & 179.

142 *Southern Cameroon* para 182. The African Commission misstated the facts by referring to 'the 1972 Unification'.

143 In *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995), the African Commission held that '[s]elf-determination may be exercised in any of the following ways - independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity' (para 4). To these ambiguities (pitting independence and territorial integrity) one needs to add the fact that the African Commission declined to clearly determine whether the Katangese constituted a people.

144 *Southern Cameroon* (n 2 above) paras 190-191.

federation that would not jeopardise the territorial integrity of the Cameroonian state.¹⁴⁵

Unlike in the *Endorois* case, the African Commission declined to adjudicate on claims of forceful annexation and colonial occupation of Southern Cameroon by the respondent state since these fell outside its temporal jurisdiction: The alleged events took place prior to the entry into force of the African Charter for Cameroon on 18 December 1989. The Commission reiterated its jurisprudential position that only violations that occurred prior to, but which continued after, this date could be adjudicated. It remains unclear which aspects of continuous violations can be adjudicated. The decision embodies a paradox whereby the African Commission declined to adjudicate on the legality of the 1961 plebiscite and of the 1972 referendum and, yet, managed to find that the inhabitants of a territory no longer existent at the time of the entry into force of the African Charter constituted a people.

Furthermore, the African Commission missed a good opportunity to unequivocally lift the ambiguities underpinning its decision in the *Katangese People's Congress* case with regard to whether victimised people have a right to exercise the right to external self-determination (secession) from a state that committed massive violations of human rights, or denied them their right to participate in public affairs.¹⁴⁶ Instead of using the *Gunme* case to clarify the matter, the African Commission made a very dubious interpretation of both the right to self-determination under the African Charter and its own jurisprudence in the *Katangese People's Congress* case. Article 20(1) of the African Charter provides that all people 'have the unquestionable and inalienable right to self-determination'. Since the Commission determined in *Gunme* that Southern Cameroonians are a 'people' under the African Charter, there should be no question that they are then entitled to an 'unquestionable and inalienable right to self-determination'. The ruling in the *Katangese People's Congress* case relating to violations of human rights and the denial of participation rights can only be helpful in determining the form of self-determination that the applicants may exercise, not whether they may exercise it. Yet, the African Commission invoked the *Katangese People's Congress* decision in affirming that 'the right to self-determination cannot be exercised *in the absence of proof of massive violations of human rights* under the Charter'.¹⁴⁷ This statement seems to condition the exercise of the right to self-determination to a proof

145 *Southern Cameroon* para 191.

146 In the *Katangese Peoples' Congress* case (n 143 above), para 6 the African Commission held that the applicants were obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire since there was no concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question or in the absence of evidence that the people of Katanga [were] denied the right to participate in government.

147 *Southern Cameroon* (n 2 above) para 199 (my emphasis).

of massive human rights violations or a denial of participation rights. It clearly misinterprets the *Katangese People's Congress* decision suggesting – even though ambiguously – that secession may be invoked in such extreme cases. Furthermore, the statement contradicts the subsequent affirmation in the same paragraph that the 'various forms of governance or *self-determination* such as federalism, local government, unitarism, confederacy, and self government can be exercised only subject to conformity with state sovereignty and territorial integrity of a state party'.¹⁴⁸ Finally, the finding that 'Southern Cameroon cannot engage in secession, *except* within the terms expressed hereinabove, since secession is not recognised as a variant of the right to self-determination within the context of the African Charter' hardly makes any sense.¹⁴⁹ The wording of this particular section displays a lack of analytical rigueur by the drafters of the African Commission decision.

The cause for independent statehood of Anglophone Cameroon central to the applicants' case – but also championed by organisations such as the Southern Cameroons National Council (SCNC) and the Southern Cameroons People's Organisation (SCAPO) – was not in any way vindicated by the ruling. The African Commission urged Cameroon to remedy violations of the applicants' rights and formulated recommendations for all parties to use other peaceful means, such as constructive or comprehensive national dialogue, to find a lasting solution to the problems used as grounds for Anglophone secession.¹⁵⁰ The *Southern Cameroon* decision, like the *Endorois* decision, raised some questions over what collective represents a people and, more generally, over the interpretation of the peoples' rights provisions of the African Charter.

4 Appraisal: Ambiguities of the African Commission on peoplehood and indigenous rights

The *Endorois* and *Southern Cameroon* cases offer two contextually different illustrations of the dynamic interpretation of the peoples' rights provisions of the African Charter. In the first case, the African Commission agreed with the applicants that members of the relatively small Endorois community – previously considered as just one among many clans of the Tugen, a sub-unit of the Kalenjin community – were indeed an indigenous people whose collective rights under the African Charter had been violated. In the second case, the Commission found only one substantive violation of peoples' rights, but nevertheless applied the peoplehood attribute to the ethnically diverse inhabitants of the former British territory of Southern Cameroon that had

148 As above.

149 *Southern Cameroon* (n 2 above) para 200 (my emphasis).

150 *Southern Cameroon* paras 203 & 215.

acquired independence through reunification with the Republic of Cameroon. The progressive interpretation of peoples' rights has very commendable advantages, but also embodies potential dangers.

The jurisprudence of the African Commission on collective rights displays an open range of possibilities in using the African Charter to address the predicament of particularly vulnerable collective identities. The inherent flexible nature of the African human rights system, whereby individuals and collectives may seek redress for human rights violations or for patterns of socio-political and economic exclusions, is an important tool in an effort to build more accountable and inclusive African polities. Yet, the very flexibility of the African Charter system in receiving communications from a variety of sources and the increasingly expansive interpretation of the peoples' rights provisions of the African Charter by the African Commission can potentially be exploited for politicised and divisive agendas within fragile African polities.

The practice of the African Commission displays the institution's readiness to apply the 'peoplehood' attribute to a wide range of societal groupings. First, the Commission has used 'people' to refer to the entire population of a country.¹⁵¹ In this case it does not matter whether the population is ethnically, racially or religiously homogenous or heterogeneous. Inhabitants of Nigeria, Cameroon, South Africa, Lesotho, Swaziland or Burundi may all be considered as peoples. Under international legal theory and practice, this is the most conventional and least contested usage of 'people(s)'.¹⁵² After all, the decolonisation process of African and other countries was celebrated as an exercise of peoples' rights to self-determination.¹⁵³

Second, the concept has also been used in reference to a single ethno-linguistic/cultural community within a multi-ethnic country.¹⁵⁴ In the particular context of the African continent, harbouring numerous ethno-cultural communities, it is yet to be clarified what collective identities qualify as peoples. Since the Endorois were and are still identified as constitutive of a sub-unit of the Tugen and Kalenjin groups, the African Commission should have clarified whether the three levels of community identification constitute one or several people(s). Prior to the current expansion of the indigenous rights movement, international legal theory insisted that 'people' should not be confused with ethnic, religious or linguistic minorities,

151 See eg *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000), where the African Commission refers to 'the Gambian peoples' (para 72) and 'the Gambian people' (para 73). In the *Democratic Republic of Congo* case (n 86 above), the African Commission referred to 'the people(s) of the Democratic Republic of Congo' (paras 68 and 77 for 'peoples'), para 95 for 'people') and 'Congolese' peoples (para 87).

152 Summers (n 140 above) 1-2.

153 United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514 (XV) 14 December 1960.

154 It was applied to the Ogonis in the *Ogoni* case (n 25 above) paras 1 *et seq*, and to the Endorois in *Endorois* (n 3 above) paras 145-162.

whose existence and rights are recognised in article 27 of the International Covenant on Civil and Political Rights'.¹⁵⁵ The African Charter system did not adopt the differentiation between minorities and peoples.¹⁵⁶ The instrument merely provides for peoples' rights. There are no undisputable legal grounds for considering some groups as minorities but not peoples under the African Charter. The jurisprudence of the African Commission suggests that beyond normative considerations, the distinction may be of limited practical relevance in the African context. In a context such as Kenya, the applicability of peoples' rights provisions to specific ethno-cultural communities suggests that the Endorois (but also Tugen and Kalenjin), the Kikuyu, the Luo, the Ogiek or the Nubians may all be considered as peoples under the African Charter, regardless of the indigenous or non-indigenous status of each one of these communities. In the case of the Nubians, CEMIRIDE and other actors capitalised on the *Endorois* precedent in presenting a communication to the African Commission for the recognition of civil and other rights of members of the Nubian community living for roughly a century in Kenya.¹⁵⁷ Reportedly numbering between 20 000 and 100 000 individuals, the Nubians settled in Kenya since the colonial era, but have always been considered as non-nationals, a situation that renders them virtually stateless.¹⁵⁸

Finally, the African Commission has used 'people' or 'peoples' to describe a non-homogenous population of a particular geographic area or a racial group within a specific country.¹⁵⁹ This represents the most uncommon conceptualisation of peoplehood. Used in the plural form, 'peoples' of a region suggests that the concept is used to refer to the various ethno-cultural communities under the second meaning discussed above. It implies that the particular geographic area to

155 See *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments: Study* by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination on Protection of Minorities, 1 January 1981, UN Doc E/CN.4/SUB.2/404/Rev 1, para 279.

156 See more generally S Slimane *Recognising minorities in Africa* (2003).

157 *The Nubian Community in Kenya v The State of Kenya*, African Commission Communication 317/06, <http://www.soros.org/initiatives/justice/litigation/ali/ali-communication-20100517.pdf> (accessed 26 August 2010). The communication made numerous references to the *Endorois* case as in paras 162-164 and 175.

158 *Nubian Community* (n 157 above) para 5. The African Commission decision in the case focused more on the recognition of their citizenship and property rights than on peoples' rights. See Communication 317/2006, *The Nubian Community in Kenya v Kenya*, Thirty-Eighth Activity Report (ACHPR 2015).

159 As in 'the people of Katanga' (*Katangese Peoples' Congress* case (n 143 above) para 6); 'the peoples of the eastern province[s] of the complainant state' (*Democratic Republic of Congo* case (n 86 above) para 87); 'Black Mauritians' in *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) paras 139-142.

which it is applied is inhabited by not one but several peoples. The singular form, as in 'people of Darfur'¹⁶⁰ or 'people of Casamance',¹⁶¹ is more problematic. The criteria under which the inhabitants of a given geographic subdivision of a country can be considered as a people are far from clear. In some cases, it is difficult to determine whether 'people of' a specific area – as in 'people of Northern Uganda'¹⁶² – is used within the colloquial meaning of 'inhabitants of', or whether the notion fits within the specific meaning of the peoples' rights provisions of the African Charter. In the same vein, the African Commission has applied peoples' rights provisions to 'Black Mauritians',¹⁶³ even if this population does not represent a homogenous group.¹⁶⁴ It is not quite clear, in this particular case, whether the various groups of black Mauritians constitute 'a people' or 'peoples' under the African Charter.

Thus, it follows from the jurisprudence and practice of the African Commission that there are several intertwined layers of peoples within single, mostly multi-ethnic African states. The Commission has displayed – explicitly or implicitly – a readiness to consider that the Endorois, the Southern Cameroonians, the Ogonis, the Black Mauritians, the Katangese; the entire Congolese, Sudanese, Senegalese populations or the native inhabitants of their respective Eastern Congo, Darfur or of Casamance provinces, are people(s) under the African Charter. Applying substantive rights assigned to peoples under the African human rights regionalism and, more generally, under international law, to all these collectives may raise some questions of consistency. Do all ethno-cultural communities in a country or only some of them have a right to self-determination? What substance – socio-political, economic, cultural and territorial dimensions – should be attached to such rights? What should state parties such as Cameroon, the Democratic Republic of the Congo and Nigeria – with hundreds of different ethno-cultural communities each – do to ensure compliance with their obligations under the relevant provisions of the African Charter and other instruments, such as the Declaration on the Rights of Indigenous Peoples?¹⁶⁵ These questions

160 African Commission 'Report of the African Commission on Human and Peoples' Rights' Fact-Finding Mission to the Republic of Sudan in the Darfur Region (8-18 July 2004)' 22nd Activity Report (2007), EX CL/364 (XI), Annex III, paras 151 and 6 refers to 'the people of Darfur' (para 6) and to the peoples of Sudan (as in para 151).

161 African Commission 'Report on the Mission of Good Offices to Senegal of the African Commission on Human and Peoples' Rights (1-7 June 1996)' 10th Annual Activity Report 1996/1997, Annex VIII, Sections V, 3 (12) and VI mentions of the people of Senegal and the people of Casamance (in the conclusions and recommendations).

162 African Commission 'Resolution on the Human Rights Situation in Uganda' 20th Activity Report (2006), EX CL/279 (IX), Annex III, para 5.

163 *Malawi African Association* (n 159 above) paras 139-142.

164 *Malawi African Association* paras 140-142.

165 United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/61/L.67 12 September 2007.

remain widely unanswered under the current jurisprudence of the African Commission.

Finally, in the *Endorois* case, as in other relevant work of the African Commission, the institution has so far failed to make a convincing case on why the indigenous legal framework was needed in the African human rights regionalism. As stated earlier, the 2001 ruling in the *Ogoni* case clearly showed that the provisions on individual and collective rights in the African Charter could be used to seek redress for violations of the rights of a particularly marginalised community without necessarily resorting to the indigenous rights legal theory. The boundaries between activism for the recognition of indigenous rights and the interpretative mandate of the African Commission are not clearly delineated in the *Endorois* decision. It was possible for the Commission to find violations of the applicants' individual and collective rights without relying too much on the contentious indigenous rights theory and jurisprudence as mainly developed in the historically and contextually different Latin American landscape.¹⁶⁶

166 For more, see FM Ndahinda 'The future of indigenous rights in Africa: Debating inclusiveness and empowerment of collective identities' in R Dunbar-Ortiz et al (eds) *Indigenous peoples' rights in international law: Emergence and application – A book in honour of Asbjörn Eide at eighty* (2015).

Rights away from home: Climate-induced displacement of indigenous peoples and the extraterritorial application of the Kampala Convention

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Summary

Existing accounts of the relationship between human rights and climate change are not explicit regarding the link between climate change and the displacement of indigenous peoples and its implications for their rights in Africa. Even if a link exists, legal redress is problematic in that an extraterritorial conduct or omission of a state within and outside Africa may feature in climate-induced displacement. Little is known on the way forward to address this challenge. The article demonstrates how climate change is linked to the displacement of indigenous peoples and how their rights are threatened in Africa. Underscoring the extraterritorial nature of activities underlying their displacement, the article examines the basis of the Kampala Convention and the way it may be applied extraterritorially to enhance the protection of indigenous peoples facing climate-induced displacement and the threat to key rights in Africa.

Key words: *climate change; climate-induced displacement; extraterritoriality; indigenous peoples' rights; Kampala Convention*

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1 Introduction

Human activities are increasing the concentration of greenhouse gases in the atmosphere, thus enhancing the greenhouse effect which, in turn, has led to an increased warming of the earth surface, resulting in climate change and, consequently, negatively affects society.¹ In general discussions about the adverse effects of climate change, the term 'climate-induced displacement', that is 'the forcible or voluntary, temporary or permanent removal of people from their home or territory due to climate change', has featured.² The work of the Human Rights Council (HRC) under the United Nations (UN) Resolutions 10/4 (2009), 18/22 (2011) and 26/33 (2014), linking climate change to human rights, mentions cursorily that indigenous peoples are vulnerable to climate change.³ Several authors have commented on the adverse impact of climate change on indigenous peoples' land use and tenure in Africa.⁴

However, the direct link between climate change and the displacement of indigenous peoples, and the implications of climate change for their rights and legal protection in Africa, has received little attention. On the question whether climate change is linked to displacement at all, two divergent schools exist: the maximalist and minimalist schools.⁵ Drawing no distinction between indigenous peoples and the broader population, and between displacement caused by climate change and other factors linked to it, the maximalists hold that displacement results from climate change.⁶ On the contrary, but also without a distinction between indigenous peoples and the broader population, the minimalists posit that displacement due to a strict causal link with climate change is rare and

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- 1 IPCC 'Summary for policymakers' in TF Stocker et al (eds) *The physical science basis: Contribution of Working Group I to the 5th Assessment Report of the Intergovernmental Panel on Climate Change* (2013) 8 15.
 - 2 Displacement Solutions *The rights of climate displaced persons: A quick guide* (2015) 3; Displacement Solutions *The Peninsula principles on climate displacement within states* (2013); J McAdam (ed) *Climate change and displacement: Multidisciplinary perspectives* (2010).
 - 3 United Nations Human Rights Council 'Resolution 10/4 – Human rights and climate change', adopted on 25 March 2009 at the 41st meeting of the Human Rights Council Preamble; United Nations Human Rights Council 'Resolution 18/22 – Human rights and climate change', adopted 30 September 2011 at the 37th meeting A/HRC/RES/18/22) Preamble; United Nations Human Rights Council 'Resolution 26 L/33 – Human rights and climate change', adopted on 23 June 2014 at the 26th session A/HRC/26/L.33 para 1.
 - 4 M Hansungule & AO Jegede 'The impact of climate change on indigenous peoples' land tenure and use: The case for a regional policy in Africa' (2014) 21 *International Journal on Minority and Group Rights* 256; for a discussion on other parts of the world, see RS Abate & EA Kronk (eds) *Climate change and indigenous peoples: The search for legal remedies* (2013).
 - 5 W Kaälin 'Conceptualising climate-induced displacement' in McAdam (n 2 above) 81; J Morrisey *Environmental change and forced migration: A state of the art review* (2009) 1-48; A Suhrke 'Environmental degradation and population flows' (1994) 47 *Journal of International Affairs* 474.
 - 6 Morrisey (n 5 above) 4; Suhrke (n 5 above) 478.

difficult to determine.⁷ On whether climate-induced displacement can give rise to a threat to the rights of indigenous peoples, little is known. For instance, while the resolutions of the HRC mention the vulnerability of indigenous peoples,⁸ there is no reference to displacement, let alone a discussion thereof and the implications for the rights of indigenous peoples. The form of legal protection available to indigenous peoples displaced by climate change is equally problematic in that activities at the root of a changing climate, although disproportionate, are global in nature.⁹ Reflecting on the situation, an argument has been made for a specific international instrument to address the plight of those at risk,¹⁰ but the need for such an instrument has been discredited in other writings, arguing that a treaty without wide ratification and implementation cannot address the humanitarian issues raised by climate change.¹¹ Other scholars contend that the available bodies of international, regional and national laws can secure the rights of those who suffer the adverse impact of climate change.¹²

In Africa, their recognition at the regional level as against the general reluctance of states to recognise indigenous peoples' identity and claims to land makes their recourse to regional protection attractive.¹³ More importantly, although formulated in the language of obligations, the African Union (AU) Convention for the Protection and Assistance of Internally-Displaced Persons in Africa (Kampala Convention) is an instrument which specifically aims at protecting and assisting internally-displaced persons (IDPs) in Africa.¹⁴ The Kampala Convention accommodates the African Charter on Human and

7 A Baldwin 'Racialisation and the figure of the climate change migrant' (2013) 45 *Environment and Planning* 1474; Morrissey (n 5 above) 4; R Black 'Environmental refugees: Myth or reality?' (2001) *New Issues in Refugee Research* 34.

8 n 3 above.

9 United Nations General Assembly 'Protection of global climate for present and future generations of mankind' UNGA Res 43/53, 70th plenary meeting 6 December 1988.

10 D Hodgkinson et al 'Towards a convention for persons displaced by climate change: Key issues and preliminary responses' <http://greencrossaustralia.org/media/120204/ccdp%20convention.pdf> (accessed 28 February 2015).

11 J McAdam 'Swimming against the tide: Why a climate change displacement treaty is not the answer' (2011) 23 *International Journal of Refugee Law* 2.

12 J Peel & HM Osofsky *Climate change litigation* (2015) 13.

13 On the recognition of indigenous peoples at the regional level, see *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case); on the discussion around the contested nature of the term and the reluctance of states in Africa to recognise indigenous peoples, see GM Wachira 'Indigenous peoples' rights to land and natural resources' in S Derso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 297-348; KN Bojosi 'The African Commission Working Group of Experts on the Rights of Indigenous Communities/Populations: Some reflections on its work so far' in Derso (above) 95-137.

14 African Union Convention for the Protection and Assistance of Internally-Displaced Persons in Africa, adopted by the Special Summit of the AU held in Kampala, Uganda, 23 October 2009 (Kampala Convention).

Peoples' Rights (African Charter) by virtue of articles 20(1) and (2),¹⁵ and is as justiciable as the African Charter in that article 20(3) allows for complaints by IDPs before the African Commission on Human and Peoples' Rights (African Commission) and the African Court of Justice and Human Rights (African Court).¹⁶ For these reasons, one cannot but conclude that the Kampala Convention is a unique instrument in terms of the protection of the human rights of IDPs. The African Commission has also passed Resolution 153 of 2009¹⁷ and Resolution 271 of 2014 in relation to climate change in Africa.¹⁸ In particular, Resolution 153 urges African states to take measures to protect vulnerable groups such as indigenous communities who are victims of natural disasters.¹⁹

Despite the above, the unclear link with climate-induced displacement and the fact that multiple states and legal regimes in and outside Africa can be involved in extraterritorial conduct or omission resulting in climate-induced displacement in Africa make the construction of legal protection of indigenous peoples problematic. A state in or outside Africa can feature in activities in and beyond its national territory resulting in climate-induced displacement. Not all states are bound by the same legal regime. Under the United Nations Framework Convention on Climate Change (UNFCCC)²⁰ and Kyoto

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- 15 African Charter on Human and Peoples' Rights adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, 21 ILM 58 (1982) entered into force 21 October 1986; reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 29.
 - 16 Art 20(3) Kampala Convention (n 14 above); Protocol on the Statute of the African Court of Justice and Human Rights (2008) in Heyns & Killander (n 15 above) 47; on the trend and implication of the creation of these institutions within the African human rights system, see generally F Viljoen *International human rights law in Africa* (2012) 448-466; a further development emerged at the Assembly of the AU 23rd ordinary session, 26-27 June 2014, Malabo, Equatorial Guinea. At the session, the AU Assembly adopted a Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. The new Protocol creates in the African Court on Human and Peoples' Rights three sections: General Affairs; Human and Peoples' Rights; and International Criminal Law. See 'Decision on the Draft Legal Instruments' Doc Assembly/AU/8(XXIII)' Assembly/AU/Dec.529(XXIII).
 - 17 African Commission on Human and Peoples' Rights 'Resolution on climate change and human rights and the need to study its impact in Africa' ACHPR/Res153(XLVI)09, 25 November 2009.
 - 18 African Commission of Human and Peoples' Rights 'Resolution on climate change in Africa' Resolution 271, adopted at the African Commission's meeting at its 55th ordinary session held in Luanda, Angola, from 28 April to 12 May 2014.
 - 19 Resolution 153 (n 17 above).
 - 20 The United Nations Framework on Climate Change Convention (UNFCCC), adopted at the World Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992.

Protocol,²¹ only developed states²² have mandatory commitments relevant to climate-induced displacement. These include commitments in relation to the reduction of emissions; the provision of finance; and appropriate and practical technology and other relevant measures to address adverse climate change. However, developed states are not parties to the Kampala Convention. States in Africa with applicable obligations under the Kampala Convention have no concrete commitment under the UNFCCC and Kyoto Protocol. The foregoing situation exemplifies Boyd's observation that, except when the 'plurality of normative orders' is harnessed, addressing global environmental problems will remain difficult.²³ The article connects climate change to the displacement of indigenous peoples and the threat to their key rights, arguing for the extraterritorial involvement of states in and outside Africa. It interrogates the basis and possible application of the Kampala Convention extraterritorially in addressing the plight of indigenous peoples displaced by climate change in Africa.

2 Connecting indigenous peoples and climate-induced displacement

In Africa, the term 'indigenous peoples' is contested,²⁴ but its significance in the context of climate-induced displacement merits consideration. In identifying certain communities as indigenous, the African Commission's Working Group on Indigenous Populations/Communities (Working Group) adopts an approach which focuses on self-identification, special attachment to and use of land, marginalisation and discrimination based on their cultural

21 United Nations Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted in 1998, entered into force 16 February 2005 (Kyoto Protocol) art 3; the 1st commitment under the Protocol ended in 2012 and was extended in Doha from 1 January 2013 to 31 December 2020; see http://unfccc.int/kyoto_protocol/items/2830.php (accessed 23 May 2015).

22 States with obligations under Annex 1 are developed countries, namely, Austria, Belgium, Canada, Denmark, European Economic Community, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland and United States of America. Other countries involved are those undergoing a process of economic transition. These are Belarus, Bulgaria, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Russian Federation, Ukraine; however, Russia, Canada and Japan indicated that their obligations did not extend beyond the first commitment. See Mellow 'Losing Canada, Japan and Russia in the climate regime: Could the solution be in Asia?' 11 April 2013 <https://unfccccecosingapore.wordpress.com/2013/04/24/losing-canada-japan-and-russia-in-the-climate-regime-could-the-solution-be-in-asia/> (accessed 27 July 2015).

23 W Boyd 'Climate change, fragmentation, and the challenges of global environmental law: Elements of a post-Copenhagen assemblage' (2014) 32 *Journal of International Law* 457.

24 n 13 above.

difference.²⁵ It identifies the lifestyles of hunters and gatherers as well as pastoralists in Africa as fulfilling the above criteria.²⁶ However, the requirements laid down by the Working Group have been contested. Bojosi argues that the criteria used by the Working Group are not internally generated but the product of a 'long enduring external mission to have the concept of indigenous peoples ... applied to certain pre-determined peoples in Africa'.²⁷ Viljoen also criticises the criterion on the requirement of attachment to the use of land, arguing that most populations in Africa are agrarian and, to some extent, remain culturally attached to the use of land.²⁸ The reliance on 'attachment to the use of land' in defining the concept, others argue, will exclude poor or rural Africans who do not fit into the 'indigenous peoples' criterion, but who depend on informally-held land.²⁹ The emphasis, as argued further, must focus on the protection of land rights based on informally-held land obtainable among many of the world's poorest and most vulnerable citizens, even if not indigenous.³⁰

The foregoing viewpoints, however, must not be accepted uncritically in the context of climate change. For instance, unlike indigenous peoples in the context of climate change, to an agrarian community the issue of cultural attachment to ancestral land hardly arises in that movement for subsistence farming is an acceptable means of adapting to climate change.³¹ Therefore, in a changing climate, the urgency for an emphasis on the peculiar vulnerability of communities who are culturally linked to ancestral land is not achieved when populations are regarded as local, agrarian or rural populations without distinction. In implementing intervention, the approach may in fact protect, at the expense of indigenous peoples, their historical oppressors, a situation which is incompatible with the rights regime as articulated particularly by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).³² Because

25 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities adopted by the African Commission at its 28th ordinary session 2005 (Working Group Report) 93.

26 Working Group Report (n 25 above) 14-61.

27 Bojosi (n 13 above) 96.

28 F Viljoen 'Reflections on the legal protection of indigenous peoples' rights in Africa' in Dersso (n 13 above) 77.

29 W Wilcomb & H Smith 'Customary communities as "peoples" and their customary tenure as "culture": What we can do with the *Endorois* decision' (2011) 11 *African Human Rights Law Journal* 422.

30 RC Williams 'The African Commission "*Endorois* case" – Toward a global doctrine of customary tenure?' <http://terra0nullius.wordpress.com/2010/02/17/the-african-commission-endorois-case-toward-a-global-doctrine-of-customary-tenure/> (accessed 23 March 2015).

31 V Jese et al 'Farming adaptations to the impacts of climate change and extreme events in Pacific Island countries: Case study of Bellona Atoll, Solomon Islands' in WG Canpat & WP Isaac (eds) *Impacts of climate change on food security in small island developing states* (2015) 186.

32 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly on 13 September 2007.

of their reliance on land for physical, cultural and spiritual survival,³³ the term 'indigenous peoples' is useful, as demonstrated below, to show that displacement as a result of climate change adversely impacts on their land, a development which threatens their rights.

2.1 Displacement as outcome of non-viability of land

In Africa, the non-viability of land due to climate change is occasioning the displacement of pastoralists and hunters and gatherers.³⁴ Among the Bororo and Tuaregs, the destruction of grazing land, drought, the destruction of animals and traditional fishing activities associated with climate change compel a movement away from traditional lands.³⁵ Among the Maasai, Ogiek, Endorois and Yaaku in Eastern Africa, drought, disappearing grazing land, famine and extreme weather conditions are climatic presentations underlying displacement.³⁶ Evidence of the depletion of forest products, the unpredictability of seasons and floods are seen to be responsible for the movement of the Batwa in Rwanda, Burundi, Uganda and the Democratic Republic of the Congo (DRC), also known as the Baka in Central African Republic (CAR) and Gabon, and the Bagyeli in Cameroon.³⁷

The migration of the Amazigh (or Imazighn), known as the Berbers in North Africa,³⁸ has been linked to the extreme scarcity of water, the degradation of palm trees, the deterioration of a unique tree species in South-Western Morocco, and salinisation traceable to a changing climate.³⁹ The spread of Kalahari dunes in Botswana, Angola, Zimbabwe and Western Zambia has been linked to climate change,⁴⁰ a development which does not only threaten the survival and lifestyle of the Sans and Basarwa of the Kalahari basin, but which

33 *Maya Indigenous Communities of Toledo District v Belize* 12.053, report 40/4 (*Belize case*), Inter-American Commission on Human Rights, OEA/Ser L/V/II122 Doc 5 Rev (2004) para 155.

34 'Agrofuels and the myth of the marginal lands' a briefing by the Gaia Foundation, Biofuelwatch, the African Biodiversity Network, Salva La Selva, Watch Indonesia and EcoNexus (September 2008) <http://www.cbd.int/doc/biofuel/Econexus%20Briefing%20AgrofuelsMarginalMyth.pdf> (accessed 24 May 2015).

35 Indigenous Peoples of Africa Co-ordinating Committee (IPACC) 'West Africa' <http://www.ipacc.org.za/en/where-we-work/west-africa.html> (accessed 6 April 2016).

36 IWGIA *The world indigenous report* (2011) 410; Tebtebba Foundation *Indigenous peoples, forests and REDD Plus: State of forests, policy environment and ways forward* (2010) 440.

37 Working Group Report (n 25 above) 16; Tebtebba Foundation (n 36 above) 481.

38 Working Group Report (n 25 above) 18-19.

39 'Climate change in three Maghreb countries. Special Report on selected side events at UNFCCC COP-7' (2001) <http://www.iisd.ca/climate/cop7/enbots/nov1> (accessed 4 April 2016).

40 'Shifting sands: Climate change in the Kalahari' <http://journals.worldnomads.com/shrummer16/story/52708/South-Africa/Shifting-Sands-Climate-Change-in-the-Kalahari> (accessed 5 April 2016).

is altering migration in that region.⁴¹ Finally, there are findings indicating that climatic threat to land use is an emerging cause of the displacement of pastoralists around Uganda, Eritrea, Ethiopia, Somalia and Eastern Sudan.⁴²

2.2 Displacement as outcome of climate response projects on land

Under the auspices of the UNFCCC and the Kyoto Protocol, climate change response projects are sustainable projects required in addressing climate change.⁴³ The displacement of indigenous peoples results from their ineffective implementation in Africa. For instance, projects promoting renewable sources of energy under article 2, paragraph 1(a)(iv) of the Kyoto Protocol, are a driver of the displacement of indigenous peoples.⁴⁴ These include biofuel plantations in states with the presence of indigenous peoples, such as Kenya, Tanzania, Namibia and Ethiopia.⁴⁵ These projects have led to the involuntary resettlement and decimation of traditional cultures and livelihoods of indigenous communities such as the Bodi, Daasanach, Kara (Karo), Muguji (Kwegu), Mursi and the Nyangatom who live in the Omo Valley in Ethiopia,⁴⁶ and the Maasai in Tanzania.⁴⁷

Displacement also features in the ineffective implementation of land-related initiatives under the Clean Development Mechanism (CDM)⁴⁸ and REDD+.⁴⁹ In respect of initiatives under the CDM in the

41 R Mwebaza 'Is climate change creating more environmental refugees than war in Africa?' <http://www.issafrica.org/iss-today/is-climate-change-creating-more-environmental-refugees-than-war-in-africa> (accessed 3 April 2016).

42 T Afifi et al *Climate change, vulnerability and human mobility: Perspectives of refugees from the East and Horn of Africa* http://www.reliefweb.int/sites/reliefweb.int/files/resources/East%20and%20Horn%20of%20Africa_final_web.pdf (accessed 1 May 2015).

43 Arts 3(4) & 4(1)(d) UNFCCC.

44 V Tauli-Corpuz & A Lyngge 'Impact of climate change mitigation measures on the territories and lands of indigenous peoples' 14-25 May 2007 E/2007/43 E/C.19/2007/12 para 52.

45 S Vermeulen & L Cotula 'Over the heads of local people: Consultation, consent, and recompense in large-scale land deals for biofuels projects in Africa' (2010) 37 *Journal of Peasant Studies* 899; L Cotula et al *Fuelling exclusion? The biofuel boom and poor people's access to land* (2008) 1-82.

46 Oakland Institute *Understanding land investment deals in Africa: Half a million lives threatened by land development for sugar plantations in Ethiopia's lower Omo valley* (2011).

47 E Laltaika *Biofuels in Tanzania: Legal challenges and recommendations for change* Monograph 120-121.

48 Art 12 Kyoto Protocol (n 21 above). CDM allows emission-reduction projects in developing countries to earn certified emission reduction (CER) credits. These CERs can be traded and sold, and used by industrialised countries to meet a part of their emission reduction targets under the Kyoto Protocol. See <http://cdm.unfccc.int/about/index.html> (accessed 4 February 2015).

49 REDD+ refers to 'Reducing emissions from deforestation and forest degradation "plus" conservation, the sustainable management of forests and enhancement of forest carbon stocks'. See J Willem den Besten et al 'The evolution of REDD+: An

DRC, a report reveals that the Batwa people have been exploited, excluded and expelled from their land.⁵⁰ Although in its preparatory stage, concern is being expressed by indigenous communities that the implementation of REDD+ in Central and Eastern Africa will occasion land alienation, and will reward states for practices of dispossession and not indigenous communities.⁵¹ In Tanzania, a study shows that indigenous communities are not consulted in REDD matters.⁵² Furthermore, the criminalisation of activities of indigenous populations, such as hunting and gathering, by the law regulating the implementation of climate-related projects, is a major tool for the state to effect displacement.⁵³ The foregoing constitutes a threat to the key human rights of indigenous peoples, as will be seen below.

2.3 Climate-induced displacement as a threat to human rights

The patterns of displacement discussed above are a threat to the key rights guaranteed to indigenous peoples under the UNDRIP, including other international human rights instruments it accommodates by virtue of its article 1. In the discussion here, considering their direct link to climate conditions occasioning the displacement of indigenous peoples, the emphasis is placed on the rights to self-determination, water, food, housing, environment and health.

Displacement due to the non-viability of land and the implementation of climate-related projects are threats to indigenous peoples' right to self-determination defined in article 4 of the UNDRIP, as including the freedom to pursue their economic, social and cultural development. As further elaborated upon by article 25 of the UNDRIP as part of their right to self-determination, indigenous peoples have the right to secure their cultural and spiritual relationship with their ancestral lands, territories, waters and coastal seas and other resources. In removing indigenous peoples from their land, climatic conditions such as drought, flooding, disrupted rainfall and the criminalisation of their activities while implementing climate response projects disrupt their cultural and spiritual attachment to traditional land, thereby threatening their right to self-determination.

The scarcity of water, drought, flooding and disrupted rainfall are a threat to indigenous peoples' right to water. Although not particularly

analysis of discursive-institutional dynamics' (2014) 35 *Environmental Science and Policy* 40.

- 50 SM Adrien *The DRC case study: The impacts of the carbon sinks of Ibi-Batéké project on the indigenous pygmies of the Democratic Republic of the Congo* (2006) (on file with author).
- 51 'Dialogue between the World Bank and indigenous peoples in Central and East Africa on the Forest Carbon Partnership Facility' Bujumbura, Burundi, 13-14 March 2008 <http://www.ipacc.org.za/en/2008/19-dialogue-between-the-world-bank-and-indigenous-peoples-in-central-and-east-africa-on-the-forest-carbon-partnership-facility-fcfc/file.html> (accessed 5 April 2016).
- 52 E Laltaika 'Indigenous peoples' recent engagement in the REDD process Tanzania' in IWGIA (ed) *REDD and indigenous peoples* (2009) 28-31.
- 53 See eg Tanzania Wildlife Conservation Act (2009) sec 31(6).

mentioned in the UNDRIP, the right to water derives from article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵⁴ and article 16(1) of the African Charter on the right to health.⁵⁵ That climate change can undermine the right to water may be seen from General Comment 15, when the Committee on Economic, Social and Cultural Rights (ESCR Committee), in delineating states' obligations, urged state parties to adopt strategies and programmes that address climate change as this may hamper the realisation of the right to water.⁵⁶ At the regional level, the African Commission in the *Free Legal Assistance Group* case affirmed that the failure by governments to provide basic services, including safe drinking water, could constitute a violation of article 16.⁵⁷ Displacements associated with drought, flooding and disrupted rainfall arising from climate change and the ineffective implementation of climate-related projects deprive indigenous peoples of access to traditional water sources, thereby constituting a threat to the right to water.

Climatic conditions and climate-related projects that are ineffectively implemented are a threat to the right of indigenous peoples to food. Although not expressly mentioned in the UNDRIP, the right of indigenous peoples to food is covered by the right to subsistence in article 20(1) of the UNDRIP. It is also accommodated under article 11 of the ICESCR. Noting the adverse impact of climate change on the right to food, the ESCR Committee urges state parties to note that the right to food can be adversely affected by climatic and ecological factors.⁵⁸ At the regional level, the African Commission has noted that the eviction of indigenous peoples from their land can hinder their access to food.⁵⁹ Consequently, as demonstrated earlier, a similar outcome can result from occurrences such as environmental degradation, the depletion of forest products, the destruction of plants and animals and traditional fishing and the criminalisation of subsistent activities of indigenous peoples associated with climate change and response measures.⁶⁰ Such occurrences are a threat to their right to food.

In removing indigenous peoples from the territory they have inhabited as their home, displacement arising from the non-viability of land and the ineffective implementation of climate-related projects threatens their right to housing guaranteed under article 21(1) of the

54 International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966.

55 United Nations General Comment 15: The right to water, arts 11 & 12 (2000); *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).

56 General Comment 15 para 28; MA Orellana et al *Climate change in the work of the Committee on Economic, Social and Cultural Rights* (2010) 21.

57 *Free Legal Assistance Group* case (n 55 above) para 47.

58 General Comment 12 paras 4 & 7.

59 *Endorois* case (n 13 above).

60 See secs 2(1) and (2) of this article.

UNDRIP, article 11 of the ICESCR and articles 14 and 16 of the African Charter. The interface of the right to housing with climate change has featured in General Comment 4, in which the ESCR Committee urged states to note that the right to adequate housing may be affected adversely by climatic and ecological considerations.⁶¹ General Comment 4 is strengthened by General Comment 7 on the right to housing, which addresses forced evictions as an interference with the right to housing.⁶² At the African regional level, the African Commission noted in Resolution 231 that forced evictions can undermine socio-economic rights.⁶³ In *Sudan Human Rights Organisation & Another v Sudan*,⁶⁴ the Commission held that the state's failure to prevent evictions or to ensure the return of displaced persons to their homes constituted a violation of the right to housing implicit in article 12 of the African Charter. Accordingly, in depriving indigenous peoples of their traditional territories, displacement associated with environmental degradation and the ineffective implementation of climate change response projects constitutes a threat to their right to adequate housing.

Warmer weather increases episodes of malaria,⁶⁵ while the salinisation of land and water resources contributes to degradation.⁶⁶ In exposing them to newer episodes of disease and undermining the integrity of their environment, these conditions constitute a threat to the right to health and environment of indigenous peoples. For instance, illnesses reported among the pastoralists in the Turkana county of Kenya, associated with warmer weather, include increasing episodes of malaria.⁶⁷ The right to health is guaranteed in article 21(1) of the UNDRIP, article 25 of the Universal Declaration of Human Rights (Universal Declaration),⁶⁸ article 12(a) of the ICESCR and article 16(1) of the African Charter. Linking the right to health to the environment, the ESCR Committee in General Comment 14 urges state parties to secure for its population a healthy natural and workplace environment and the right to the prevention, treatment

61 United Nations General Comment 4: The right to adequate housing, art 11(1) of the Covenant 6th session (1991) para 18.

62 United Nations General Comment 7: The right to adequate housing, art 11(1) of the Covenant: Forced evictions 16th session (1997) para 3.

63 Resolution 231 on the right to adequate housing and protection from forced evictions, adopted at the 52nd ordinary session of the African Commission on Human and Peoples' Rights held in Yamoussoukro, Côte d'Ivoire, 9-22 October 2012.

64 (2009) AHRLR 153 (ACHPR 2009) paras 186-190.

65 P Collier et al 'Climate change and Africa' (2008) 24 *Oxford Review of Economic Policy* 337.

66 RDH Bagan et al 'Quantifying the catchment salt balance: An important component of salinity assessments' (2015) 111 *South African Journal of Science* 1.

67 Human Rights Watch 'There is no time left: Climate change, environmental threats, and human rights in Turkana county, Kenya' 15 October 2015 <https://www.hrw.org/report/2015/10/15/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana> (accessed 5 April 2016).

68 Universal Declaration of Human Rights adopted by the United Nations General Assembly in Paris, 10 December 1948, General Assembly Resolution 217 A (III).

and control of diseases.⁶⁹ Article 29(1) of the UNDRIP guarantees the right to conservation and protection of the environment, while article 24 of the African Charter provides for the right to a satisfactory environment. In respect of Nigeria, the ESCR Committee expresses concern over the effect of environmental degradation on the right to health.⁷⁰ Applying article 16(1) of the African Charter in the *SERAC* case the African Commission ruled that environmental depreciation of the region had a negative impact on the right to health.⁷¹ Displacement associated with the non-viability of land and the ineffective implementation of climate-related projects can lead to the exposure of indigenous peoples to diseases that they are not familiar with and, therefore, can undermine their right to health and a healthy environment.⁷²

The foregoing discussion has shown that displacement as a result of the non-viability of land and the ineffective implementation of climate change projects both constitute a threat to the key rights of indigenous peoples. These are the rights to self-determination, water, food, housing, health and a healthy environment. The next question is whether the extraterritorial activities of states in and outside Africa are implicated in climate-induced displacement and a threat to human rights.

3 Displacement as a result of an extraterritorial conduct or omission

Extraterritoriality connotes the exercise of legal power outside territorial borders.⁷³ In relation to the realisation of human rights, particularly socio-economic rights, extraterritoriality encompasses the conduct or omission of a 'state within or beyond its territory that have effects on the enjoyment of human rights outside of that state's territory'.⁷⁴ The displacement of indigenous peoples through the non-viability of land and the ineffective implementation of climate-related projects raises an important issue. The question is whether a state in Africa or beyond can be responsible for the climate-induced displacement of indigenous peoples and its threat to their rights in

69 United Nations General Comment 14: The right to the highest attainable standard of health E/C.12/2000/4 (2000) paras 15 & 16.

70 Concluding Observations of the ESCR Committee, Nigeria E/C.22/1/Add.23, 13 May 1998, para 29.

71 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC* case) para 52.

72 *Inter-American Court Comunidad Yanomami v Brazil*, decision of 5 March 1985, Case 7615 (*Yanomami* case).

73 AJ Colangelo 'What is extraterritorial jurisdiction?' (2014) 99 *Cornell Law Review* 1302; S Besson 'The extraterritoriality of the European Convention on Human Rights' (2012) 25 *Leiden Journal of International Law* 857.

74 O de Schutter et al 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084 1101.

another African state. Arguably, this is possible in two ways: through the conduct or omission of an African state in and outside its territory in Africa; and the conduct or omission of non-African states (developed states) in their territories and in Africa.

3.1 Conduct or omission of an African state in and outside its territory in Africa

African states generate emissions which have implications for climate change and the displacement of indigenous peoples and pose a threat to their rights. The increased emission profile of some states in Africa is characterised by large-scale agriculture, mining, construction and logging which, according to the findings of scientific research, are a substantial driver of climate change.⁷⁵ For instance, South Africa's contribution to the African carbon emission profile is 40 per cent, followed by Egypt at 17 per cent, Algeria at 10 per cent and Nigeria at 7 per cent.⁷⁶ While the impact of these activities is not responsible for the immediate state of the climate,⁷⁷ it can be argued that at such an emission rate, any of these states will contribute to the future worsening of the climate and, by implication, the scenarios underlying the displacement of indigenous peoples and the threat to their rights.

There is evidence indicating that the failure of a state to regulate or influence its non-state actors to implement climate response measures in a manner that prevents displacement and respects rights abroad is a driver of the displacement of indigenous peoples in Africa. For instance, a company based in South Africa, J & J Group Property Limited Pretoria, is involved in the biofuel project associated with the displacement of indigenous peoples in Tanzania.⁷⁸ In this context, there is no direct link between South Africa and the displacement of indigenous peoples. However, this development questions the availability of appropriate legislation in the state to regulate the activities of companies abroad. South Africa is also involved in the conversion of 300 000 to 400 000 hectares of wetland in Southern Benin for the production of palm oil, which is criticised as undermining rights.⁷⁹ The fact that no specific legislative measure is in place to regulate or influence such activities abroad shows how a state

75 G Rist *The history of development: From Western origins to global faith* (2009) 21-24; on the negative impacts of these activities on the climate, see RW Gorte & PA Sheikh *Deforestation and climate change* (2010).

76 Urban Earth South Africa 'Carbon snapshot' 2012 http://urbanearth.co.za/system/files/private/Urban%20Earth_SA%20Carbon%20Snapshot_0.pdf (accessed 27 June 2015).

77 'Climate is the average weather condition at least for 30 years' http://www.ipcc.ch/publications_and_data/ar4/wg2/en/annexessglossary-a-d.html (accessed 23 March 2015).

78 n 42 above.

79 African Biodiversity Network *Agrofuels in Africa: The impacts on land, food and forests* http://www.biofuelwatch.org.uk/docs/ABN_Agro.pdf (accessed 16 August 2015).

in Africa can indirectly be linked to displacement, threatening the rights of indigenous peoples elsewhere in Africa.

3.2 Conduct or omission of developed states in their territories and in Africa

With regard to the causation of climatic change resulting in the displacement of indigenous peoples, the conduct of developed states in their own territories or in support of investments abroad is a driver of climate-induced displacement and its effect on the rights of indigenous peoples. Historically, developed states have been responsible for the current state of the climate which is due to past emissions associated with their economic development path.⁸⁰ At the heart of this development are the investments of actors such as ExxonMobils, Chevron, Western Fuels and the Edison Electric Institute.⁸¹ The emissions generated from these activities are largely responsible for climate change which undermines water resources, food security, natural resource management and biodiversity, human health, settlements and infrastructure, and desertification in Africa.⁸² Since these are factors in the displacement of indigenous peoples, it is logical to link the displacement of indigenous peoples in Africa to the contribution of developed states.

The ineffective implementation of climate response projects in Africa which drives the displacement of indigenous peoples is linked to the omission of developed states to regulate or influence the activities of their non-state actors in Africa. For instance, the involvement of London-based Central African Mining and Exploration Company (CAMEC) in a large bio-ethanol project, called Procan, is not only responsible for dispossession and displacement in Central and Southern Africa,⁸³ but it shows a failure on the part of the United Kingdom (UK) to influence or regulate the activities of its non-state actors abroad. A similar inference may be drawn from the lack of accountability of companies originating from Malaysia, Italy and South Korea, which are involved in land grab for biofuel purposes causing the displacement of communities, including the Bodi, Daasanach, Kara (Karo), Muguji (Kwegu), Mursi and Nyangatom, who live in the Omo Valley in Ethiopia.⁸⁴ Further, Prokon Renewable Energy Solutions and Systems Ltd of Germany, Mitsubishi Corporation of Japan and Sun Biofuel of the UK are involved in the biofuel sectors

80 B McKibben *The end of nature: Humanity, climate change and the natural world* (2003).

81 Greenpeace *Dealing in doubt: The climate denial machine v climate science* (2013) 8-13.

82 MI Boko et al 'Africa: Climate change, impacts, adaptation and vulnerability' in ML Parry et al (eds) *Climate change, impacts, adaptation and vulnerability: Contribution of Working Group II to the 4th Assessment Report of the Intergovernmental Panel on Climate Change* (2007) 433.

83 Cotula et al (n 45 above) 35.

84 Oakland Institute (n 46 above).

in Tanzania which implicate the displacement of indigenous communities from their land,⁸⁵ indicating that these companies are not under any restriction by their home countries to operate in a manner that respects rights abroad. Regarding the implementation of projects under the CDM, evidence from Tanzania indicates that no accountability is assumed by Norway for its Green Resources Limited implementing reforestation activities occasioning displacement.⁸⁶

Overall, the conduct or omission of African states in and outside their territories in Africa and the conduct or omission of non-African states (developed states) in their territories and in Africa are responsible for the displacement of indigenous peoples which undermines rights. The next section considers the basis of the Kampala Convention and how it may be applied extraterritorially to address climate-induced displacement of indigenous peoples in Africa.

4 Extraterritorial application of the Kampala Convention

The extraterritorial application of states' human rights obligations, namely, holding a state responsible for its violation of rights or that of its agents abroad is a topical subject in international human rights discourse.⁸⁷ It is supported by international instruments such as the United Nations Charter,⁸⁸ and the Draft Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission, which require the accountability of a state and other states that aid or assist it in the violation of human rights.⁸⁹ It serves a similar purpose as the 'do no harm' principle of international environmental law, which holds that a state should not allow its territory to be used in a manner that results in injury to another state,⁹⁰ and the principle that states are responsible for the damage caused by their acts or omissions of which they are aware or 'ought to know'.⁹¹ The notion that a state's human rights obligations extend beyond its borders is popularised by the Maastricht Principles on

85 Cotula et al (n 45 above).

86 B Karumbidza & W Menne 'Unclean development mechanism' <http://www.pambazuka.org/en/category/features/67532> (accessed 27 February 2015).

87 As part of the global debate on the subject, see K da Costa *The extraterritorial application of selected human rights treaties* (2013); De Schutter et al (n 74 above) 1084.

88 United Nations *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI art 55(3).

89 International Law Commission *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement 10 (A/56/10), ch iv.e.1 art 16.

90 *Trail Smelter (US/Canada)* (1941) 3 RIAA 1905.

91 *Corfu Channel (UK/Albania)* (1949) ICJ Rep 4, 22.

Extraterritorial Obligations of States (Maastricht Principles).⁹² The urgency for developed states to ensure that rights are respected extraterritorially has featured in the Concluding Observations and General Comments of treaty-monitoring bodies.

In its concluding observations, the ESCR Committee condemns the failure of countries such as China,⁹³ Austria⁹⁴ and Norway⁹⁵ to regulate the activities of state and privately-owned companies abroad. Regarding the specific situation of indigenous peoples in the context of climate change, the Concluding Observations of the Committee on the Elimination of Racial Discrimination (CERD Committee) are definite on the need for extraterritorial accountability. While examining the report of the UK, the CERD Committee notes that the activities of its transnational corporations are adversely threatening the rights of indigenous peoples to land, health and environment abroad.⁹⁶ General Comment 12 of the ESCR Committee on the right to food affirms that individual and joint responsibility should be assumed by states to provide disaster relief and humanitarian assistance to refugees and IDPs.⁹⁷ General Comment 15 on the right to water calls upon states not only to ensure that their companies and citizens do not interfere with the right to water abroad, but to ensure the provision of adequate water as a form of disaster relief and humanitarian assistance to refugees and IDPs.⁹⁸

At the African regional level, whether a human rights instrument can apply extraterritorially was questioned initially in relation to the African Charter on the basis that the instrument is territorial.⁹⁹ However, new literature has shown that in so far as there is no jurisdictional clause in its provisions, the African Charter can give rise to extraterritorial obligations.¹⁰⁰ In particular, contending that there is

92 *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* [http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1\[downloadUid\]=23](http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1[downloadUid]=23) (accessed 30 March 2015) (Maastricht Principles).

93 ESCR Committee Concluding Observations on the second periodic report of China, including Hong Kong, China, and Macao, China, 13 June 2014, E/C.12/CHN/CO/2 para 13.

94 ESCR Committee Concluding Observations on the fourth periodic report of Austria, 20 November 2013, E/C.12/2013/SR.53 & 54 para 12.

95 ESCR Committee Concluding Observations on the fifth periodic report of Norway, 13 December 2013, E/C.12/NOR/CO/5 para 6.

96 UN Committee on the Elimination of Racial Discrimination, Concluding Observations on the eighteenth to twentieth periodic reports of the United Kingdom and Northern Ireland, 1 September 2011, CERD/GBR/CO/18-20 para 29.

97 General Comment 12 para 38.

98 General Comment 15 paras 33-34.

99 C Anyangwe 'Obligations of state parties to the African Charter on Human and Peoples' Rights' (1998) 10 *Arizona Journal of International and Comparative Law* 625.

100 Leading literature on the subject in Africa includes TS Bulto 'Public duties for private wrongs: Regulation of multinationals' in M Gibney & W Vandenhoe (eds) *Litigating transnational human rights obligations: Alternative Judgment* (2014) 239;

no jurisdictional clause in the African Charter limiting the application of rights to the territory of a member state, Bulto concludes that there is '[n]o textual basis to limit the spatial reach of socio-economic rights such as the right to water or correlative state obligations to a state's territorial jurisdiction'.¹⁰¹ Arguably, the Maastricht Principles, Concluding Observations and General Comments relating to extraterritorial obligations apply to the African Charter by virtue of article 60 which allows for reference to human rights instruments other than the African Charter in interpreting its provisions. Therefore, since the Kampala Convention by virtue of articles 20(1) and (2) accommodates the application of the African Charter, one may argue that the Maastricht Principles, Concluding Observations and General Comments relating to extraterritorial obligations are relevant in the extraterritorial application of the Kampala Convention.

4.1 Climate-induced displacement and indigenous peoples' specific provisions as basis

Affirming that displacement can result from climatic conditions, the Kampala Convention defines internal displacement as 'the involuntary or forced movement, evacuation or relocation of persons',¹⁰² and article 5(4) requires states to take 'measures to protect and assist persons who have been internally displaced due to natural or human-made disasters, including climate change'. Also, article 10, which deals with displacement induced by projects, accommodates displacement resulting from ineffectively implemented climate response projects in Africa. As a result, it may be asserted that the Convention is the first international instrument to link climate change to displacement, thus rendering redundant the debate as to whether displacement is linked to climate change.

Although the term 'indigenous peoples' is not used anywhere in the Kampala Convention, it may be concluded from various of its provisions that the instrument speaks to the specific features describing indigenous peoples. The possibility that indigenous communities are included among people affected by climate change is recognised in article 4(5) of the Kampala Convention, which enjoins parties to the Convention to 'protect communities with special attachment to, and dependency, on land due to their particular culture and spiritual values'. In similar vein, the Kampala Convention affirms the need to 'protect individual, collective and cultural properties', and to safeguard areas where IDPs are located from environmental degradation.¹⁰³ Article 11(5) requires states to take

TS Bulto 'Towards rights-duties congruence: Extraterritorial application of the human right to water in the African human rights system' (2011) 29 *Netherlands Quarterly Human Rights* 1.

101 Bulto (2011) (n 100 above) 39.

102 Art 1(i) Kampala Convention (n 14 above).

103 Arts 9(2)(i) & (j) Kampala Convention.

measures to 'restore the lands of communities with special dependency and attachment to such lands upon return'. The features emphasised in the foregoing provisions agree with the report of the Working Group which explains special attachment to and use of land, marginalisation and discrimination based on their cultural difference in the description of indigenous peoples.¹⁰⁴ This is consistent with articles 25 and 26 of the UNDRIP which generally safeguard the spiritual and cultural attachment of indigenous peoples to their ancestral lands. These provisions are also in line with the recommendations by the Special Rapporteur on Indigenous Peoples that decisions in relation to the development on indigenous peoples' lands are not taken without genuine and good faith efforts to obtain the free, prior and informed consent of those communities.¹⁰⁵ Accordingly, the inference that may be drawn from these provisions is a legal certainty that the Kampala Convention applies to the climate-induced displacement of indigenous peoples in Africa.

Equally, the evidence that the provisions apply extraterritorially is almost certain. The provisions calling upon states to protect the collective and cultural properties of IDPs,¹⁰⁶ to address environmental degradation in areas of IDPs,¹⁰⁷ and to create and maintain effective registration and personal documentation of IDPs,¹⁰⁸ are unique in that they are expected to be achieved within their jurisdiction or effective control. While the reference to areas under 'their effective control' suggests an extraterritorial reach, its scope is, however, debatable. The question is whether the term refers only to activities in an area under military control or whether it can be interpreted to cover activities of non-state actors abroad. Supporting the former interpretation, a case relating to the invasion of the territory of the DRC¹⁰⁹ demonstrates that extraterritorial application of the African Charter is possible, but appears to limit such interpretation to where a state exercises military control abroad. However, it appears that the interpretation need not be limited to military occupation. Although adjudged inadmissible, in discussing the scope of application of the territorial jurisdiction of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),¹¹⁰ the case of *Bankovic*¹¹¹ is instructive. It recognises that exceptional

104 Working Group of Experts (n 25 above).

105 United Nations General Assembly Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, 22 February 2010 A/HRC/15 para 92.

106 Art 9(2)(i) Kampala Convention (n 14 above).

107 Art 9(2)(j) Kampala Convention.

108 Art 13(1) Kampala Convention.

109 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004) paras 79 & 81.

110 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

111 *Bankovic & Others v Belgium & Others* [2001] ECHR 970 para 67.

circumstances, other than the factor of 'military control', may allow for the extraterritorial application of the European Convention.

Therefore, the decision in *Bankovic* is useful to validate the assumption that, where a non-state actor belonging to one state but conducting activities in another state embarks upon climate response projects which results in the internal displacement of indigenous communities from their lands, this should constitute an exceptional circumstance necessitating the accountability of the former state. This is particularly so in the context of the Kampala Convention which in article 3(1)(h) urges state parties to ensure the accountability of non-state actors, which include multinational companies, for their involvement in displacement. This reasoning is supported by the Concluding Observations and General Comments of international monitoring bodies, particularly the CERD Committee, which affirms that the rights of indigenous peoples should be protected extraterritorially¹¹² as applicable under article 61 of the African Charter and, by implication, articles 20(1) and (2) of the Kampala Convention. It is reinforced by Resolution 157 of the African Commission which calls for the inclusion of indigenous peoples in climate-related actions and instruments.¹¹³

4.2 Applying obligations capable of extraterritorial interpretation

The Kampala Convention provides for the obligations of different stakeholders in internal displacement. The obligations of state parties with regard to protection from internal displacement and protection and assistance are set out in articles 4, 5 and 9 respectively. The obligations with regard to displacement induced by projects, sustainable return and relocation and compensation are set out in articles 10, 11 and 12 respectively. Article 6 deals with obligations relating to international organisations and humanitarian agencies, while article 8 deals with obligations of the African Union (AU). These obligations are generally couched without specifying jurisdiction, which is not unintended: Where the contrary is intended, the Kampala Convention is specific. For instance, the obligation to provide humanitarian assistance and protection in article 5(1) is territorial in the sense that it is limited to the IDPs in their territory or jurisdiction.¹¹⁴ These obligations, arguably, apply extraterritorially in addressing the climate-induced displacement of indigenous peoples by states in and outside Africa.

4.2.1 Obligations applicable among states in Africa

The Kampala Convention is unique in that the above provisions relating to different actors on the subject of displacement are situated in the context of states' obligations to respect, protect, fulfil and

112 CERD Committee (n 96 above).

113 Resolution 153 (n 17 above).

114 Art 5(1) Kampala Convention (n 14 above).

promote rights.¹¹⁵ These obligations may be substantiated by the jurisprudence of the African Commission and the Maastricht Principles. The jurisprudence of the Commission in the *SERAC* case¹¹⁶ sets out four tiers of obligations, namely, the obligations to respect, protect, fulfil and promote rights. Furthermore, as mentioned earlier, the Maastricht Principles are important in motivating the Kampala Convention by virtue of article 61 of the African Charter. Using the jurisprudence of the African Commission and the Maastricht Principles as a guide, the extraterritorial application of the Kampala Convention may be advanced.

According to the African Commission, the obligation to respect connotes that states should not interfere in the enjoyment of rights of collective groups.¹¹⁷ According to the Maastricht Principles, the extraterritorial obligation to respect requires states to refrain from direct conduct which may hinder the realisation of rights outside their territories.¹¹⁸ The Kampala Convention has provisions which may be used to ensure the obligation to 'respect' the rights of indigenous peoples in the context of climate-induced displacement. These include provisions which call on state parties to 'refrain from, prohibit and prevent arbitrary displacement of populations'.¹¹⁹ In the context of climate-induced displacement and indigenous peoples, the extraterritorial obligation to 'respect' signifies that no state in Africa should, by itself or through its agents, be involved in climate response projects which may bring about the displacement of indigenous communities in another African state. It connotes that where involvement in such projects is inevitable, the rights of indigenous communities should not in the process be compromised. Accordingly, a state involved in biofuel projects or other climate-related initiatives, such as REDD+ and CDM, which occasions displacement and undermines the rights of indigenous peoples in another state, contradicts the obligation to respect under the Kampala Convention.

In discussing the obligation to protect, the African Commission enjoins states to adopt measures, including legislation, and to provide effective remedies for the protection of rights holders 'against political, economic and social interferences' and to regulate non-state actors to ensure that their operations do not hinder the realisation of rights.¹²⁰ The Maastricht Principles explain the 'obligation to protect' as requiring that states should adopt appropriate measures to ensure that their non-state actors do not hamper the realisation of rights abroad. Where they cannot regulate their conduct, they should influence the conduct of non-state actors and co-operate to ensure

115 Preamble Kampala Convention.

116 *SERAC* case (n 71 above).

117 *SERAC* case para 45.

118 Maastricht Principles (n 92 above) Principles 20-22; De Schutter et al (n 74 above) 1126-1133.

119 Arts 3(1)(a), (d) & 4(1) Kampala Convention (n 14 above).

120 *SERAC* case (n 71 above) para 46.

that rights are not impeded extraterritorially by non-state actors. This mode of protection involves the creation of an appropriate atmosphere and framework through a mix of laws and regulations so that beneficiaries of rights can achieve their rights.¹²¹ The Kampala Convention requires states to formulate regulation and to ensure the accountability of non-state actors.¹²² The displacement of indigenous peoples by climate-related activities of a state or its agents in another state shows that participating non-state actors from a state in Africa operating in another African state are not necessarily subject to any law in their home country requiring them to respect rights abroad. Such failure is in breach of the obligation to protect which African states owe to one another under the Kampala Convention.

The obligation to 'fulfil', according to the African Commission, requires states to mobilise 'its machinery towards the actual realisation of the rights'.¹²³ It entails the provision of 'basic needs such as food or resources that can be used for food'.¹²⁴ According to the Maastricht Principles, the extraterritorial implication of the obligation to 'fulfil' involves the co-ordination and allocation of responsibilities, the use of maximum abilities and resources, co-operation, request and response to international assistance and co-operation.¹²⁵ The Kampala Convention urges state parties to make available, as far as possible, the necessary funds for protecting IDPs without prejudice to international support.¹²⁶ The assistance includes the provision of food, water, shelter and medical care for the necessary protection of IDPs.¹²⁷ The urgency of assistance in the context of a harsh environmental situation is discussed by the Indian Supreme Court in *Peoples' Union for Civil Liberties v Union of India*.¹²⁸ In that case, the Supreme Court of India was approached for relief when several states in India faced an acute drought. The Court ordered that 'food is provided to the aged, disabled, destitute, women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children'.¹²⁹ Indirectly, the non-viability of land underlying the displacement of indigenous peoples reflects inadequate assistance or the failure by a state to seek assistance and/or to co-operate, a situation which contradicts the extraterritorial obligation to fulfil the rights of indigenous peoples displaced by climate change.

121 Maastricht Principles (n 92 above) Principles 24-27; De Schutter et al (n 74 above) 1133-1145.

122 Arts 3(1)(i), 3(2)(a) & 14(4) Kampala Convention (n 14 above).

123 *SERAC* case (n 71 above) para 47.

124 As above.

125 Maastricht Principles (n 92 above) Principles 29-35; De Schutter et al (n 74 above) 1145-1159.

126 Art 3(2)(d) Kampala Convention (n 14 above).

127 Art 9(2)(b) Kampala Convention.

128 (Civil) 196 of 2001 (SC).

129 As above.

The African Commission explains the obligation to promote the enjoyment of all human rights as entailing that state parties should ensure 'that individuals are able to exercise their rights, for example, by promoting tolerance, raising awareness, and even building infrastructures'.¹³⁰ Its extraterritorial connotation is explained by the Maastricht Principles to include the observance of principles such as informed participation¹³¹ and impact assessment.¹³² This obligation is evident in the provisions of the Kampala Convention that aim at promoting sustainable livelihood among IDPs,¹³³ and ensuring the protection of communities culturally and spiritually dependent on lands.¹³⁴ Further, it is exemplified by the Kampala Convention which provides for consultation and participation of IDPs in decision making,¹³⁵ and the socio-economic and environmental impact assessment of projects related to development.¹³⁶ While these provisions generally relate to IDPs, is not difficult to imagine that it serves the purpose of indigenous peoples, considering its similarity with indigenous peoples' rights regime.¹³⁷ Therefore, interpreting the extraterritorial obligation to promote under the Kampala Convention implies that a state sourcing non-state actors operating in another state in Africa should encourage such actors to embark on programmes and activities which strengthen and do not undermine the cultural distinctiveness of indigenous peoples abroad. To act otherwise is to be in breach of the obligation to promote rights under the Kampala Convention.

Overall, in respect of the foregoing extraterritorial obligations, indigenous peoples should be able to lodge complaints against the state whose extraterritorial conduct or omission underlies climate-induced displacement before the African Commission or African Court, provided the article 34(6) requirement of the African Court Protocol has been made.¹³⁸ This is in accordance with article 20(3) of the Kampala Convention, which allows an IDP to lodge a complaint before the African Commission or Court, as appropriate.

4.2.2 Obligations applicable to developed states outside Africa

States outside Africa are not bound by the Kampala Convention in that they are not parties to the instrument. Hence, the discussion of

130 *SERAC* case (n 71 above) para 46.

131 Maastricht Principles (n 92 above) Principle 7.

132 Maastricht Principles (n 92 above) Principle 14.

133 Art 3(1)(k) Kampala Convention (n 14 above).

134 Art 4(5) Kampala Convention.

135 Arts 10(2) & 9(2)(l) Kampala Convention.

136 Art 10(3) Kampala Convention.

137 See UNDRIP arts 15, 17, 30, 36 & 38 dealing with consultation and consent; *Anaya's Botswana Report* (n 105 above).

138 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted in Addis Ababa, Ethiopia on 10 June 1998, entered into force on 25 January 2004.

their obligations cannot be articulated by using the framework of the extraterritorial obligation to respect, protect, fulfil and promote rights under the Kampala Convention. For the same reason, indigenous peoples displaced by climate change cannot litigate under the instrument against states outside Africa. However, there are provisions in the instrument which justify a proposition that developed states can indirectly be accountable for their extraterritorial conduct or omission underlying the climate-induced displacement of indigenous peoples in Africa. The specific provisions fall under the obligations of the AU to 'co-ordinate mobilisation of international resources for the assistance and protection of IDPs'.¹³⁹ The fulfilment of this role entails 'collaboration with international organisations and humanitarian agencies, civil society organisations and other relevant actors' to support concerned state parties.¹⁴⁰ The AU is also tasked with co-operating with African states and other actors for the protection of and assistance to IDPs.¹⁴¹ The fact that these provisions highlight the relevance of 'international organisations and humanitarian agencies, civil society organisations and other actors', without limiting this to Africa, suggests that the reach for international support for IDPs extends beyond Africa.¹⁴² This construction is supported by the Maastricht Principles, which recognise the role of international assistance and co-operation of organisations and humanitarian agencies, civil society organisations and other actors.¹⁴³

In the context of indigenous peoples displaced by climate change, there are grounds to expect that the request and response to such assistance extend to developed states outside Africa. Developed states listed under the UNFCCC and Kyoto Protocol already have a commitment to provide different forms of assistance, including the promotion, facilitation and provision of finances and appropriate technology, practices and processes to address the adverse effect of climate change in developing states, including Africa.¹⁴⁴ An important platform to negotiate and harvest the commitment under the UNFCCC is the Conference of Parties (COP), which is made up of state parties and acts as the main forum of elaborating the climate change regime.¹⁴⁵ Since states in Africa participate in the discussion

139 Art 8(3)(b) Kampala Convention (n 14 above).

140 Art 8(3)(c) Kampala Convention.

141 Art 8(3)(d) Kampala Convention.

142 International organisations in developed countries, according to *The Economist*, deliver more aid than the UN system; see *The Economist* 'The non-governmental order' 11 December 1999 20; also see E Ferris 'Faith-based and secular humanitarian organisations' (2005) 87 *International Review of the Red Cross* 1.

143 De Schutter et al (n 74 above) 1104.

144 Art 4(1)(b) UNFCCC; Arts 10(c) & 11(2)(a)(b) Kyoto Protocol (n 21 above).

145 Art 7 UNFCCC; D Bodansky 'International law and the design of a climate change regime' in U Luterbacher & DF Sprinz (eds) *International relations and global climate change* (2001) 201 213.

at the COP as a group,¹⁴⁶ in line with its obligations under the Kampala Convention, it is logical to expect the AU to use this medium to mobilise international resources for the assistance and resources required to address the climate-related displacement of indigenous peoples. By doing so, the AU will be aligning developed states outside Africa with the obligations under the Kampala Convention.

Where the AU fails to perform the role above, it is debatable whether indigenous peoples affected by climate-induced displacement can hold it accountable before the African Commission or African Court. In *Femi Falana v African Union*,¹⁴⁷ the Court held that an individual complaint against the AU by a non-state entity and state party that has not made a declaration pursuant to 34(6) of the African Court Protocol is impossible. In its analysis, the Court relied on article 34 of the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations¹⁴⁸ to hold that 'as far as an international organisation is not a party to a treaty, it cannot be subject to legal obligations arising from that treaty'.¹⁴⁹

However, it is doubtful whether the above reasoning will apply to the application of the Kampala Convention. There are grounds to infer that the *Falana* case can be distinguished and that, unlike the African Charter and the African Court Protocol, the AU can be accountable under the Kampala Convention. First, the Court in the *Falana* case expressed itself on the African Charter and the Court Protocol which have no specific provision on AU obligations, but not on the Kampala Convention in which obligations for the AU are clearly set out. Second, it is clear that in respect of the AU obligations, relief may be sought by complainants by virtue of article 20(3) of the Kampala Convention which saves the right to lodge complaints, a provision which suggests that since the AU enjoys the legal capacity to act, a complaint can be lodged against it. Third, if applied without distinction, the position of the African Court in the *Falana* case, that the AU cannot answer for its conduct except if it is a party to an instrument of its member states,¹⁵⁰ will render the AU obligations under the Kampala Convention non-justiciable. This is because it signifies that in so far as the AU remains a non-party to the Kampala Convention, no complaint in relation to its obligations under the instrument can successfully be lodged before the African Commission or African Court. Arguably, such a legal consequence is inconsistent

146 W Scholtz 'The promotion of regional environmental security and Africa's common position on climate change' (2010) 10 *African Human Rights Law Journal* 1.

147 Application 001/2011, judgment delivered on 26 June 2012.

148 United Nations Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, 12 March 1986.

149 *Falana* case (n 147 above) para 71.

150 *Falana* case para 71; also see the separate opinion of Judge Fatsah Ouguergouz, para 32.

with article 20(2) of the Kampala Convention which provides that no provision of the instrument should be interpreted in a manner that restricts the rights of IDPs. It is incompatible with a fundamental objective of the Kampala Convention as articulated in article 2(e), which requires relevant actors, including the AU, to prevent internal displacement and to protect and assist IDPs. As a result, the fact that the AU is not a party or cannot make the article 34(6) declaration of the Protocol should not constitute a bar to lodging a complaint before the African Commission and the African Court by indigenous peoples displaced by climate change in respect of the specific AU obligations arising from the Kampala Convention.

5 Conclusion

Due to the non-viability of their land due to climate change and the ineffective implementation of climate-related projects, there is a link between climate change and the displacement of indigenous peoples in Africa. The displacement of indigenous peoples has implications for a range of their rights, mainly the rights to self-determination, water, food, housing, environment and health. As has been shown above, the extraterritorial conduct or omission of states in and outside Africa in causing climate change and the ineffective implementation of climate response projects may be implicated in the displacement of indigenous communities and threats to their rights. Established to address internal displacement in Africa, the Kampala Convention incorporates the African Charter and has provisions which can be motivated by the Maastricht Principles to apply extraterritorially in protecting indigenous peoples under the risk of climate-induced displacement and resultant threat to their rights in Africa.

The basis for this, as the article has demonstrated, is that the Kampala Convention speaks to the specific features and issues of indigenous peoples challenged by displacement due to climate-related extraterritorial activities of states in and outside Africa. Its obligations to respect, protect, fulfil and promote apply to states in Africa where the conduct or omission of one state occasions the displacement of indigenous peoples in another state. While states outside Africa are not parties to the Convention and are not bound by its provisions or accountable before its complaints mechanism, the AU can, in fulfilling its obligations to mobilise international assistance, engage in the UNFCCC COP platform to render assistance required by indigenous peoples displaced by climate-related conditions and, thereby, ensure the indirect accountability of developed states. Where the AU fails its obligations under the Kampala Convention, indigenous people should be able, as it has been argued, to lodge a complaint before the African Commission or African Court, as the case may be.

The right not to be arbitrarily displaced under the United Nations Guiding Principles on Internal Displacement

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Summary

Globally, the issue of internal displacement has over the years emerged as one of the most pressing human rights concerns. For many years, millions of people have been displaced for various reasons, including conflicts, natural disasters and development projects. Recognising the need to address the issue of internal displacement, the United Nations developed a set of Guiding Principles in 1998. One significant provision of the Guiding Principles is their recognition of a right not to be arbitrarily displaced, which requires states to ensure the protection of persons in displacement situations with reference to fundamental human rights safeguards. However, the Guiding Principles are not clear on the yardstick against which to assess compliance by states with the duty. In light of the foregoing, the article explores the normative content of the right not to be arbitrarily displaced under the United Nations Guiding Principles on Internal Displacement.

Key words: *internal displacement; Guiding Principles on Internal Displacement; internally-displaced persons; arbitrary displacement*

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1 Introduction

Internal displacement has for many years been a human rights challenge. While Syria has in recent times emerged as the poster child for the problem with over 7 000 000 conflict-induced displacees, the issue of internal displacement has been a recurring concern globally. During the last six decades, millions of people have been displaced by various causes of internal displacement ranging from conflict to development projects. Recognising the need to address the problem at the international level, the United Nations (UN) developed a common standard on internally-displaced persons (IDPs) in 1998. This standard, known as the UN Guiding Principles on Internal Displacement (Guiding Principles),¹ is the first attempt by the international community to create a set of obligations for states in relation to internal displacement.

A novel creation of the Guiding Principles is the recognition of the right not to be arbitrarily displaced, which frames internal displacement as a rights-based problem and creates a duty on states to ensure that arbitrary displacement is prevented. While this right is recognised under the Guiding Principles, the yardstick against which to assess the arbitrariness of displacement is not explicitly contained in the Guiding Principles. The article explores the content of this right. The article begins with a discussion of the prevalence of internal displacement globally. Following this discussion, the creation of the Guiding Principles is discussed and the content of the right not to be arbitrarily displaced is analysed.

2 The prevalence of internal displacement

Internal displacement has been a major human rights challenge in countries across various continents. Across Africa, Asia and the Americas, the problem of internal displacement resonates in the context of conflicts, natural disasters and development projects.²

1 UN Commission on Human Rights, Addendum 'Guiding Principles on Internal Displacement' *Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to the UN Commission on Human Rights Resolution 1997/39*, UN Doc E/CN.4/1998/53/Add.2 (11 February 1998) (Guiding Principles).

2 In Europe, natural disasters have been a significant cause of internal displacement. In a 2011 report, the European Environment Agency observed that floods between 1998 and 2009 'produced more than 1 100 fatalities and affected more than 3 million people'. During the conflict situation in Ukraine, around 1 382 000 individuals were displaced, mostly in the eastern region of Luhansk and Donetsk. See European Environment Agency Technical Report 13 'Mapping the impacts of natural hazards and technological accidents in Europe: An overview of the last decade' (2010) 65; United Nations High Commissioner for Refugees 'Ukraine factsheet: July 2015: Highlights' (2015) 1 <http://unhcr.org.ua/attachments/article/317/UNHCR%20-%20Ukraine%20Factsheet%20-%20JULY%202015.pdf> (accessed 12 April 2016).

2.1 Africa

In Africa, conflicts, natural disasters and development projects have been significant drivers of internal displacement. In Uganda, the over two decade-long conflict between the government and the Lord's Resistance Army has displaced more than 2 000 000 people in the northern province.³ In 2014, about 2 700 000 people were displaced in the Democratic Republic of the Congo (DRC), mainly from the eastern region, as a result of conflicts between government forces and armed militias groups⁴ The ethno-political tensions within the Sudan People's Liberation Movement in South Sudan has resulted in the displacement of an estimated 1 500 000 people since 2013. In Nigeria, the conflict between government forces and members of the Boko Haram sect for close to a decade has internally displaced over 2 100 000 people in the northern region.⁵

Natural disasters in countries such as Togo, Niger and Malawi have contributed to internal displacement in the region. Over 20 000 people were displaced in Niger due to torrential rains in August 2015.⁶ Torrential rains in Mozambique displaced over 150 000 people in January 2015.⁷ In Malawi, around 200 000 people were displaced by heavy rainfalls in the same month.⁸

Development projects in Uganda, Angola and Kenya have equally led to several displacements. In the early 2000s, Ugandan authorities displaced about 2 041 persons (401 peasant families) without adequate compensation for the Kaweri Coffee Plantation. In Angola, between 2002 and 2006 an estimated 20 000 to 30 000 persons were reportedly displaced by government authorities for the purpose of development. In Kenya, between 1 000 and 2 000 persons were displaced in Raila village in Kibera in 2004⁹ for a road bypass,¹⁰ without prior notice, compensation, resettlement or legal remedies.¹¹

3 S Finnström *Living with bad surroundings: War, history and everyday moments in Northern Uganda* (2008) 77; BH Williams *The colour of grace: How one woman's brokenness brought healing and hope to child survivors of war* (2015) 304-305.

4 Norwegian Refugee Council and Internal Displacement Monitoring Centre *Global overview 2015: People internally displaced by conflict and violence* (2015) 26.

5 'Over 2,1 million displaced in Nigeria by Boko Haram insurgency' *News24* 4 September 2015.

6 'Niger floods kill four, displace 20 000' *Punch Nigeria* 15 August 2015.

7 A Essa 'Malawi faces "unprecedented" flood disaster' *Aljazeera* 19 January 2015.

8 M Mucari 'Death toll rises as Mozambique weighs up flood costs' *Mail & Guardian* 23 January 2015.

9 V Metcalfe et al 'Sanctuary in the city? Urban displacement and vulnerability in Nairobi' Humanitarian Policy Group Working Paper, September 2011 7.

10 Amnesty International *Kenya the unseen majority: Nairobi's two million slum dwellers* (2009) 18.

11 Centre on Housing Rights and Evictions 'Listening to the poor? Housing rights in Nairobi, Kenya' Fact-Finding Mission to Nairobi Kenya, Final Report, June 2006 4 11 13 55; UN-Habitat *Forced evictions – Towards solution? Second report of the Advisory Group on Forced Evictions to the Executive Director of UN-Habitat* (2007) 26.

2.2 Asia

In Asia, all three factors, not least natural disasters and conflicts, have been significant drivers of internal displacement in various countries. The 2004 Indian Ocean tsunami that affected 12 countries in the Indian ocean region, including India, the Maldives, Thailand, Sri Lanka and Indonesia,¹² displaced more than 500 000 people in South-Western Sri Lanka.¹³ Typhoon Haiyan, which affected parts of Palau,¹⁴ displaced an estimated 4 000 000 people in the Philippines in 2013.¹⁵ Around 40 000 people were displaced in Indonesia following torrential rain in 2014.¹⁶ In 2015, heavy rainfalls displaced over 100 000 people in Japan¹⁷ and around 500 families in the Kailali district of Nepal.¹⁸

Aside from natural disasters, conflicts have also been a significant driver of displacement in the Asian region. Over five decades of protracted conflict between the military junta and ethnic groups in Myanmar have resulted in the displacement of over 1 000 000 people.¹⁹ In 2002, between 600 000 and 1 000 000 people were internally displaced in states in the eastern region, including the states of Rakhine, Karen, Karenni, Shan and Mon.²⁰ The majority of these were women and children fleeing the war and sexual violence.²¹ In Sri Lanka, the protracted civil war from 1983 to 2009 between the Sri Lankan government, mostly dominated by the Sinhalese majority, and the Liberation Tigers of Tamil Eelam, composed of members of the

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- 12 KF Inderfurth & D Fabrycky 'The 2004 Indian Ocean tsunami: One year report' Sigur Centre for Asian Studies Papers, George Washington University, December 2005 5; 'Profile of internal displacement: Sri Lanka' Compilation of the information available in the global IDP database of the Norwegian Refugee Council (as at 7 March 2005) 7.
 - 13 UN Human Rights Council, Addendum, 'Mission to Sri Lanka' *Report of the Representative of the Secretary-General on the Human Rights of Internally-Displaced Persons*, Walter Kälin, UN Doc A/HRC/8/6/Add.4 (21 May 2008) para 17; D Colombage 'Tsunami horror haunts Sri Lanka survivors' *Aljazeera* 26 December 2014.
 - 14 'Typhoon Haiyan devastates northern island of Palau' *ABC* 9 November 2013.
 - 15 P Baylis & C Larano 'Philippines disaster leaves millions without homes' *The Wall Street Journal* 18 November 2013.
 - 16 K Quiano & J Mullen '13 dead, 40 000 displaced in floods in Indonesia's North Sulawesi' *CNN* 16 January 2014.
 - 17 I Kato 'More than 100 000 flee floods in Japan after "once-in-50 years" rain' *Reuters* 10 September 2015.
 - 18 'Floods displace 500 families in Kailali' *The Himalayan Times* 18 July 2015.
 - 19 M Mahn et al 'Health security among internally-displaced and vulnerable populations in Eastern Burma' in M Skidmore & T Wilson (ed) *Dictatorship, disorder and decline in Myanmar* (2008) 209.
 - 20 J Hampton *Internally-displaced people: A global survey* (2002) 111.
 - 21 P Banerjee et al 'Resisting erasure: Women IDPs in South Asia' in P Banerjee et al *Internal displacement in South Asia: The relevance of the UN's Guiding Principles* (2005) 287-288.

marginalised Tamil minority, resulted in the displacement of between 730 000 and 1 000 000 people.²² This resulted in socio-economic deprivations and psychosocial problems and affected specific groups, including women and children.²³

Development projects, particularly dam-building projects in various parts of Asia, particularly India and China, have significantly occasioned internal displacement. Although these projects are often intended for the economic benefit of the states, their socio-economic consequences for those displaced are often not considered properly. Projects are often carried out with the understanding that the displaced persons are 'necessary sacrifices'.²⁴ In mid-1985, when the loan agreement for the Sardar Sarovar dam in India was signed, its actual effect on the displaced population was not adequately factored in.²⁵ Following widespread criticism, the World Bank set up an independent review team.²⁶ In its report, the team noted that dam projects were 'flawed' and that the environmental impacts were not properly taken into account or sufficiently addressed.²⁷ It was initially projected that the Sardar Sarovar dam would displace around 6 147 families and, on the strength of this figure, the economic feasibility of the project was ascertained.²⁸ However, in the 1980s, the government placed the figure at around 13 335 families.²⁹ While the Supreme Court acknowledged a figure of over 40 000 in 2002, estimates of those displaced, in recent times, have been placed at around 40 000 to 100 000 families.³⁰ In China, around 1 200 000 people were displaced from the Yangtze River region between the 1990s to early 2000s to make way for the Three Gorges dam, the majority of whom were not adequately compensated.³¹ Although resettlement plans were developed and implemented, some displaced

22 Profile of internal displacement: Sri Lanka (n 12 above) 20; L Starke & Worldwatch Institute *State of the world: A Worldwatch Institute report on progress towards a sustainable society* (2006) 128; H Adelman & E Barkan *No return, no refuge: Rites and rights in minority repatriation* (2011) 117-118.

23 Profile (n 12 above) 19.

24 R Fujikura et al 'Introduction' in R Fujikura & M Nakayama (eds) *Resettlement policy in large development projects* (2015) 2.

25 B Morse & TR Berger *Sardar Sarovar: Report of the independent review* International Environment Law Research Centre, 1992 3.

26 P Penz et al *Displacement by development: Ethics, rights and responsibilities* (2011) 272.

27 Morse & Berger (n 25 above) 1.

28 P Cullet 'The Sardar Sarovar dam project: An overview' in P Cullet (ed) *The Sardar Sarovar dam project: Selected documents* (2007) 20.

29 As above.

30 As above.

31 International Rivers Network *Human rights dammed off at Three Gorges: An investigation of resettlement and human rights problems in the Three Gorges Dam project* (2003) 2; B Terminski *Development-induced displacement and resettlement: Causes, consequences, and socio-legal context* (2015) 96.

persons have been 'considerably poorer'³² after the move and 'worse off than ... [those] who were not moved'.³³

2.3 The Americas

In the Americas, conflicts, natural disasters and development projects have also been significant drivers of internal displacement. More than three decades of conflict³⁴ between armed groups of the Guatemalan National Revolutionary Unity and the Guatemalan government displaced between 500 000 and 1 500 000 people in Guatemala,³⁵ mostly from the indigenous Mayan communities.³⁶ The protracted conflict in Colombia between the government and the Revolutionary Armed Forces of Colombia (FARC) since the 1960s internally displaced an estimated 6 400 000 people.³⁷ In 2012, it was observed that around 30 per cent of the displaced population lacked access to health care.³⁸ In Peru, over 500 000 people were displaced by conflicts between government forces and militia groups in the 1980s and 1990s.³⁹

Aside from conflict, natural disasters have accounted for a significant number of displacements in the region. The 2005 hurricane, Katrina, in the United States displaced around 1 500 000 people, and led to the permanent displacement of around 300 000.⁴⁰ In Venezuela, 32 000 people were displaced by floods after heavy rains in 2010.⁴¹ In the same year, an estimated 1 500 000 people were displaced by an earthquake in Haiti,⁴² and in early 2015, around

32 J Jing 'Rural resettlement: Past lessons for the Three Gorges Project' (1997) 38 *The China Journal* 65-70.

33 As above.

34 The Guatemalan conflict ended in a peace agreement in 1996 following 36 years of armed conflict. M Line 'Case study: Comparative aspects of the human rights field operations in Bosnia and Herzegovina and Guatemala' in M O'Flaherty (ed) *The human rights field operation: Law, theory and practice* (2007) 346.

35 Internal Displacement Monitoring Centre and Norwegian Refugee Council 'Guatemala: 12 years after conflict, few solutions for IDPs or other victims' (2008) <http://www.internal-displacement.org/assets/library/Americas/Guatemala/pdf/Guatemala-Overview-Aug08.pdf> (accessed 27 October 2015).

36 Internal Displacement Monitoring Centre (n 35 above) 3; 'Guatemala's Mayan Indians endure poverty' *Voice of America* 27 October 2009; M Benton 'Guatemalan migration in times of civil war and post-war challenges' *Migration Information Source* 27 March 2013.

37 E Rosser 'Colombia's 6.4 million displaced lead global figures after Syria: UN' *Colombia Reports* 22 June 2015.

38 PC Webster 'Health in Colombia: Treating the displaced' (2012) 184 *Canadian Medical Association Journal* E291-292.

39 GD White 'Displacement, decentralisation and reparation in post-conflict Peru' (2009) 33 *Forced Migration Review* 44.

40 N Fernando et al 'Migration and natural hazards: Is relocation a secondary disaster or an opportunity for vulnerability reduction' in T Afifi & J Jäger *Environment, forced migration and social vulnerability* (2010) 145-146.

41 'Venezuelan flooding claims 21' *CNN* 1 December 2010.

42 'In pictures: Haiti five years after the earthquake' *BBC News (Latin America & Caribbean)* 12 January 2015; O Laurent 'Haiti earthquake: Five years after' *Time* 12 January 2015.

85 500 people were living in IDP camps in Haiti with limited access to social services for children.⁴³

Development projects in the region have equally resulted in displacements. In Chile, some members of the Pehuenche Mapuche indigenous communities were displaced to make way for a hydropower installation plant.⁴⁴ In 2013, around 19 000 families were displaced in Brazil to make way for infrastructural developments in preparation for the 2014 World Cup.⁴⁵ In some cases, displaced families were neither adequately notified nor properly compensated. Indigenous communities in Ecuador, Peru, Honduras and Paraguay have faced significant threats of displacement from development projects bound to affect their cultural existence. In Peru, thousands of people belonging to the Ashaninka tribe are likely to be displaced by the Pakitzapango dam.⁴⁶ In Brazil, over 20 000 people and about 1 000 indigenous peoples are set to be displaced in the near future for the creation of the Belo Monte Dam.⁴⁷

In light of the prevalence of the problem, the need for states to recognise and protect the right not to be arbitrarily displaced as required by the Guiding Principles is essential. Article 6(1) of the Guiding Principles provides that '[e]very human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence'.⁴⁸ The key word in this provision is the term 'arbitrary' which, although not defined in the Guiding Principles, suggests that certain rules must be followed to prevent displacement as a violation of international law. Below the article considers the yardstick against which the arbitrariness of internal displacement should be assessed. Before engaging in this, however, it is relevant to consider the development of the Guiding Principles as a response to internal displacement in the UN system.

3 Development of the Guiding Principles

While explicit mention of the right not to be displaced is made first in the Guiding Principles, discussions on internal displacement date back to the 1980s. In the 1980s, conflicts in Southern African states, including Angola and Mozambique, and the mass population

43 BBC News (n 42 above).

44 R Stavenhagen *The emergence of indigenous peoples* (2013) 90.

45 O Gibson & J Watts 'World cup: Rio favelas being "socially cleansed" in run-up to sporting events' *The Guardian* 5 December 2013.

46 N Hamdi *The spacemaker's guide to big change: Design and improvisation in development practice* (2014) 23; A Nelsen 'Dam project threatens a way of life in Peru' *The New York Times* 15 May 2012.

47 Amazon Watch 'Fact sheet: The Belo Monte dam' (2011) <https://amazonwatch.org/assets/files/2011-august-belo-monte-dam-fact-sheet.pdf> (accessed 27 October 2015); G Elizondo 'Dam it: Brazil's Belo Monte stirs controversy' *Aljazeera* 20 January 2012.

48 Guiding Principles (n 1 above) para 6(1).

displacement in South Africa due to the policies of the apartheid government resulted in a mass population displacement that affected millions of people. These displacements called for an immediate response to the humanitarian situation in the Southern African region. The Organisation of African Unity (OAU) requested an international meeting to discuss the situation of the population affected by mass displacements in the Southern African region in 1984. Two years later, the OAU called on the Secretary-General of the United Nations (UNSG) and the UN agency for refugees to constitute a committee in collaboration with the Southern African Development Community (SADC) to prepare for the meeting. A year later, a resolution was passed by the United Nations General Assembly (UNGA), endorsing this request for a meeting on the displaced population, and requesting the UNSG in collaboration with the UN agency for refugees and the Secretary-General of the OAU to convene a meeting. The UNGA also called on the global community to provide increased support to Southern African countries 'to enable them to facilitate their capacity to provide the necessary facilities and services for the care and well-being of refugees, returnees and displaced persons in their countries'.⁴⁹

In 1988, an International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (Southern African Conference) was assembled in Oslo, Norway. At the Southern African Conference, mention was made of the legal and institutional *lacuna* for the protection and assistance of IDPs. President Moussa Traoré, the President of Mali and Chairperson of the OAU at the time, 'appealed to the international community to consider the need for such a mechanism or arrangement to deal with ... persons [internally displaced]'.⁵⁰ A Declaration and Plan of Action were adopted at the meeting. In the Plan of Action, the UNSG was implored to 'undertake studies and consultations in order to ensure ... timely implementation and overall co-ordination of relief programmes for ... persons [internally displaced]'.⁵¹ In December 1988, after the Southern African Conference, the UNGA passed a resolution endorsing the Declaration and Plan of Action and requested the UNSG to conduct studies in determining whether there was a need to develop a United Nations committee to co-ordinate relief to internally-displaced persons.⁵² In July 1990, the United Nations Economic and Social Council also called upon the UN Secretary-General to carry out a

49 *International conference on the plight of refugees, returnees and displaced persons in Southern Africa*, adopted by UN General Assembly Resolution 42/106, UN Doc A/RES/42/106 7 December 1987 para 6.

50 *Report of the Secretary-General Pursuant to General Assembly Resolution 42/106: International Conference on the Plight of Refugees, Returnees and Displaced Persons*, UN Doc A/43/717.

51 As above.

52 *International conference on the plight of refugees, returnees and displaced persons in Southern Africa*, adopted by UN General Assembly Resolution 43/116, UN Doc A/RES/43/116 8 December 1988.

'United Nations system-wide review'⁵³ and 'recommend ways of maximising co-operation and co-ordination among ... various organisations of the United Nations system in order to ensure an effective response ... to the problems of refugees, displaced persons and returnees'.⁵⁴

While, at the level of the UN, relief-based solutions to the issue of internal displacement were being proposed, civil society organisations called for a more legal response. Organisations such as the World Council of Churches, the Friend World Committee for Consultation and the Refugee Policy Group called for the development of an international instrument on IDP protection and for the appointment of a UN special rapporteur on IDPs.⁵⁵ However, the appropriateness of this approach at the level of the UN was queried by agencies such as the UN High Commissioner for Refugees and the UN Development Programme. When lobbied, the UN Commission on Human Rights (CHR) responded differently.⁵⁶ The CHR was asked to 'designate a representative to again seek views and information from all [g]overnments on the human rights issues related to internally-displaced persons, including an examination of existing international human rights'.⁵⁷

In 1992, the UNSG appointed Francis Deng, a Sudanese diplomat and scholar, to carry out the mandate.⁵⁸ Deng highlighted that the problem of IDPs was 'so severe and particular that they cannot be adequately remedied by the general law applicable to human rights protection but should instead be addressed separately'.⁵⁹ Deng further recognised that there was a *lacuna* in international law protection which the refugee framework could not adequately respond to as refugees, unlike IDPs, crossed international borders and the notion of a refugee as a displaced person triggers a well-

53 Refugees, displaced persons and returnees, UN Economic and Social Council Resolution 1990/78, UN Doc E/RES/1990/78 27 July 1990 (Resolution 1990/78) para 7.

54 Resolution 1990/78 (n 53 above) para 8.

55 R Cohen 'The guiding principles on internal displacement: An innovation in international standard setting' (2004) 10 *Global Governance* 459 462; R Cohen 'UN human rights bodies should deal with the internally displaced' presented at a meeting for delegates to the UN Commission on Human Rights by the Quaker United Nations Office and the World Council of Churches 7 February 1990 5; 'Human rights protection for internally-displaced persons' international conference convened by the Refugee Policy Group 24-25 June 1991.

56 Cohen (1990) (n 55 above) 7; Internally-Displaced Persons, adopted by UN Commission on Human Rights Resolution 1991/25, UN Doc E/CN.4/RES/1991/25 5 March 1991.

57 As above.

58 FM Deng 'The global challenge of internal displacement' (2001) 5 *Washington University Journal of Law and Policy* 141.

59 UN Commission on Human Rights, *Note by the Secretary-General pursuant to the UN Commission on Human Rights Resolution 1992/73 – Annex: Comprehensive study prepared by Mr Francis Deng, Representative of the Secretary-General on the human rights issues related to internally-displaced persons*, UN Doc E/CN.4/1993/35 21 January 1993 (January 1993 report) para 55.

established body of international norms distinct from internal displacement.⁶⁰ Under the UN Refugee Convention, a person could claim refugee status where there was a 'well-founded fear' of persecution.⁶¹ However, the triggers of internal displacement are not always identical to those of refugees. For instance, development projects are not recognised as triggers of refugee status, but it may trigger internal displacement and leave displaced persons without adequate protection and in a precarious situation.

As the legal implications of the status of refugees and IDPs differ in international law, it was useful to develop a set of norms for the protection of IDPs.⁶² The UN Special Representative further noted that it was important to develop such norms for IDP protection in view of the fact that the international law standards applicable to IDPs at the time consisted of a 'highly complex web of norms originating from a variety of legal sources which makes its application in specific situations of internal displacement difficult unless it is restated in a concise form'.⁶³ To fill this *lacuna*, the UN Special Representative developed the Guiding Principles on Internal Displacement which

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- 60 UN 1951 Convention Relating to the Status of Refugees 189 UNTS 137 (UN Refugee Convention); January 1993 report (n 59 above) para 66; UN Commission on Human Rights *Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to the UN Commission on Human Rights resolution 1993/95 – Internally-displaced persons* UN Doc E/CN.4/1994/44 (25 January 1994) para 26.
- 61 UN Refugee Convention (n 60 above) art 1(2).
- 62 In the January 1993 report, it was emphasised that 'that there is at present no clear statement of the human rights of internally-displaced persons, or those at risk of becoming displaced. The applicable international law is a patchwork of customary and conventional standards: Parts of it are applicable to all persons, parts only to certain subgroups of displaced persons such as those displaced as a result of armed conflict, and parts may not be applicable in certain situations, such as an emergency threatening the life of the nation or, on the contrary, may be applicable only during a state of emergency. There are about 24 million internally-displaced persons around the world, most of whom suffer, have suffered or risk suffering extremely serious violations of their basic human rights. This constitutes a humanitarian and human rights crisis of major proportions, which calls for clear guidelines that could be applied to all internally-displaced persons, regardless of the cause of their displacement, the country concerned, or the prevailing legal, social, political or military situation.' January 1993 report (n 59 above) para 75; for a discussion of refugee law in Africa, see C d'Orsi *Asylum seeker and refugee protection in sub-Saharan Africa: The peregrination of a persecuted human being in search of a safe haven* (2015).
- 63 During this period, express prohibitions of arbitrary displacement were only to be found in norms relating to international humanitarian law and indigenous peoples' protection. In international human rights law, arbitrary displacement was only implicitly provided in rights relating to freedom from arbitrary interference with one's home, choice of residence, freedom of movement and housing rights. However, the UN Special Representative observed that these rights 'do not provide adequate and comprehensive coverage for all instances of arbitrary displacement, as they do not spell out the circumstances under which displacement is permissible'. UN Commission on Human Rights *Report of the Representative of the Secretary-General, Mr Francis M Deng submitted pursuant to the UN Commission on Human Rights Resolution 1995/57 – Internally-displaced persons: Compilation and analysis of legal norms* UN Doc E/CN.4/1996/52/Add.2

recognise the right not to be arbitrarily internally displaced.⁶⁴

4 Defining the term 'arbitrary'

The Guiding Principles explicitly provide for the right not to be displaced.⁶⁵ This recognition has three pertinent implications. It offers a platform on which IDPs may bring a claim for their protection that is constitutive and instrumental.⁶⁶ Further, it creates awareness on the issue of internal displacement distinct from other forced migration discourses, including the discussion on refugees and stateless persons. Additionally, it frames the discussion on internal displacement as a rights-based problem requiring rights-based solutions that touch on states' human rights commitments. Although the Guiding Principles provide for the right not to be arbitrarily displaced within the context of internal displacement, it does not explicitly set out the constitutive element of this right.

In line with international law, there are two constitutive elements of this right. The first key element is that displacement must be grounded in international law.⁶⁷ The significance of this element resonates from the need to ensure that displacements are not done without recourse to the law. Within the context of displacements, international human rights and humanitarian law standards are pivotal. These standards form the fulcrum of internal displacement norms from which the Guiding Principles and other regional norms on internal displacements have emerged. Article 6 of the Guiding Principles provides for grounds upon which displacement may be founded in international law. The provision sets out the permissible grounds on which various root causes of displacement will be considered non-arbitrary. In relation to armed conflict, displacement will be considered non-arbitrary where it is premised on the need to protect the civilian population or for the realisation of certain military exigencies.⁶⁸ In situations of large-scale development projects, displacement will be considered non-arbitrary where the project is in the realisation of a public interest need, and where it is for a compelling and overriding public interest.⁶⁹ In situations of disasters, displacement will be considered non-arbitrary where it is carried out

(5 December 1995) para 5; UN Commission on Human Rights, Addendum, *Report of the Representative of the Secretary-General, Mr Francis M Deng, submitted pursuant to the UN Commission on Human Rights resolution 1997/39 – Compilation and analysis of legal norms, part II: Legal aspects relating to the protection against arbitrary displacement*, UN Doc. E/CN.4/1998/53/Add.1 (11 February 1998) (Compilation and analysis of legal norms) para 84.

64 Guiding Principles (n 1 above) art 6(1).

65 M Morel *The right not to be displaced in international law* (2014) 82-83.

66 M Stavropoulou 'The right not to be displaced' (1994) 9 *American University International Law Review* 689 745.

67 Compilation and analysis of legal norms (n 63 above) para 88.

68 Guiding Principles (n 1 above) art 6(2)(b).

69 Guiding Principles art 6(2)(c).

on the grounds of safety and health.⁷⁰ However, for certain types of displacements, such as apartheid and ethnic cleansing, the Guiding Principles do not set out the grounds on which these will be permissible as they are absolutely prohibited under international law.⁷¹

Aside from the requirement of compliance with international law, the second key element for determining arbitrariness is due process or the 'minimum procedural requirements'.⁷²

Article 7(1) of the Guiding Principles provides that prior to displacement, feasible alternatives must be considered. In relation to conflict-induced displacement, international humanitarian law provides for a specific alternative that must be considered where protected persons are to be displaced in situations of armed conflict, either for military exigency or for safety.⁷³ The Fourth Geneva Convention provides that where protected persons are to be relocated, the occupying power should consider relocating them within the 'bounds of the occupied territory'⁷⁴ unless it is impracticable to do so for a 'material reason'.⁷⁵ In the context of disaster-induced displacement, the Peninsula Principles on Climate Displacement require states to consider climate adaptation and mitigation measures.⁷⁶ In the context of development projects, alternatives to the proposed projects must be considered.

However, where alternatives to displacements are not feasible, a second due process requirement is that strategies for minimising displacement and avoiding the adverse effect of displacements must be considered. In avoiding adverse effects, prior-impact assessments are relevant. While prior impact assessments may not always be feasible in the context of conflict-induced displacement, such assessments are feasible to avoid the adverse impact of development projects and natural disasters. In the context of development projects-induced displacement, socio-economic and environmental impact assessments are relevant. In relation to natural disasters, states must ensure that climate displacement risk managements are conducted.⁷⁷

A third due process requirement that resonates from the Guiding Principles is adequate resettlement. Article 7(2) of the Guiding Principles mandates authorities to ensure that displaced persons are properly accommodated and basic social amenities are provided,

70 Guiding Principles art 6(2)(d).

71 Guiding Principles art 6(2)(a).

72 Compilation and analysis of legal norms (n 63 above) para 88.

73 The Geneva Convention Relative to the Protection of Civilian Persons in Time of War 12 August 1949 (Fourth Geneva Convention).

74 Geneva Convention (n 73 above) art 49.

75 As above.

76 Peninsula Principles on Climate Displacement (2013).

77 Peninsula Principles (n 76 above) art 9.

including sanitation, nutrition and health care. The provision further requires that family members are not separated.⁷⁸

A fourth due process requirement integral to preventing arbitrary displacement is that displaced persons must be sufficiently informed prior to displacement. Article 7(3) of the Guiding Principles incorporates this requirement. In line with this provision, displaced persons must be informed of displacement prior to its occurrence; the free, prior and informed consent of displaced persons must be sought; and affected individuals, and women in particular, must be involved in resettlement planning and co-ordination.⁷⁹ However, an exception to this requirement is in the 'the emergency stages of armed conflicts and disasters'.⁸⁰

Another significant due process requirement is that displacement must not be carried out in violation of human rights law. This fifth requirement, integral to an understanding of 'arbitrariness', contemplates that displacement must not be orchestrated in a way that 'violates the rights to life, dignity, liberty and security of those affected'.⁸¹ Articles 10, 11 and 12 clearly set out what the nature of the protection of the rights to life, dignity, liberty and security entails within the context of displacement. In situations of internal displacement, the right to life is often considered one of the most significant human rights concerns, particularly in situations of armed conflict and displacements orchestrated by development projects. Article 10 specifically requires that IDPs are to be protected against '(a) genocide; (b) murder; (c) summary or arbitrary executions; (d) enforced disappearances' and threats to commit any of these crimes. The Guiding Principles further mandate states to ensure that in situations where IDPs are not involved in hostilities, acts of violence against such persons should be prevented.⁸² Aside from the right to life, the right to dignity also must not be violated. As a norm underlying various rights and as a right in itself, the concept of dignity is fundamental to the nature of human life.⁸³ Glensy notes that 'dignity has been considered to be an elemental part of personhood',⁸⁴ and scholars like Waldon,⁸⁵ Howard and Donnelly⁸⁶

78 Guiding Principles (n 1 above) art 7(2).

79 As above.

80 Guiding Principles (n 1 above) art 7(3).

81 Guiding Principles art 8.

82 Guiding Principles art 10(2).

83 RD Glensy 'The right to dignity' (2011) 43 *Columbia Human Rights Law Review* 65 69; EK White 'There is no such thing as a right to human dignity: A reply to Conor O'Mahony' (2012) 10 *International Journal of Constitutional Law* 575 578.

84 Glensy (n 83 above) 72.

85 J Waldon 'Dignity, rank and rights' The Tanner Lectures on Human Values delivered at University of California, Berkeley, 21-23 April 2009; J Waldon 'How law protects dignity' Public law and legal theory research paper series, New York University School of Law Working Papers 11-83 (2011).

86 See RE Howard & J Donnelly 'Human dignity, human rights, and political regimes' (1986) 80 *American Political Science Review* 801.

have taken similar positions on the notion of dignity as an intrinsic worth of every human. States do not only have the passive obligation of respecting the right,⁸⁷ but they have an obligation to positively take steps to ensure its realisation as a norm underlying all forms of rights and also as a right in itself. Article 11(2) specifically sets out some of the acts to be avoided intrinsic to the protection of this right, among which are acts of torture, rape, sexual abuse and acts directed at orchestrating terror. Article 12 provides for the security of persons and mandates states to protect internally-displaced persons from unjustifiable arrests or detention. Articles 13 to 23 further recognise the rights to movement; respect for family life; an adequate standard of living; equal recognition before the law; expression; assembly; vote; political participation; education; and the right against arbitrary deprivation of property.

A sixth requirement of the due process requirement is that adequate safeguard measures must be in place. The essence of these measures is to ensure that concerns resonating from displacements are adequately addressed in line with international standards in order to prevent the negative impact of displacement on the enjoyments of other human rights. These safeguard measures should include recognition of the right of IDPs to receive protection⁸⁸ and to be duly involved in the planning processes and co-ordination of resettlement, return and reintegration.⁸⁹ Additionally, competent lawful authorities should carry out law enforcement measures where such measures are required, and the right to effective remedies must be ensured.⁹⁰ Further, adequate safeguards must exist to protect specific categories of persons, including children, persons with disabilities and the elderly, and expectant mothers and mothers with children must be adequately protected.⁹¹

Although the Guiding Principles are non-binding, their norms have served as a tool for constructive engagement with states for the protection of IDPs⁹² and for the creation of norms in domestic systems.⁹³ National courts in countries such as Colombia and South Africa have made reference to the Guiding Principles.⁹⁴ The Guiding

87 Howard & Donnelly (n 86 above) 803.

88 Guiding Principles (n 1 above) art 3(2).

89 Guiding Principles art 28(2).

90 As above.

91 Guiding Principles (n 1 above) art 4(2).

92 See E Ferris 'Assessing the impact of the principles: An unfinished task' (2008) *Forced Migration Review* 10.

93 D Fisher 'Epilogue: International law on the internally-displaced persons' in Banerjee et al (n 21 above) 316-328.

94 MJC Espinosa 'The constitutional protection of IDPs in Colombia' in RA Rivadeneira (ed) *Judicial protection of internally-displaced persons: The Colombian experience* (2009) 1-32; *City of Cape Town v All those adult males and females whose names are set out Annexure 'hs 1' to affidavit and who reside at Bluewaters Site B and C, Lukannon Drive, Strandfontein in Western Cape & Others* (2010) ZAWCHC 32 24 February 2010.

Principles have equally influenced the creation of regional frameworks in the Great Lakes region and within the African Union.⁹⁵ While the right not to be displaced is recognised in the framework of these systems, indications of appropriate recognition in domestic legal systems are few and far between.⁹⁶ However, it is important to note that if the right is to serve its purpose of providing IDPs with a claim that is both constitutive (of other human rights violations implicated in internal displacement) and instrumental (for the realisation of specific redress), national legal frameworks must adequately respond by explicitly recognising this right. This is important in view of the fact that the 'ultimate test of international human rights law is the extent to which it takes root in national soil'.⁹⁷

5 Conclusion

Aside from being the first global normative standard on internal displacement, the Guiding Principles form the first human rights framework to recognise the right not to be arbitrarily displaced. While the Guiding Principles explicitly provide for this right, they do not provide for the yardstick against which to assess the arbitrariness of internal displacement. Two significant standards may be inferred from international instruments relevant to the Guiding Principles. First, displacement must be permissible under international law. Second, displacement must be in line with due process requirements. The article identifies six due process requirements, namely, that (i) feasible alternatives must be considered; (ii) strategies for minimising displacements must be explored; (iii) adequate resettlement must be implemented; (iv) displaced persons must be sufficiently informed; (v) displacement must not be carried out in violation of human rights law; and (vi) adequate safeguards must exist.

For over a decade, the Guiding Principles have significantly influenced the creation of normative standards, particularly at the supranational level. While the Guiding Principles have inspired national frameworks, little explicit provision in domestic legal systems has been made for the right not to be arbitrarily displaced. However, if the Guiding Principles are to take root in national legal systems and if the protection of IDPs within national systems is to be enhanced,

95 Protocol on the Protection and Assistance to Internally-Displaced Persons, November 2006 in S Ebobrah & A Tanoh (eds) *Compendium of African sub-regional human rights documents* (2010) 127; African Union Convention for the Protection and Assistance of Internally-Displaced Persons in Africa, adopted by the African Union Heads of State and Government, Uganda, October 2009, in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 143.

96 Notably, the internal displacement law in Kenya incorporates the Guiding Principles and places a duty on states to 'protect every human being against arbitrary displacement'. Prevention, Protection and Assistance of Internally-Displaced Persons and Affected Communities Act 56 (2012) arts 3(b) & 6(1).

97 F Viljoen *International human rights law in Africa* (2012) 517.

the explicit recognition of this right is useful. Not only does it provide IDPs with a legitimate human rights claim which is useful for engaging states constructively, but it reinforces the need for the institutionalisation of adequate safeguards and the formation of durable rights-based solutions to the issue of internal displacement.

The legacy of the *Kenyatta* case: Trials *in absentia* at the International Criminal Court and their compatibility with human rights

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Summary

As a consequence of the African Union's pressure on the Assembly of States Parties (ASP) to the International Criminal Court (ICC), the ASP modified the Rules of Procedure of the ICC to permit the accused to be tried in absentia. This article examines the general requirements under which trials in absentia are possible in light of the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights and the European Convention on Human Rights, and whether the new in absentia provisions of the ICC are consistent with international fair trial standards developed by the Human Rights Committee, the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights and the European Court of Human Rights. The article demonstrates that the increasing acceptance of in absentia trials by international criminal courts tends to overlook the rights and roles of victims in international criminal proceedings. To this end, the article considers whether the macro-criminal character of international crimes may require that victims and witnesses have a public interest to trials in the presence of the accused.

Key words: *right to a fair trial; international criminal law; criminal proceedings; procedural rights; article 7 of the African Charter; article 6 of the European Convention*

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1 Introduction

On 5 December 2014, the office of the prosecutor of the International Criminal Court (ICC) withdrew the charges of crimes against humanity against Uhuru Kenyatta due to a lack of evidence.¹ Kenyatta, who became the President of Kenya after the ICC had confirmed the charges against him, is the second head of state who has been accused of crimes against humanity during his tenure.² Given his official position, it always was uncertain whether he actually would appear before the ICC. According to article 63(1) of the ICC Statute,³ an accused is obliged to appear and no provision existed explicitly providing for the absence of the accused during the trial.⁴ However, on 27 November 2013, a decision of the Assembly of States Parties (ASP) to the Rome Statute of the ICC adopted three additional rules to the existing Rules of Procedure and Evidence of the ICC.⁵ The new rules, which were applied for the first time in the case against William Ruto, Kenya's Deputy-President, charged in a separate case related to the post-election violence⁶ and the Kenyatta case, stipulate that the accused 'may submit a written request to the Trial Chamber to be excused only during part or parts of his or her trial'.⁷

2 Background

The procedural law of the ICC was changed because of a number of procedural and political events. Initially, during the pre-trial proceedings concerning his case, the accused, Ruto, argued that his duties as Deputy-President of Kenya would prevent him from standing trial and he, therefore, requested to be excused from continuous presence at his trial.⁸ Trial Chamber V(a) decided to grant Ruto's

1 Kenyatta, charged with crimes allegedly committed after the 2007/2008 Kenya elections, appeared before the ICC for the first time on 7 October 2014. The proceedings against his Vice-President, Ruto, were continued. On the history of the proceedings against Kenyatta, see Case Information Sheet, *Prosecutor v Kenyatta*, 15 December 2014, ICC-PIDS-CIS-KEN-02-013/14_Eng.

2 The first to appear was the Sudanese President, Omar al-Bashir.

3 Rome Statute of the International Criminal Court (ICC Statute), UN-Doc A/CONF.183/9 (1998).

4 Friman holds that 'trials *in absentia* are not provided for under any circumstances in the Statute'; H Friman 'Rights of persons suspected or accused of a crime' in RS Lee (ed) *The International Criminal Court: The making of the Rome Statute* (1999) 262.

5 Rule 134bis, Rule 134ter und Rule 134quater, Resolution ICC-ASP/12/Res.7, 27 November 2013, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf (accessed 10 April 2015).

6 On the history of the proceedings against William Ruto, see Case Information Sheet, *Prosecutor v Ruto & Another* 18 September 2013, ICC-PIDS-CIS-KEN-01-012/13_Eng.

7 Rule 134ter (n 5 above).

8 Situation in the Republic of Kenya, Defence Request Pursuant to Article 63(1) of the Rome Statute, 17 April 2013, ICC-01/0901/11-685.

request with certain restrictions,⁹ but the Appeals Chamber suspended the decision in October 2013 on the basis that the Chamber had exceeded ‘the limits of its discretionary powers’. However, it did state that article 63(1) of the ICC Statute did not generally exclude the continuation of the proceedings in the partial absence of the accused.¹⁰ In October 2013, on the basis of article 16 of the ICC Statute, the African Union (AU) filed a request to the United Nations (UN) Security Council for the proceedings against Kenyatta and Ruto to be deferred.¹¹ This request was rejected by the UN Security Council.¹² As a result, the AU, of which 34 member states are state parties to the ICC, adopted a resolution which stated that ‘[n]o charges shall be commenced or continued before any international court or tribunal against any serving AU head of state or government’.¹³ To prevent further disputes regarding article 27 of the ICC Statute,¹⁴ as well as to prevent a feared mass withdrawal of African states from the Rome Statute, member states Botswana, Jordan and Liechtenstein initiated an amendment process in the ASP to implement new rules into the Rules of Procedure and Evidence of the ICC in order to excuse the accused from attending some of the proceedings under certain circumstances.¹⁵ This process finally led to the adoption of the new absence rules addressed in this article.¹⁶

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- 9 Situation in the Republic of Kenya, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, 18 June 2013, ICC-01/09-01/11-777 104.
 - 10 Situation in the Republic of Kenya, Judgment on the Appeal of the Prosecutor against the Decision of Trial Chamber V(a), 25 October 2013, ICC-01/09-01/11-1066 1 46 63; see dissenting opinion of Judge Herrera. Hansen evaluates the decision of the chamber as a misinterpretation of art 63(1) of the ICC Statute; TO Hansen ‘Caressing the big fish? A critique of ICC Trial Chamber V(a)’s decision to grant Ruto’s request for excusal from continuous presence at trial’ (2013) 22 *Cardozo Journal of International and Comparative Law* 104.
 - 11 Art 16 of the ICC-Statute states: ‘No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect.’
 - 12 UN-Doc S/PV.7060 (2013).
 - 13 African Union ‘Extraordinary Session of the Assembly of the African Union’ 12 October 2013.
 - 14 Art 27 of the ICC Statute declares the official capacity of state officials irrelevant for the applicability of the Statute.
 - 15 See the statements of Botswana, Congo, Côte d’Ivoire, Ghana, Kenya, Namibia, Nigeria, Seychelles, South Africa, Tanzania, Tunisia and Uganda during the General Debate of the Twelfth Session of the Assembly of State Parties to the Rome Statute, 20–26 November 2013, http://www.icc-cpi.int/en_menus/asp/sessions/general%20debate/Pages/general%20debate%20_%20twelfth%20session.aspx; with regard to Article 27 ICC-Statute see the statement of Congo, 21 November 2013, https://www.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Congo-FRA.pdf (accessed 30 April 2016).
 - 16 Revised Proposal for a New Rule on the Question of Presence at Trial, including through Communications Technology, 6 November 2013 (unpublished).

3 Trials *in absentia* and international criminal procedure

Trials *in absentia* may be separated into cases in which the defendant is not at any time present during the trial (*nunquam praesens*), because he is a fugitive or detained and cannot be extradited, and those cases in which the defendant appears at first and only later remains absent from the trial (*semel praesens*).¹⁷ Despite the fact that only the former constellation is partly referred to as a 'real' trial *in absentia*,¹⁸ under the term '*in absentia*' the article considers all absence regulations of the ICC that provide for (even partial) absence of the accused during the trial. Consequently, the article does not address rules applying *in absentia* during pre-trial proceedings.¹⁹ While it can certainly be argued that the confirmation hearing at the ICC is of particular importance because it determines whether there are 'substantial grounds' to believe that the suspect committed the alleged crimes, the confirmation hearing is not a trial and the evidentiary threshold is noticeably lower compared to trial proceedings.²⁰ By contrast, the trial stage of the ICC concerns itself with the proving of facts and evidence needed to determine whether an accused is guilty of the charges. Therefore, the presence of the accused and, thus, his contribution to the truth-seeking process are more important during the trial stage of proceedings, it having the highest evidentiary threshold.²¹ This contribution, therefore, will be limited to the rules applicable during the trial procedure.

A comparative analysis of national criminal law comes to the simplistic conclusion that *in absentia* proceedings in a *common law* (adversarial) system are largely unusual, whereas they are commonly recognised in *civil law* systems that follow the inquisitorial system of

17 N Pons 'Some remarks on *in absentia* proceedings before the Special Tribunal for Lebanon in case of a state's failure or refusal to hand over the accused' (2010) 8 *Journal of International Criminal Justice* 1307 1310.

18 *Prosecutor v Nahimana & Others* 28 November 2007 98, ICTR-99-52-A; Special Tribunal for Lebanon, Rules of Procedure and Evidence, Rule 104, STL-BD-2009-01-Rev.6-Corr.1.

19 In accordance with art 61(1) of the ICC Statute, the confirmation hearing 'shall be held in the presence of the Prosecutor and the person charged'. However, art 61(2) of the ICC Statute stipulates that the Pre-Trial Chamber is authorised to hold a confirmation hearing in the absence of the defendant, when the Chamber is satisfied that all reasonable steps have been taken to secure the person's appearance and to inform him or her of the charges and the fact that such a confirmation hearing is to be held. See *Prosecutor v Katanga & Others* 11 July 2008 23, ICC-01//04-01/07.

20 W Schabas *The International Criminal Court* (2010) arts 61 & 736; E Trendafilova 'Fairness and expeditiousness in the International Criminal Court's pre-trial proceedings' in C Stahn & G Sluiter (eds) *Emerging practice at the ICC* (2008) 441 452.

21 Schabas (n 20 above) arts 63 & 750; M Marchesiello 'Proceedings before the pre-trial chambers' in A Cassese et al (eds) *The Rome Statute of the ICC: A commentary* (2002) 1231 1244.

criminal litigation.²² By contrast, in the statutes of international criminal tribunals there is no uniform approach to *in absentia* proceedings. Article 12 of the Charter of the International Military Tribunal (IMT),²³ on which basis the alleged fugitive and, in fact, already deceased Martin Bormann was sentenced to death on 1 October 1946,²⁴ explicitly regulated the absence of the accused, while the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) do not explicitly allow trials *in absentia*. Both *ad hoc* tribunals rather implicitly presume the presence of the accused and stipulate the right to be present as an individual right of the accused.²⁵ In spite of the wording and the legislative history of these *ad hoc* tribunals that seem to speak against the recognition of *in absentia* trials,²⁶ the statutes nevertheless entail no absolute prohibition of such trials.²⁷ Next to exceptional provisions in which the re-confirmation of the charge can be held in the absence of the accused (Rule 61 procedures),²⁸ both tribunals have in exceptional cases allowed trials *in absentia* in parts, when the accused remained absent and explicitly and voluntarily waived his right to be present after an initial appearance at the trial.²⁹ Mixed and hybrid tribunals, such as the Extraordinary Chambers in the Courts of Cambodia (ECCC)³⁰ or the Special Court for Sierra Leone (SCSL), permit trials in partial absence

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- 22 R Rabinovitch 'Universal jurisdiction *in absentia*' (2004) 28 *Fordham International Law Journal* 500 526. In the United States, trials in (partial) absence of the accused are possible. See *Crosby v United States* 506 US 255 262 (1993).
- 23 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) (1951) 82 UNTS 279, art 12.
- 24 W Schabas 'In *absentia* proceedings before international criminal courts' in G Sluiter & S Vasiliev *International criminal procedure: Towards a coherent body of law* (2008) 335 335.
- 25 Art 21(4) lit d of the ICTY Statute (which is identical to art 20(4) lit d of the ICTR Statute) stipulates that '[t]he accused shall be entitled to the following minimum guarantees, in full equality: (d) to be tried in his presence ...'; Statute of the International Criminal Tribunal for the former Yugoslavia, September 2009.
- 26 AL Quintal 'Rule 61: The voice of the victims screams out for justice' (1998) 36 *Columbia Journal of Transnational Law* 723 743. The UN Secretary-General highlighted the negative attitude of the Security Council towards *in absentia* trials during the establishment of the *ad hoc* tribunals, UN-Doc S/25704 para 101.
- 27 H Friman 'Trying cases at the international criminal tribunals in the absence of the accused?' in S Darcy & J Powderly *Judicial creativity at the international criminal tribunals* (2010) 340.
- 28 This proceeding, however, does not produce a final, binding verdict. See AB Stankovic 'Guilty until proven: Rule 61 of the ICTY' (2010) 14 *Touro International Law Review* 95; K Ambos 'The structure of international criminal procedure: 'Adversarial', 'inquisitorial' or mixed?' in M Bohlander *International criminal justice* (2007) 457.
- 29 Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *Prosecutor v Blaskic* 29 October 1997, ICTY-IT-95-14-AR 59. Decision on Defence Counsel Motion to Withdraw; *Prosecutor v Barayagwiza*, 2 November 2000, ICTR-97-19-T 6.
- 30 Art 35(2)(d) of the new ECCC Statute; Law on the Establishment of the Extraordinary Chambers, 27 October 2004; art 81(4) ECCC Internal Rules (Rev 8) 3 August 2011.

of the accused under special circumstances.³¹ In recent years, the Special Tribunal for Lebanon (STL), which is the only international criminal court that allows proceedings in the complete absence of the accused, encountered a lot of criticism.³² This was caused by the fact that under the Statute of the STL, trials *in absentia* can be conducted not only if the accused has voluntarily and in writing waived his right to be present or is not extradited by government agencies, but even if he is a fugitive or cannot be found for any other reason.³³

4 Trials *in absentia* and their compatibility with human rights

Fair trial guarantees constitute the elementary level of protection during criminal proceedings and can particularly be found in article 14 of the International Covenant on Civil and Political Rights (ICCPR),³⁴ article 6 of the European Convention on Human Rights (ECHR) and article 7 of the African Charter on Human and Peoples' Rights (African Charter).³⁵ The fact that international human rights treaties only impose obligations upon their state parties leads to the situation that international criminal courts are, whether directly or not, neither bound by human rights treaties nor by the case law of human rights courts.³⁶ However, according to article 21(1)(b) of the ICC Statute, the judges of the ICC may take into account human rights treaties such as the ICCPR and the ECHR as a secondary source

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- 31 Art 17(4)(d) of the SCSL Statute reflects the wording of art 14(3)(d) of the ICCPR, which states that the defendant must be present during the trial. Statute of the Special Court for Sierra Leone, 16 January 2002, 2178 UNTS 138, Annex. However, art 60 of the Rules of Procedure allows the resumption of the proceedings if the accused has already participated in the process. SCSL Rules of Procedure and Evidence <http://www.rscsl.org/Documents/RPE.pdf> (accessed 10 April 2015).
- 32 See P Gaeta 'To be (present) or not to be (present): Trials *in absentia* before the Special Tribunal for Lebanon' (2007) 5 *Journal of International Criminal Justice* 1165.
- 33 On condition that all reasonable steps have been taken to secure his or her appearance before the tribunal and to inform him or her about the charges. See art 22(1)(c) of the Statute of the Special Tribunal for Lebanon, 30 May 2007, UN-Doc S/RES/1757/ (2007). According to art 22(3) of the STL Statute, in case of a conviction *in absentia*, the accused has the right to be retried in his or her presence. This 'solution' is criticised by W Jordash & T Parker 'Trials *in absentia* at the Special Tribunal for Lebanon: Incompatibility with international human rights law' (2010) 8 *Journal of International Criminal Justice* 487 498.
- 34 International Covenant on Civil and Political Rights 1966, 999 UNTS 171.
- 35 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 29. The African Charter has been ratified by 53 out of 54 member states of the AU.
- 36 See art 1 of the ECHR; art 2(1) of the ICCPR.

of law for the interpretation of the Statute.³⁷ In accordance with article 21(3) of the ICC Statute, the judges even have a *duty* to apply and interpret the Statute and the Rules of Procedure and Evidence in keeping with ‘internationally-recognised human rights’.³⁸ Consequently, the ICC cannot ignore the minimum standards for trials *in absentia* developed by human rights case law.

4.1 Trials *in absentia* under the ICCPR

In article 14(3)(d) of the ICCPR the right of the accused to be present at the trial is explicitly stated.³⁹ From the wording of the Covenant, it may be concluded that *in absentia* trials are generally not permissible under the ICCPR.⁴⁰ The meaning of article 14(3)(d) of the ICCPR is explained further in General Comment 13 of the Human Rights Committee (HRC), which makes it clear that ‘[w]hen exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary’.⁴¹

Even though the HRC leaves the exact meaning of ‘justified reasons’ open, it is clear that, although *in absentia* proceedings are not *per se* impermissible within the sphere of the ICCPR, they are only possible in exceptional cases.⁴² In *Mbenge v Zaire*, the HRC further states that trials *in absentia* are possible in the interests of justice, provided that the accused has unequivocally waived his right to be present.⁴³ Such a waiver is, in the opinion of the HRC in *Maleki v Italy*, only permissible if the court has fulfilled its obligations, particularly with regard to the procedures for summoning and informing the defendants, and if the court can prove that the summons to appear has, in fact, reached the accused.⁴⁴ The lack of such proof, from the viewpoint of the HRC, constitutes a breach of the right to be present and, according to article 14 of the ICCPR, cannot be remedied by a representative that appears to speak for the accused.⁴⁵

37 Art 21(1) of the ICC Statute states: ‘The Court shall apply ... (b) in the second place, where appropriate, applicable treaties and the principles and rules of international law ...’ Due to a lack of differentiation in art 21(1)(b) between international and regional treaties, the inclusion of non-universal treaties is possible. ICC Situation in the DRC ICC-01/04-101-Corr 17 January 2006 para 51.

38 Art 21(3) of the ICC Statute states: ‘The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights.’ D Akande ‘Sources of international criminal law’ in A Cassese et al (eds) *The Oxford companion to international criminal justice* (2009) 47.

39 Art 14(3) of the ICCPR states: ‘In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (d) to be tried in his presence and to defend himself in person or through legal assistance of his own choosing.’

40 UN Secretary-General, UN-Doc S/25704 para 101.

41 HRC, General Comment 13, art 14, 13 April 1984, UN-Doc HRI/GEN/1/Rev 1 (1994) para 11.

42 M Nowak *CCPR commentary* (2005) art 14 para 62.

43 *Mbenge v Zaire* 16/1977, 25 March 1983, UN-Doc CCPR/C/OP/2 (1990) 14.1.

44 *Maleki v Italy* 699/1996, 27 July 1999, UN-Doc CCPR/C/66/D/699/1996 9.4.

45 HRC General Comment 32, art 14, 23 August 2007, UN-Doc CCPR/C/GC/32 36.

4.2 Trials *in absentia* under the African Charter on Human and Peoples' Rights

In article 7, the African Charter does not expressly include a right to be present at trial. However, it recognises rights which could not exist without the accused being present or at least on notice of the proceedings, such as the right to have one's case heard and the right to be defended by counsel of one's choice.⁴⁶ While the African Charter does not provide direction in this respect, it seems that the drafters of the Charter did not overlook the right of the accused to be present at trial; they rather considered it as an implied right.⁴⁷ Moreover, it should be noted that, according to article 60 of the African Charter, the African Commission on Human and Peoples' Rights (African Commission)⁴⁸ must take into account other international human rights instruments, a provision that enables the Commission to be inspired, *inter alia*, by the provisions of article 14 of the ICCPR when interpreting the trial guarantees laid down in article 7 of the African Charter. The African Commission did this when specifying that the right to be present is part and parcel of the right to a fair trial.

While a survey of the jurisprudence of the African Commission shows that the question of trials *in absentia* has been considered in only a few cases, the Commission in the case *Avocats Sans Frontières v Burundi*⁴⁹ held that the right to defend oneself implies an accused's presence at each stage of the proceedings.⁵⁰ Unfortunately, this decision says little about which measures must be taken in case an accused is tried *in absentia*. The African Commission should have seized the opportunity to clarify this question. However, in order to close the gap between the explicit provisions in the African Charter and the case law of human rights bodies relating to trials *in absentia*, the African Commission in its Principles and Guidelines on the Right to

46 Art 7(1) of the African Charter states: 'Every individual shall have the right to have his cause heard. This comprises (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and custom in force; ... (c) the right to defence, including the right to be defended by counsel of his choice.'

47 See also *Thomas v Tanzania* 005/2013, 20 November 2015 92.

48 The African Commission is the regional treaty oversight body established under the African Charter. The Commission has mandatory jurisdiction over inter-state (art 54 of the African Charter) and individual (art 55 of the African Charter, as interpreted by the African Commission) petitions. On the African Commission generally, see R Murray 'African Commission on Human and Peoples' Rights' in R Wolfrum (ed) *Max Planck encyclopaedia of public international law* (2014) <http://opil.ouplaw.com/home/EPIL> (accessed 30 April 2016).

49 *Avocats Sans Frontières (on behalf of Bwampamyé) v Burundi* (2000) AHRLR 48 (ACHPR 2000) paras 27-29.

50 As above.

a Fair Trial and Legal Assistance in Africa (Fair Trial Guidelines) notes:⁵¹

- (i) In criminal proceedings the accused has the right to be tried in his or her presence.
- (ii) The accused has the right to appear in person before the judicial body. The accused may not be tried *in absentia*. If an accused is tried *in absentia*, the accused shall have the right to petition for a reopening of the proceedings upon a showing that inadequate notice was given, that the notice was not personally served on the accused, or that his or her failure to appear was for exigent reasons beyond his or her control. If the petition is granted, the accused is entitled to a fresh determination of the merits of the charge.
- (iii) The accused may voluntarily waive the right to appear at a hearing, but such a waiver shall be established in an unequivocal manner and preferably in writing.

While not legally binding, this clarification by the Fair Trial Guidelines made an important contribution to the substantive basis of the right to be present at trial and partly goes beyond the scope of major international human rights instruments, such as the ICCPR and the ECHR, as will be shown below.⁵²

Unlike the African Commission, the African Court on Human and Peoples' Rights (African Court)⁵³ issues binding judgments. In a decision on 20 November 2015 in the case of *Thomas v Tanzania*, the African Court held that Tanzania violated due process rights under article 7(1)(c) of the African Charter and article 14(3)(d) of the ICCPR by trying the applicant *in absentia*.⁵⁴ The applicant, Thomas, was tried *in absentia* as he was hospitalised during the defence case at the trial court and was denied the opportunity of explaining his absence. The African Court interpreted article 7 of the African Charter in light of article 14(3)(d) of the ICCPR and adopted the view that article 7(1)(c)

51 See Guidelines Part N(6)(c), http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf (accessed 28 April 2016). These principles are not legally binding and are based on art 45(c) of the African Charter mandating the African Commission 'to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation'.

52 The American Convention on Human Rights, in art 8(2)(d), only refers to 'the right of the accused to defend himself personally'.

53 The African Court was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 9 June 1998, entered into force 25 January 2004) (1999) 20 HRLJ 269. The mandate of the African Court is to ensure the protection of human and peoples' rights on the continent and to complement and reinforce the functions of the African Commission. The Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the Protocol and any other relevant human rights instrument ratified by the states concerned. To date, 29 African states have ratified the Protocol. See generally F Viljoen 'African Court on Human and Peoples' Rights' in Wolfrum (n 48 above).

54 *Thomas v Tanzania* (n 47 above) 90-92 161.

required that the applicant be present to defend himself.⁵⁵ Given the 'serious nature of the offence that the applicant has been charged with, the fact that the magistrate had granted the applicant bail on the basis of his serious ill health and that he was unrepresented', the Court was of the view that the trial court should have given him the opportunity to defend himself.⁵⁶ The African Court concluded that Tanzania had violated the right to be represented provided for in article 7(1)(c) of the African Charter.

4.3 Trials *in absentia* under the European Convention

While article 6 of the ECHR⁵⁷ contains no provision that expressly requires the continuous presence of the accused, the European Court assumes that the presence requirement is an integral part of a fair trial.⁵⁸ This stems from the scheme of article 6 of the ECHR according to which the process guarantees of the accused in article 6(3) provide constitutive elements of the fair trial principle in article 6(1) of the Convention.⁵⁹ Accordingly, the European Court in *Colozza v Italy* points out that it seems difficult to imagine how some of the process guarantees contained in article 6(3) of the ECHR, such as the right of the accused to defend himself in person (article 6(3)(c)) or the right to examination of witnesses on his behalf (article 6(3)(d)), could be realised in the absence of the accused.⁶⁰ Although the right to be present at trial traditionally is inferred from article 6(3) of the ECHR,⁶¹ trials *in absentia* are not generally prohibited under the Convention and are recognised by European Court jurisprudence.⁶² The Court determined that trials *in absentia* must be attended by minimum safeguards in order to respect the fundamental rights of the accused. It must be ensured that:⁶³

- (i) the accused was fully aware of the proceedings and the charges against him,⁶⁴
- (ii) the accused has expressly and 'in an unequivocal manner' waived his right to be present;⁶⁵

55 *Thomas v Tanzania* 88 91.

56 *Thomas v Tanzania* 93.

57 Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 5.

58 *Colozza v Italy* 9024/80 12 February 1985 27; *Poitrimol v France* 14032/88, 12 November 1993 31.

59 *Goddi v Italy* 8966/80, 9 April, 1984 28.

60 *Colozza* (n 58 above) 27.

61 C Grabenwarter & K Pabel *Europäische Menschenrechtskonvention* (2012) 446.

62 *Krombach v France* 29731/96, 13 February 2001 85; *Friman* (n 27 above) 340.

63 *Pelladoah v Netherlands* 16737/90, 22 September 1994 34-36.

64 *Colozza* (n 58 above) 28-29.

65 As above.

- (iii) the right of the accused to be represented by a counsel during the absence of the accused remains unaffected,⁶⁶
- (iv) the right of the accused to be present cannot be forfeited and he or she has the opportunity to return to the proceedings at any time.

The European Court in *Ekbatani v Sweden* held that if the trial *in absentia* is conducted in breach of these cumulative conditions, the accused in the case of his later appearance is entitled to a retrial.⁶⁷ Otherwise, the proceedings in his absence constitute a violation of the Convention. However, the presence of the accused cannot be dispensed with if the court is aware that the accused is in custody due to criminal proceedings led against him in a foreign country.⁶⁸ In the opinion of the European Court, the waiver of the right to be present can be accomplished expressly or tacitly,⁶⁹ with the restriction that an implicit waiver should not be inferred solely from the absence of a fugitive accused,⁷⁰ and will only be considered if the defendant is definitely aware of the ongoing proceedings in his absence and reasonably could have foreseen what the legal consequences of his conduct would be.⁷¹

In light of the above case law, article 6 of the ECHR does not prevent a person from waiving of his own free will and the entitlement to the guarantees of a fair trial.⁷² Thus, the fundamental *right* of the accused in article 6(3) of the ECHR to take part in the trial is not of an absolute character and should, therefore, not be confused with a *duty* to appear.⁷³ Nevertheless, the European Court indicates that⁷⁴

[i]t is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses.

Hereby, the European Court acknowledges that, besides the subjective right of the accused to a hearing, the interests of victims and witnesses as well as the public interest in ascertaining the truth ('it must not run counter to any important public interest')⁷⁵ exist, which can only be achieved in the presence of the accused.⁷⁶ The procedural significance of the presence of the accused for a fair trial,

66 *Van Geyseghem v Belgium* 26103/95, 21 January 1999 33-34; *Pelladoah* (n 63 above) 33 40.

67 *Ekbatani v Sweden* 10563/83, 16 May 1988 31; *Poitrimol* (n 58 above) 31.

68 *FCB v Italy* 12151/86, 28 August 1991 30.

69 *Sejdovic v Italy* 56581/00, 1 March 2006 86.

70 *Zana v TUR* 18954/91, 25 November 1997 70.

71 *Sejdovic* (n 69 above) 86.

72 *Colozza* (n 58 above) 29.

73 *Ekbatani* (n 67 above) 29.

74 *Krombach* (n 62 above) 86; *Van Geyseghem* (n 65 above) 33.

75 *Sejdovic* (n 69 above) 86.

76 *Crosby* (n 22 above); M Gardner 'Reconsidering trials *in absentia* at the Special Tribunal for Lebanon' (2011) 43 *George Washington International Law Review* 100.

thus, goes beyond the protection of the accused's individual rights. Although it cannot be assumed that the right to be present has the same procedural importance as the right to a public trial – which is clearly designed to serve both the interests of the accused and the public itself⁷⁷ – the right of the accused to be present at the trial also includes general public interests which cannot be determined exclusively by the accused. This factor plays a significant role for the subsequent evaluation as to whether the new rules satisfy the requirements of a fair trial.

5 New *in absentia* rules of the International Criminal Court

During the negotiations on the Rome Statute of the ICC, the inclusion of *in absentia* provisions to the procedural law of the Court was highly controversial.⁷⁸ Due to a particular skepticism in respect of *in absentia* trials by representatives of the common law system, the majority of states dismissed the implementation of *in absentia* rules into the legal framework of the trial proceedings.⁷⁹ Pursuant to article 63(1) of the ICC Statute, the required presence of the accused ('the accused shall be present during the trial') has not permitted trials to be held *in absentia* for any reason so far,⁸⁰ with the exception that the accused, in accordance with article 63(2) of the ICC Statute, can be removed from the courtroom in the event of a repeated disturbance.⁸¹ In addition to the accused's *obligation* to appear before the court in article 63(1), the presence of the accused is stipulated as a fundamental *right* in article 67(1)(d) of the ICC Statute.⁸² Some detailed exceptions from these principles are contained in the ICC Statute, which are limited to the pre-trial and appeal proceedings: Article 61(2)(a) stipulates that the suspect may waive his or her right to be present at the confirmation of charges hearing, and article 83(5) allows the promulgation of the appeal decision in the absence of the

77 Grabenwarter (n 61 above) 447-448.

78 E Hofstetter *Das Verfahrensrecht internationaler Strafgerichte zwischen common law und civil law* (2005) 86.

79 W Schabas 'Article 63' in O Triffterer (ed) *Commentary on the Rome Statute* (2008) paras 9-10.

80 GJ Shaw 'Convicting inhumanity *in absentia*: Holding trials *in absentia* at the International Criminal Court' (2012) 44 *George Washington International Law Review* 107 117 129; Friman (n 4 above) 262; Hansen (n 10 above) 104. As already mentioned (n 9 above), Trial Chamber V(a) and the Appeals Chamber in the *Ruto* case held that Art 63(1) was compatible with the partial absence of the accused.

81 On the condition that the accused can follow the proceedings by means of communications technology, see art 63(2) of the ICC Statute.

82 Art 67(1)(d) of the ICC Statute states: 'The accused shall be entitled ... to the following minimum guarantees, in full equality (d) ... to be present at the trial'. Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber V(a); *Ruto* (n 6 above) 25 October 2013, ICC-01/09-01/11-1066 para 40.

accused.⁸³ Reflecting the distinct nature of these stages in the proceedings,⁸⁴ the absence of the accused during the trial stage is clearly ruled out in article 63(1) of the ICC Statute.⁸⁵

The first amended provision, Rule 134*bis*, allows defendants to maintain a virtual presence through video technology.⁸⁶ Under Rule 134*ter*, the accused now has the right to 'submit a written request to be excused and to be represented by counsel only during part or parts of his or her trial', provided that he or she has been duly summoned.⁸⁷ The Trial Chamber may grant such a request if 'exceptional circumstances' justify the decision, 'alternative measures would be inadequate', and the defendant has 'explicitly waived his or her right to be present'. The new regulation emphasises that 'any absence must be limited to what is strictly necessary and must not become the rule'. The third amendment, Rule 134*quater*, creates its own excusal regime for the accused, who is 'mandated to fulfil extraordinary public duties at the highest national level'. The request of such a person shall be granted by the Trial Chamber 'if alternative measures are inadequate', if it can be determined that an excusal 'is in the interests of justice', and if 'the rights of the accused are fully ensured'.

5.1 Knowledge-related obligations of the Court *vis-à-vis* the accused

As mentioned above, the HRC, the European Court and the Fair Trial Guidelines of the African Commission stipulate that in order to meet the notice requirements, a court must verify that the accused has

83 Other exceptions are found in arts 72(7)(a)(i) and 76(4) of the ICC Statute.

84 Marchesiello (n 21 above) 1231 1244; Schabas (n 20 above) 754-755.

85 Hansen (n 10 above) 104; Friman (n 4 above) 262.

86 Rule 134*bis* states: '(1) An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present in the courtroom through the use of video technology during part or parts of his or her trial.' Rule 134*ter* states: '(1) An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be excused and to be represented by counsel only during part or parts of his or her trial.' Rule 134*quater* states: '(1) An accused subject to a summons to appear who is mandated to fulfil extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be allowed to be excused and to be represented by counsel only; the request must specify that the accused specifically waives the right to be present at the trial. (2) The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interest of justice and provided that the rights of the accused are fully ensured.'

87 Although the wording of the new rules seemed to be in conflict with art 63(1) of the ICC Statute ('The accused shall be present'), Trial Chamber V(a) affirmed the compatibility of the two standards; Reasons for the Decision on Excusal from Presence at Trial under Rule 13*quater*, 18 February 2014, ICC-01/09-01/11-1186 para 60; Hansen evaluates the decision of the chamber as a misinterpretation of art 63(1) of the ICC Statute; Hansen (n 10 above) 104. For a more extended critique of this case, see AS Knottnerus 'Extraordinary exceptions at the International Criminal Court: The (new) rules and jurisprudence' (2014) 13 *The Law and Practice of International Courts and Tribunals* 261 268.

been fully informed of the proceedings.⁸⁸ On this point, Rule 134*ter* and Rule 134*quater* are designed in such a way as to guarantee that the accused is fully aware of the ongoing investigations and charges raised against him, but voluntarily wishes not to be present during the proceedings. At least at that stage of the proceedings, it can reasonably be assumed that the request of the accused to be excused from parts of his trial implies the accused's knowledge of the charges against him. In accordance with the requirements developed by human rights case law,⁸⁹ the Court under Rule 134*ter* has fulfilled its duties to inform and summon the accused.

5.2 General disposability of the accused

The European Court observed that the presence requirement cannot be waived if the Court is aware that the accused is in custody due to criminal proceedings led against him in a foreign country.⁹⁰ Keeping in mind the legislative history of the new rules and taking the decision of the Appeals Chamber in the *Ruto* case as a benchmark for the amendments, it seems to suggest that such a situation was not intended by the amendment of the state parties. This is also reflected in the wording of Rule 134*ter*, that 'any absence must be limited to what is strictly necessary and must not become the rule'. Hypothetical scenarios that are covered by the new rules, therefore, differ from cases in which the accused, although he is aware of the proceedings against him, sees no way of participating because he is, for example, imprisoned and not extradited by the imprisoning state.⁹¹ Nevertheless, a situation in which the accused, despite the existence of an objective obstacle that precludes his appearance, waives his right, is still possible under Rule 134*ter*. Beginning a trial under such conditions would certainly undermine the right of the accused and the fairness of the proceedings. Indeed, the discretion of the chamber to determine the extent of the accused's absence is limited by Rule 134*ter* to 'part or parts of his or her trial', which appears suitable to impeding an excessive enlargement of the accused's absence. According to this, the rule can certainly not be understood as a blanket excusal making the 'accused's absence the general rule and his presence an exception'.⁹² Notwithstanding this, *Ruto's* defence following the amendment of the rules argued that Rule 134*quater* would allow an accused to be excused from all trial hearings as long as the accused would be mandated to full extraordinary public duties

88 *Maleki* (n 44 above) 9.4.

89 *Colozza* (n 58 above) 28 29.

90 *FCB* (n 68 above) 30.

91 This scenario is covered by art 22(1)(c) of the STL Statute (n 33 above).

92 Judgment on the Appeal of the Prosecutor (n 10 above) para 63.

at the highest national level.⁹³ The Trial Chamber did not follow this view, and reasoned that such an unconditioned excusal would undermine the 'interests of justice, given the active participation of victims in the proceedings'.⁹⁴ On this ground, the chamber stated that Ruto had to be present at all trial hearings in which victims present their views in person.⁹⁵ However, Ruto was excused from all other hearings, except closing statements, the delivery of the judgment and the days of hearings following a judicial recess, as set out in Regulation 19*bis* of the Regulations of the Court.⁹⁶ According to the legislative history, the wording and the recent case law of the ICC's new rules assume an accused who at least is partially present at the trial proceedings (*semel praesens*).

5.3 Waiver

Rules 134*ter* and 134*quater* clearly exclude situations in which the defendant cannot be found, is a fugitive or it cannot be ascertained whether or not he wishes to participate in the procedure. Due to this higher level of protection, the dispute as to whether the judges were entitled to assume a voluntary absence or an unauthorised absence as an implicit waiver is irrelevant. However, in practice, the waiver provision ('the accused has explicitly waived his or her right to be present') may lower standards of protection. According to Rule 134*ter* and Rule 134*quater*, the waiver must be 'explicit' but need not be written or obtained following legal advice. It is, however, difficult to guarantee a waiver has been understood when it can be made without the accused persons having received prior legal advice or having otherwise obtained full knowledge of the consequences of such a waiver. The European Court and the Fair Trial Guidelines of the African Commission emphasised that the waiver must be 'attended by minimum safeguards commensurate to [the waiver's] importance' and will only be considered if the defendant is definitely aware of the ongoing proceedings in his absence and could have reasonably foreseen the legal consequences of his conduct.⁹⁷ It is, therefore, doubtful that the wording of the new rules reaches the necessary standard.

93 Situation in the Republic of Kenya, Defence Request Pursuant to Article 63(1) of the Rome Statute and Rule 134*quater* of the Rules of Procedure and Evidence to excuse Mr William Samoei Ruto from attendance at trial, 16 December 2013 01/09–01/11 29.

94 Situation in the Republic of Kenya, Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*, 18 February 2014 01/09–01/11 57 74.

95 n 87 above, 63.

96 As above.

97 *Poitrimol* (n 58 above) 31.

5.4 Presence of the accused as ‘public interest’ and ‘interests of justice’?

According to the European Court in *Håkansson v Sweden*, a waiver of the right to take part in the trial ‘must not run counter to any important public interest’.⁹⁸ Similarly, the HRC in *Mbenge v Zaire* took the ‘interests of justice’ as a yardstick for assessing the admissibility of trials *in absentia*.⁹⁹ Even though the European Court and the HRC do not specify what is meant by ‘public interest’ or ‘interests of justice’, it could be argued that *in absentia* trials are possible as long as a reasonable balance between the rights of the accused and other public interests can be created. With regard to proceedings of international criminal law, one of the main public interests, next to the constitution of a *judicial* record, is probably to create a *public* record that promotes peace and reconciliation between the former parties to the conflict.¹⁰⁰ In addition, the macro-criminal character of international crimes, in contrast to most national offences, is of particular relevance in international proceedings that may require that the public also has an interest – though not a right as does the accused – to trials in the presence of the accused.

If and how international criminal justice can contribute to the consolidation of peace is significantly influenced by the extent to which victims are given the opportunity to tell their story in the presence of the accused and thereby to create an uncontradicted historical record.¹⁰¹ This was also recognised by the Appeals Chamber when it reversed the Trial Chamber’s decision on Ruto’s excusal request by stating that the accused ‘is not merely a passive observer of the trial, but the subject of the criminal proceedings and, as such, an active participant therein’.¹⁰² The Chamber further held that the presence of the accused is not only important for his proper rights, but also that ‘[i]t is through the process of confronting the accused with the evidence ... [that] the fullest and most comprehensive record of the relevant events may be formed’.¹⁰³ If the accused is absent, this prospect runs the risk of losing its benefits from the presentation of a one-sided narrative.¹⁰⁴

98 *Håkansson v Sweden* 171-A, 21 February 1990 66.

99 *Mbenge v Zaire* 16/1977, 25 March 1983, UN-Doc CCPR/C/OP/2 (1990) 14.1: ‘Proceedings *in absentia* are in some circumstances ... permissible in the interest of the proper administration of justice.’

100 *Prosecutor v Karadzic* Decision on Appointment of Counsel and Order on Further Trial Proceedings, 5 November 2009, ICTY-IT-95-5/18-T para 20.

101 S Zappalà *Human rights in international criminal proceedings* (2005) 126; FP King ‘Public Disclosure in Rule 61 Proceedings before the International Criminal Tribunal for the Former Yugoslavia’ (1997) 29 *NYU Journal of International Law and Policy* 523 552.

102 Judgment on the Appeal of the Prosecutor (n 10 above) para 49; see also S Trechsel & S Summers *Human rights in criminal proceedings* (2005) 253.

103 Trechsel & Summers (n 102 above).

104 Stankovic (n 28 above) 115.

Furthermore, given the increasing role of victims in international criminal proceedings and the respective recognition of the European Court that, in addition to the subjective right of the accused to be present, the interests of victims and witnesses 'need to be protected',¹⁰⁵ it seems contradictory to focus solely on the expediency aspect of *in absentia* proceedings. Therefore, from the victims' and witnesses' perspectives as well as from a general public interest in addressing international crimes, the settlement of guilt and sustained injustice in the presence of the accused appears as a prerequisite for overcoming collective trauma.¹⁰⁶ Public prosecution does not exclusively belong to the prosecutor and the accused; rather, it belongs to the victims, and its aim is to arrive at truth and justice. Such legitimate public interests basically speak in favour of an extensive presence of the accused at trial, as it serves both the interests of the accused, and those of the victims and witnesses. It follows that the scope of the new provisions must, in particular, be assessed in light of a more general right to a fair trial by considering the victim's point of view. Consequently, it remains to be seen how judges will implement the new rules when making decisions on granting a request for absence from the proceedings, for instance, witnesses' testimonies.

6 Conclusion

In response to the reservations of Kenya and other African states concerning the trials against Ruto and Kenyatta, the ASP decided to amend the Rules of Procedure and Evidence of the ICC. Although the procedural amendments largely correspond to the requirements developed by human rights case law, the increasing acceptance of *in absentia* trials by international courts tends to overlook the specificities and purposes of international criminal proceedings. The restrictions of trials in the absence of the accused should not, therefore, focus solely on the question of whether the disputed procedure satisfies the rights of the defence, but also on how the court takes into consideration the interests of the public, especially of victims and witnesses.¹⁰⁷ In addition, international criminal courts, in particular the ICC, are dependent on the acceptance by the public, which also serves as a safeguard against the possible abuse of judicial power. If the ICC loses the recognition of the public, it also loses its political legitimacy. Apart from the fact that the relaxing restrictions against trials *in absentia* may serve to enhance the effectiveness and feasibility of international criminal trials, in the long term it is crucial that the principles and

105 *Krombach* (n 62 above) 86; *Van Geyselghem* (n 65 above) 33.

106 *Karadzic* (n 100 above) para 20.

107 Situation in the Republic of Kenya, Prosecution's Observations on Defence Request Pursuant to Article 63(1) of the Rome Statute'; *Ruto* (n 6 above) 1 May 2013, ICC-01/0901/11-713 para 11.

purposes of international criminal justice remain untouched. This is the only way in which the confidence of victims in the administration of justice by the ICC can be strengthened.

Children's rights, domestic alternative care frameworks and judicial responses to restrictions on inter-country adoption: A case study of Malawi and Uganda

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Summary

As the problem of a lack of parental care over the years has worsened in Africa, states have not adopted sufficient alternative care measures to address the needs of the children involved. To date, many countries in Africa remain suspicious of inter-country adoption and, hence, consider it as a subsidiary means of providing alternative care to children deprived of a family environment. Through a study of the legal frameworks and court decisions of Malawi and Uganda, the article demonstrates that some of the most common restrictions on inter-country adoption do not serve the best interests and rights of the child. As a result, the courts in these countries have gone out of their way to bypass or ignore these restrictions, and have sanctioned inter-country adoptions. In doing so, the courts have put themselves at risk of being accused of law making. Due to the absence of an appropriate legal framework, these courts have also struggled to make inter-country adoption orders that are capable of being effectively

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monitored and supervised by the state authorities in the sending and receiving states. The protection of the rights of children in need of parental care requires that states treat inter-country adoption as a worthy alternative care option that should not be subjected to undue restrictions, but regulated sufficiently to protect and promote the best interests and rights of the child.

Key words: *alternative care; inter-country adoption; children's rights; Malawi; Uganda; Africa*

1 Introduction

A lack of parental care remains one of the most glaring failings of the twenty-first century. Although this problem is present throughout the world, it is arguably most acute in Africa.¹ Even as the international community recognised children as rights holders by adopting the Convention on the Rights of the Child (CRC)² in 1989, children remain the most affected by poverty and a lack of access to basic services.

In most African traditional societies, the problem of a lack of parental care was not as acute as it is now, partly because of the communitarian nature of these societies, which meant that a child belonged to the clan, the village or the whole community of which it was centrally a part. With time, community ties have increasingly weakened and broken down, leaving children whose parents have died without social protection from the extended family.³

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- 1 See, eg, UNICEF 'Africa's orphaned generations' (2003), http://www.unicef.org/sowc06/pdfs/africas_orphans.pdf (accessed 18 June 2015), where UNICEF found that 11 million children under the age of 15 were orphans due to HIV/AIDS and predicted that this number would almost double by 2010. This represents a mere fraction of all orphaned children in the region. The same report noted that there were more than 35 million orphans in sub-Saharan Africa by 2003, representing 12% of all children in the region. These estimates have proved to be correct. In particular, a recent UNICEF report reveals that '67 per cent of all the children in the thirty countries suffer from two to five deprivations crucial to their survival and development, corresponding to 247 million out of a total of 368 million children below the age of 18 living in these thirty countries'. M de Milliano & I Plavgo 'Analysis of child poverty and deprivation in sub-Saharan Africa' Office Research Working Paper WP 2014-19, http://www.unicef-irc.org/publications/pdf/ccmoda_africa.pdf (accessed 20 June 2015). See also M Turshen 'Child poverty in Africa' (2008) 35 *Review of African Political Economy* 494-500; T Abebe 'Orphanhood, poverty and the care dilemma: Review of global policy trend' (2009) 7 *Social Work and Society International Online Journal*.
 - 2 GA Res 44/25, annex, 44 UN GAOR Supp (No 49) 167, UN Doc A/44/49 (1989), entered into force 2 September 1990.
 - 3 J Iwelunmor et al 'Family systems and HIV/AIDS in South Africa' (2006) 27 *International Quarterly of Community Health Education* 321 322; RS Katapa 'Caretakers of AIDS patients in rural Tanzania' (2004) 15 *International Journal of STD and AIDS* 673-678; J Seeley et al 'The extended family and support for people with AIDS in a rural population in South West Uganda: A safety net with holes?' (1993) 5 *AIDS Care* 117-122.

As more and more children become orphans or lack parental care, states have not established sufficient alternative care options to accommodate the needs of these children.⁴ Yet, many countries in Africa remain suspicious of inter-country adoption, instead preferring domestic solutions. As a result, restrictions are imposed on the use of inter-country adoption as an alternative care option for children deprived of parental care.

The reluctance to embrace inter-country adoption arises from several concerns about this practice.⁵ They also feed on an ambiguity in international law that suggests that inter-country adoption is a measure of last resort. The principle of last resort has been interpreted by some to mean that inter-country adoption cannot be used before in-country options have been exhausted.⁶ This interpretation stands in stark opposition to the view advocated in this article, which considers inter-country adoption as one of the alternative care options to be considered on a case-by-case basis alongside other care options, and to be used when it stands a better chance of serving the best interests of a particular child than other options.

The article examines the legal restrictions placed on inter-country adoption in two African countries, Malawi and Uganda, and how the courts have responded to these restrictions when applying the law in specific cases. Both these countries have experienced a significant rise in the number of children who lack parental care.⁷ Yet, both countries place legal restrictions on the use of inter-country adoption. These restrictions operate in two distinct legislative frameworks of alternative child care. Malawi's legislation establishes no clear hierarchical

4 See generally UNICEF 'Alternative care for children in Southern Africa: Progress, challenges and future directions' (2008), http://www.unicef.org/esaro/Alternative_care_responses_ESAR_06_2008.pdf (accessed 4 April 2016); L Richter et al (eds) *Family and community interventions for children affected by AIDS* (2004).

5 These include arguments that inter-country adoption represents a form of imperialism since most African children are adopted by parents from the West; that it completely severs the child from his or her cultural or religious setting; that it undermines the rights of poor parents who are seen as incompetent parents and not deserving of being parents; and that it is used as a mechanism for diverting children into trafficking networks, prostitution and exploitative work. These have been amply discussed and critiqued elsewhere. See eg S Dillon 'Making legal regimes for intercountry adoption reflect human rights principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption' (2003) 21 *Boston University International Law Journal* 179; B Mezmur 'Inter-country adoption as a measure of last resort in Africa: Advancing the rights of a child rather than a right to a child' (2009) *International Journal on Human Rights* 82.

6 See eg B Mezmur 'From Angelina (to Madonna) to Zoe's Ark: What are the A-Z lessons for inter-country adoptions in Africa?' (2009) *International Journal of Law, Policy and the Family* 145.

7 By 2012, at least 8,5 million of Malawi's total population were children. Approximately 13% of this child population had lost one or both parents, and was at risk of lacking parental care. Overall, about 1,2 million children experienced 'reduced parental care'. About 12 000 of these lived in child-headed households, while about 6 000 lived in institutional care. UNICEF 'Malawi child protection strategy: 2012-2016', http://www.unicef.org/malawi/MLW_resources_child_protec_strategy.pdf (accessed 20 November 2014). By 2012, about 12 000 children were

structure for alternative care options, while Ugandan legislation does. Curiously, in both countries the courts have found it difficult to apply the restrictions on inter-country adoption in specific cases without undermining the best interests of the child. Through these two cases studies, the article seeks to argue that inter-country adoption should be considered as possible alternative care without having to subordinate it to other care options. In other words, inter-country adoption should be prescribed as a possibility along other alternative care options in every case where a child is in need of alternative family care. What should ultimately turn the scales in favour of any of the available alternative care options is the principle of the best interests and the totality of the child's rights. This is a decision that ought to be made on a case-by-case basis, taking full account of the child's specific circumstances.

2 Inter-country adoption: Subsidiary or primary option?

Article 21(b) of the CRC and article 24(b) of the African Charter on the Rights and Welfare of the Child (African Children's Charter)⁸ provide the basis for the view that inter-country adoption should be given less priority in alternative care solutions.

Article 21(b) of the CRC provides:

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

...

Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's origin ...

Article 24(b) of the African Children's Charter provides:

States Parties which recognise the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

...

confirmed to be living in institutional care (orphanages and other approved homes estimated to be in the region of 600) and an additional 45 000 were in institutional care, while approximately 10 000 more lived on the streets. M Riley 'Baseline study: The state of institutional care in Uganda', Ministry of Gender, Labour and Social Development, Uganda (2012); ChildFund 'ChildFund receives USAID grant to assist orphaned and homeless children in Uganda' (2014), https://www.childfund.org/uploadedFiles/public_site/media/press_releases/USAID%20Grant%20Final%2081314.pdf (accessed 20 June 2015).

8 Charter OAU Doc CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

recognise that inter-country adoption in those states who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as a last resort, be considered as an alternative of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin ...

On the face of it, it could be said for countries that recognise adoption that both the CRC and the African Children's Charter consider inter-country adoption as a subsidiary option.⁹ For example, the African Children's Charter specifically states that inter-country adoption may be considered as a *last resort*, while the CRC states that inter-country adoption may be considered as an option that may be *taken if the child cannot be provided with other means of alternative care*. Furthermore, the CRC states that placement in a suitable institution could be made 'if it is necessary'.¹⁰ The same caution is not attached to foster placement, in-country adoption or *Kafalah*.

However, this view cannot be sustained. For one thing, both these articles show that adoption is not mandatory. The obligation to ensure that adoption fulfils the best interests of the child applies only to countries that recognise adoption. For another, both the CRC and the African Children's Charter leave it to states to determine the appropriate forms of alternative care for children. Therefore, even when they appear to suggest what forms of alternative care might be adopted and preferred, the two treaties do so using directory rather than obligatory terms. For example, the African Children's Charter states that inter-country adoption '*may, as a last resort, be considered as an alternative of child's care*'.¹¹ Since neither treaty prescribes an exhaustive list of alternative care options nor defines precisely what each care option entails, states have a discretion to devise more alternative care options and to reconfigure the well-known ones so that they better serve the best interests of children. For example, institutional care is widely considered unfavourable, mainly because it does not allow the child to grow up in a family environment or make it possible for the child to participate in the normal social life of his or

9 Mezmur, eg, appears to endorse such a hierarchy, although he argues that it should not be applied rigidly. He also cites UNICEF, which also recommends a hierarchy of alternative care options and prioritises family-based options over institutionalisation, permanent solutions over temporary solutions, and national solutions over those involving more than one country. See Mezmur (n 5 above) 85-98, citing UNICEF 'Intercounty adoption' (1998) *Innocent Digest* 5. It now appears that UNICEF has moved from that view as its new report shows. See N Cantwell 'The best interests of the child in intercounty adoption', UNICEF Office of Research 2014 49-70, http://www.unicef-irc.org/publications/pdf/unicef%20best%20interest%20document_web_re-supply.pdf (accessed 4 April 2016).

10 Art 20(3).

11 See art 24(b) (my emphasis). Art 21(b) of the CRC also uses 'may'.

her community.¹² It is possible, however, for institutional placement to be arranged in such a way that the child is allowed to maintain a meaningful relationship with his or her relatives.

In addition to the forms of alternative care suggested by the CRC and the African Children's Charter, child-headed households and group homes are new child care options that have been developed.¹³ States can devise variations of foster care, adoption, institutional care, or care options that combine any of these. Whatever care options are adopted, their suitability has to be measured with reference to the child's best interests, the entirety of the child's rights and the specific circumstances of the child.

The conclusion of this discussion is that a rigid legal framework that prescribes beforehand what forms of alternative care should be prioritised may not in specific cases ensure the protection and advancement of the child's best interests and rights. Neither the CRC nor the African Children's Charter can be interpreted plausibly as suggesting such a rigid framework. States have a singular duty to provide alternative care for children deprived of a family environment or whose best interests require that they be separated from their parents or guardians. This duty implies an obligation to devise as many suitable options as possible to cater for the different personal circumstances of children. The suitability of each form of alternative care and its likely impact on the child need to be considered on a case-by-case basis, bearing in mind the best interests of the child.

3 Legislative framework

3.1 Malawi

Until very recently, legal issues concerning children in Malawi were dealt with in fragments and haphazardly by various Acts of parliament. Of these, the Children and Young Persons Act¹⁴ and the Adoption of Children Act¹⁵ were solely concerned with children despite the fact that they did not do so comprehensively.

12 See generally UNICEF *Children in institution: The beginning of the end? The cases of Italy, Spain, Argentina, Chile and Uruguay* (2003), <http://www.unicef-irc.org/publications/pdf/insight8e.pdf> (accessed 4 April 2016); K Browne 'The risk of harm to young children in institutional care' (2009), Save the Children, http://www.kinnect.org.au/assets/resources/23.The_Risk_of_Harm.pdf (accessed 4 April 2016).

13 See generally NA Phaladze 'The plight of family caregivers in homes-based care in Botswana' (2003) 33 *Botswana Notes and Records* 73; C Phillips 'Child-headed households: A feasible way forward, or an infringement of children's rights to alternative care?' (2011), <http://www.charlottephillips.org/eBook%20Child-headed%20Households.pdf> (accessed 4 April 2016); LM Richter & C Desmond 'Targeting AIDS orphans and child-headed households: A perspective from national surveys in South Africa, 1995-2005' (2008) 20 *AIDS Care* 1019.

14 Ch 26:03 Laws of Malawi, now repealed.

15 Ch 26:01 Laws of Malawi.

These Acts have a long history, both having been enacted in the colonial era. The former, modelled on the English Act of 1933, was first enacted in 1946 as the Children and Young Persons Ordinance, as part of a package of laws aimed at improving the treatment of African offenders in colonial territories. Despite its seemingly general title, its preoccupation was with children in conflict with the law rather than with children in need of alternative care. The renaming of this legislation as an Act in 1969¹⁶ brought about some changes to the Ordinance but, on the whole, it retained its criminal justice focus and approach.

Therefore, it is not surprising that the Children and Young Persons Act saw child destitution and a lack of parental care more as an issue of child delinquency than an issue of the denial of the human rights of the affected children. Section 20(1) of the Act defined a child in need of care, control and supervision as one

who, having no parent or guardian or a parent or guardian unfit or unable to exercise proper care and guardianship, or not exercising proper care and guardianship, is either falling into bad associations, or exposed to moral or physical danger, or beyond control.

It was taken as evidence that the child was exposed to danger if he or she was found destitute, wandering from place to place without a permanent place of abode or the means of subsistence, begging or loitering.¹⁷ Apart from the narrowness of the definition of children in need of protection and care,¹⁸ the Act prescribed limited options for the care of such a child. These included an order to send the child to an approved school; to commit the child to the care of a fit person (whether a relative or not) who was willing to take care of the child; or to order the parent or guardian to enter into a recognisance to exercise proper care and guardianship.¹⁹

Like the Children and Young Persons Act, the Adoption of Children Act was enacted at the height of colonialism, in 1949,²⁰ in order to facilitate the adoption of African children by foreign residents in the then Nyasaland.²¹ The assumption was that Africans would continue to use their informal systems of providing child care based on the applicable African customary laws, customs and traditions. Thus, the type of adoption recognised by this Act is that known to English law,

16 Act 7 of 1969. The Act was amended several times thereafter by Acts 51 of 1971, 24 of 1972, 5 of 1976, 22 of 1989 and 6 of 1990.

17 Sec 20(2) Children and Young Persons Act.

18 Eg, it did not mention children who have been victims of domestic violence, trafficking, sexual abuse or exploitation, or child refugees and internally-displaced children. It also suggests that children who lack parental care *per se* without falling into bad associations or being exposed to moral or physical danger did not need alternative care.

19 Sec 22(1) Children and Young Persons Act.

20 As Act 13 of 1949. It was subsequently amended by Acts 19 of 1957, 22 of 1958, 8 of 1963, and 21 of 1967.

21 UNICEF 'Malawi fact sheet: Justice for children', http://www.unicef.org/malawi/MLW_factsheet_justice.pdf (accessed 20 November 2014).

resulting in the termination of the pre-existing parent-child relationship.²² Although such dualist approach to adoption was not restricted to this field of law,²³ the separation of adoption from the province of the alternative care covered, albeit in rudiments, by the Children and Young Persons Act, created and has continued to present an obstacle to the integration of adoption into alternative care in Malawi.

It is clear from the provisions of the Adoption Act that it does not see adoption primarily as a means of providing alternative care. Rather, adoption is conceived largely from the perspective of the rights and privileges of adults. To begin with, the Act pays little attention to the question of the adoptability of children. All it says is that any child under the age of 21 years, who has never been married and is resident in Malawi, may be adopted.²⁴ It does not specify any concrete adoptability criteria related to the child's lack of parental care or the need to protect the child from destitution, abuse, exploitation or domestic violence. In contrast to the scant attention given the child's adoptability, the Act dedicates considerable attention to the issue of the eligibility of adoptive parents.

An analysis of the eligibility requirements will prove that some of them are rational and others irrational. The Act states that an adoption can be made in favour of single adults or jointly in favour of two spouses.²⁵ Where the application is made by one applicant, the consent of his or her spouse has to be obtained unless the court dispenses with the need for this.²⁶ There is nothing concerning about these provisions. The rest is hardly rational and appears to be outdated. For example, the Act states that the applicant must be at least 25 years old and there must be an age difference of at least 21 years between the applicant and the child unless the applicant is related to the child (within the prohibited degrees of consanguinity).²⁷ The requirement as to the difference in age between the child and the adoptive parent was presumably intended to prevent sexual abuse but, with respect, it cannot serve as a guarantee against such abuse. There is no basis for saying that a parent who is older than a child by more than 21 years is less likely to abuse a child than a parent who is less than 21 years older than the child.

22 See sec 6 of the Adoption of Children Act.

23 Dualist laws based largely on race were common then, especially as far as personal laws were concerned, such as in fields of marriage, inheritance, divorce and child maintenance. Africans (black Malawians) were generally left to be governed in these areas by the African customary laws applicable to them, unless they opted out of these laws by expressly acting under the Acts of parliament designed for non-Africans.

24 See secs 2 and 3(5) of the Adoption of Children Act.

25 See sec 2(3) of the Adoption of Children Act.

26 See sec 3(4) of the Adoption of Children Act.

27 Sec 3(1) Adoption of Children Act.

A more bizarre requirement relates to the gender of the adoptive parents *vis-à-vis* that of the child. According to section 3(2) of the Act, a sole male applicant cannot adopt a female child unless the court is satisfied that special circumstances justify such an adoption. The same is the case with single female applicants *vis-à-vis* male children.²⁸ This Act was based on outmoded conceptions of sexual orientation, and if the intention was to prevent adoptive parents from sexually abusing their adopted children, this requirement cannot serve that purpose as it allows adoptive parents of same-sex or bisexual orientation to adopt children of their own sex.²⁹

The last requirement for an adoptive parent is that he or she must be resident in Malawi.³⁰ It is this requirement that has been the subject of much controversy and forms the focus of much of the discussion in the article.

To its credit, the Act regards decisions on adoption as serious, requiring the involvement of the courts. Thus, an adoption can only be made by a court of the appropriate jurisdiction in a prescribed form.³¹ The court is enjoined to ensure that the consent of the parents or any other person whose consent is required by the Act has been given, that such consent is informed or has been given after being fully appraised of the effects of the adoption, that no person has received any payment in consideration of the adoption and, more importantly, that the adoption is necessary for the welfare of the child, due regard being given, subject to the age and understanding of the child, to the wishes of the child.³² As an additional measure of protection of the child, a court may make an interim order of adoption under certain conditions pending the granting of the final adoption order.³³

As is clear from the above, the Adoption of Children Act and the Children and Young Persons Act, considered together, provided a patchy framework for dealing with children in need of parental care or requiring state protection from abuse or violence. It is a framework that fell short of the expectations of the new Constitution adopted in 1994, which recognises children as rights holders who have the right to know and be raised by their parents, the right to family protection, the right to development, the right to education and the right to equality before the law and equal protection, to mention just a few

28 Sec 3(2) Adoption of Children Act.

29 In both countries, homosexuality is prohibited by their respective criminal codes, although their constitutions can be interpreted to mean that such criminalisation is unconstitutional. However, since one does not have to disclose one's sexual orientation, there is nothing that prevents prospective adoptive parents of same-sex orientation to adopt.

30 Sec 3(5) Adoption of Children Act.

31 This may be the High Court or, at the option of the applicant, a Resident Magistrate's Court, or First Grade Magistrate's Court. See sec 9 of the Adoption Act.

32 Sec 4 of the Act.

33 See sec 7 of the Adoption of Children Act.

rights.³⁴ Importantly, Malawi acceded to the CRC on 2 January 1991 and to the African Children's Charter on 16 September 1999. The former, having been acceded to before the new Constitution came into force,³⁵ is binding and justiciable before Malawian courts.³⁶

The shortcomings of these laws, considered against these treaties and the Constitution, relate to the conflation of the lack of parental care and child destitution with child or juvenile delinquency; the limited options for the provision of alternative care; the failure to locate adoption and inter-country adoption within the broader context of alternative care; and the failure to provide a comprehensive framework for the regulation of inter-country adoption.

The repeal of the Children and Young Persons Act by the Child Care, Protection and Justice Act,³⁷ enacted in 2010, ameliorated some of these concerns. For example, the new Act is more comprehensive and covers three broad children's rights themes: child care broadly conceived as family and alternative care; the protection of children from harm; and the protection of children accused of having offended against the criminal law. Its provisions on family care are in some ways radical, especially insofar as they seek to abolish the parallel system of laws governing the rights and responsibilities in a marriage, to prescribe equal parental responsibilities towards children, and to protect equal rights to child custody and to inheritance.³⁸

The specific provisions regarding children in need of care also represent a marked improvement on the Children and Young Persons Act. Not only do they address the situation of children who have no surviving parents, guardians or traceable relatives and children who have been abandoned and neglected by their parents, but they also deal with the circumstances of children involved in begging, loitering and other illegal activities and children who are under threat or are actual victims of exploitation, violence, trafficking and abuses of all kinds.³⁹ The Act also makes provision for the appointment of guardians,⁴⁰ for the establishment of public foster homes⁴¹ and the

34 See sec 23 of the Constitution.

35 The Constitution came into force on 18 June 1994.

36 See sec 211(2) of the Constitution, as interpreted in *S Kalinda v Limbe Leaf Tobacco Ltd* Civil Cause 542 of 1995 (unreported); *Malawi Telecommunications Ltd v Makande & Omar* MSCA Civil Appeal 2 of 2004 (unreported).

37 Act 22 of 2010.

38 Eg, the Act codifies the joint primary responsibility of parents for raising their children, and clarifies the laws and procedures governing the determination of parentage. See secs 3 and 5-7. These provisions mark a fundamental break with African customary law which defines parental responsibilities through a gender lens and based on whether the marriage is governed by matrilineal or patrilineal systems of law.

39 See sec 23.

40 See secs 38-45.

41 See sec 46.

accreditation of private foster homes,⁴² for the responsibilities of local authorities towards children in need of care and protection,⁴³ for the protection of children from undesirable practices,⁴⁴ and for the establishment of reformatory centres and safety homes.⁴⁵

However, the Act fails to integrate adoption in its framework. Just as was the case previously, the issue of adoption has been left to a separate legislative review process aimed at amending the Adoption of Children Act. This reform initiative has not yet come to fruition, which means that the Adoption of Children Act remains operational. It is thus unclear, for example, whether the new provisions governing guardianship contained in the Child Care, Protection and Justice Act are meant to supersede those concerning adoption under the Adoption of Children Act.⁴⁶ This, particularly, is a problem given that some of the circumstances that may justify a guardianship order mirror those under which an adoption may be granted.⁴⁷

3.2 Uganda

Ugandan child laws before the Children Act⁴⁸ was enacted in 1997 were as fragmented as Malawian laws before Malawi's Child Care, Protection and Justice Act was passed in 2010. Although an attempt was made in Uganda to separate issues of child care and protection from child reformation by enacting two separate statutes dedicate to these themes, the Approved Schools Act⁴⁹ and the Reformatory Schools Act,⁵⁰ both of which were inherited from the colonial era, child care was largely conceived in narrow terms that targeted the so-called 'problematic child'. The Approved Schools Act defined a child in need of care as one who was beyond parental guidance or was involved in immoral behaviour, loitering or street begging. Indeed, such children were considered to be as problematic as those accused of having committed or been convicted of criminal offences; the difference, if any, lay in degree only. Thus, children in need of such care were committed to approved schools where child or juvenile offenders were also kept.⁵¹ The procedure for determining which

42 See sec 47.

43 See secs 70-77.

44 See secs 78-85.

45 See secs 157-176.

46 Although this Act is currently under review, it remains in force.

47 See sec 41 which provides that a guardian may be appointed upon an application by *any person* where the child's parents are no longer living, cannot be found or are not living together and it is in the best interests of the child that a guardian be appointed. There are no restrictions based on the nationality of the applicant. As will be seen below, guardianship has been used in Uganda to bypass restrictions on inter-country adoptions.

48 Ch 59 Laws of Uganda.

49 1964 Revision, ch 110 Laws of Uganda, repealed.

50 1964 Revision, ch 111 Laws of Uganda, repealed.

51 See Department of Probation and Social Welfare *Report of the Child Law Review Committee* (1992) 28.

child was in need of care was coercive and lacked guarantees of procedural fairness.⁵²

The provisions regarding foster placement in the Approved Schools Act were also inadequate. For example, there was no provision for the supervision of fosterage.⁵³ For its part, the Reformatory Schools Act provided for the treatment of children who offended against the criminal law, a more extreme category of problematic children, so to speak. The Act was by and large harsh and paid scant regard to the rights of the children involved.⁵⁴ Furthermore, it overemphasised judicial means of dealing with offending children, thereby ignoring non-judicial means.

As was the case in Malawi before 2010, adoption in Uganda was dealt with separately from the laws that regulated child care. The Adoption Act⁵⁵ made provision for both in-country adoption and inter-country adoption under strict terms but with minimal regulatory mechanisms.⁵⁶ Ugandan children could be adopted by either British citizens or Ugandan citizens, provided the prospective parent was *resident* in Uganda or East Africa. Similarly, inter-country adoption was permissible only if it involved British and Ugandan citizens who were *resident* in East Africa as the adoptive parents. However, these restrictions were routinely circumvented as adoptive parents resorted to guardianship as an alternative and left the country with the children once the orders were granted.⁵⁷

The adoption of the CRC and the African Children's Charter in 1989 and 1990 respectively provided the impetus for the review of all child-related laws in Uganda. Probably the first country to do so, Uganda established the Child Law Review Committee in 1990 to review all child-related laws in order to bring them in line with these treaties. The Committee produced its report in 1992, three years before Uganda adopted a new democratic Constitution in 1995. The Committee's recommendations culminated in the adoption of the Children Act in 1997.

As the Child Law Review Committee had intended, the Children Act is a comprehensive piece of legislation that brings various child-related laws together under one roof. As far as the question of child care is concerned, the Act sets out from the premise that the child has the right to live with his or her parents and, hence, that the separation of the child from his or her parents can only be justified where it is in

52 Department of Probation and Social Welfare (n 51 above) 29.

53 Department of Probation and Social Welfare 30.

54 Typically, a child older than 10 years could be incarcerated in an approved school for three years or until he or she reached the age of 12 years, whichever was longer. Children younger than 10 could also be committed to approved schools. See sec 9. A child could also be sentenced to between three and five years' imprisonment in a reformatory school. See sec 5.

55 Ch 216 Laws of Uganda, repealed.

56 See secs 2 and 3.

57 Department of Probation and Social Welfare (n 51 above).

the child's best interests.⁵⁸ The Act goes further to provide that where such separation is necessary, the best possible substitute care must be provided to the child.⁵⁹ However, the determination of such substitute care is not left entirely to the courts. The Act elaborates a complex but logically-predetermined matrix within which such determination has to be made.

Because of the importance attached to the family, the Act rightly prohibits courts from making care and supervision orders unless they consider these to be 'beneficial to the child'.⁶⁰ Courts may make supervision and care orders only where they are concerned that the child will or is likely to suffer harm.⁶¹ The scheme established by the Act suggests that courts are obliged to make supervision orders first before a care order may be considered.⁶² In turn, a supervision order cannot be made unless local government councils at the village and sub-country levels have dealt with the issue without success.⁶³

In keeping with the recommendation of the Child Law Review Committee that institutionalisation should be used sparingly and for the shortest period of time,⁶⁴ the Children Act regards an approved home as a temporary form of substitute family care for a child until such time as the parents of the child are able to provide adequate care, the child completes his or her three years or attains the age of 18 years, whichever is earlier.⁶⁵ Institutionalisation is also seen a stop-gap measure in the search for a family solution, as will be seen below.

The centrality of fosterage to such family solutions is unmistakable. Other care options, such as adoption and inter-country adoption, have to be preceded by fosterage. This explains why the Act dedicates considerable attention to the eligibility requirements of foster parents and the procedures for fosterage. Most notably, non-Ugandan citizens

58 Sec 4.

59 As above.

60 Sec 17.

61 See sec 21.

62 See secs 19, 21 and 27 of the Children Act.

63 See sec 22 of the Children Act. It must be noted, however, that a child can be separated from parents in situations of emergency or on an interim basis where the child is likely to suffer harm if such separation is not ordered. See secs 33 and 37 of the Children Act. A supervision order means that the child is left with his or her parents but placed under the supervision of a probation and welfare officer. By contrast, a care order results in the separation of the child from his or her parents and, simultaneously, placement in the care of a warden of an approved home or foster parents. See sec 27 of the Children Act. A care order may be valid for a maximum period of three years or until the child reaches the age of 18 years, whichever is shorter, but the order is reviewable at least once every year. See sec 29 of the Children Act.

64 Department of Probation and Social Welfare (n 51 above) 79-80.

65 See sec 58 of the Children Act.

are not prohibited from serving as foster parents, but they have to be *resident* in Uganda.⁶⁶ Furthermore, the foster parents have to be demonstrably capable of raising the child and the wishes of the child have to be considered if these are ascertainable.⁶⁷ Crucially, the Act requires that attempts are made, whenever possible, to place a child with a foster parent who has the same cultural background as the child's parent or comes from the same area of Uganda as the parents of the child.⁶⁸ Similarly, where the child's religion is known, placement must, as far as is possible, be with a foster parent of the same religion, or must involve an undertaking by the foster parent to raise the child in accordance with that child's religion.⁶⁹ All foster care placements are subject to supervision by probation and social welfare officers.⁷⁰ As will be seen below, the requirements related to the child's identity are not specifically prescribed for adoptive parents, understandably so, since fosterage precedes adoption.

In-country adoption and inter-country adoption are the last forms of alternative care recognised by the Children Act, the latter being reserved for 'exceptional circumstances'.⁷¹ The preference for the former to the latter is also indicated by the need to maintain the child's identity as far as is possible built into the foster care scheme discussed above. Whereas foster parents need to be at least 21 years old, prospective adoptive parents have to be at least 25 years old and there has to be an age difference of 21 years between the parent and child, if they apply as single parents, and one of them has to meet these age requirements if they apply jointly as husband and wife.⁷² Single males are precluded from adopting girl children, as are single females from adopting male children, unless there are special circumstances justifying this.⁷³

Both in-country adoption and inter-country adoption have to be preceded by three years (36 months) of foster care of the specific child to whom the adoption relates. To remove any doubt about the requirement of residence for foster parents and its application to prospective inter-country adoptive parents, section 46(1)(a) of the

66 See rule 5(3) of the Foster Care Placement Rules, Second Schedule to the Children Act, made in accordance with sec 43 of the Children Act (Foster Care Placement Rules). Foster parents could be a husband and wife, or a single woman or single man aged above 21. A single man is prohibited from fostering a female child. No similar restriction applies to single women. See rules 5(1)-(2) of the Foster Care Placement Rules. This may be a mere drafting oversight, given that for purposes of adoption, this restriction applies to single females as well. See sec 45(3) of the Children Act.

67 Rule 6 of the Foster Care Placement Rules elaborates a procedure that involves an assessment of the suitability of the prospective adoptive parent, visitation to their home and character vetting.

68 Rule 8 Foster Care Placement Rules.

69 Rule 7 Foster Care Placement Rules.

70 See rule 11 of the Foster Care Placement Rules.

71 Sec 46(1) Children Act.

72 Sec 45(1) Children Act.

73 Sec 45(3) Children Act.

Children Act expressly requires such parents to prove that they have 'stayed in Uganda for at least three years'. As has been the case in Malawi, the litigation in Uganda on inter-country adoption has focused on this requirement.

Additional requirements include that the prospective parents must not have a criminal record, must be in possession of a recommendation on their suitability to adopt from the country of origin, and must prove that their country of origin will respect and recognise the adoption order.⁷⁴ Mandatory requirements as to consent are stipulated for parents of the child and children aged above 14 years who are the subject of adoption.⁷⁵ As to relatives and other people who may be interested in the child, the court is given a discretion where it appears to it that a person not being a parent of the child has rights or obligations in relation to the child, to require the consent of that person before making the adoption order,⁷⁶ or to ask a probation and welfare officer to prepare a report that may help the court to determine whether there is any other person whose consent to the adoption ought to be obtained.⁷⁷

The courts' powers, when presented with an application for an adoption order, are to ensure that the requirements as to consent and the prohibition of financial gain from adoptions and other requirements discussed above have been complied with and, finally, to make the decision whether or not to grant the order based on the welfare of the child.⁷⁸ The adoption recognised under the Children Act is one that terminates the pre-existing parent-child relationship and inaugurates a new one.⁷⁹

The Ugandan scheme for child care described above is systematically and logically set out in a hierarchical structure that begins with the family, assistance to and supervision of the family, the separation of the child and placement with a fit and proper person or foster parent under supervision, placement in an approved home as a stop-gap measure, fosterage as a central pillar of alternative care, in-country adoption and, lastly, inter-country adoption as an exceptional measure.

For the most part, the considerations involved in these steps are in keeping with the human rights standards set out in the African Children's Charter and the CRC. However, for it to work, this scheme assumes that the supply of children in need of care will not surpass the demand from foster parents, and then from adoptive parents, in-country or inter-country. However, this scheme can collapse and has indeed failed to contain the rise of the number of children who need

74 Sec 46(1) Children Act.

75 See secs 47(1) & (6) of the Children Act.

76 See sec 47(7) of the Children Act.

77 Sec 47(8) Children Act.

78 See sec 48 of the Children Act.

79 See sec 51.

alternative care, resulting in large numbers of institutionalised children and fewer outlets for fosterage and in-country adoption. This is the reason why inter-country adoption has increasingly come into the picture, despite clear attempts to constrain its role.

4 Judicial responses to restrictions on inter-country adoption

4.1 Malawi

Malawi has seen the emergence of an increasing number of orphanages run by religious organisations or private individuals on a charitable basis. Most of these rely on foreign donor funding. For its part, the state has not built more institutions for the care of children temporarily or permanently deprived of a family environment or in need of state protection. Neither has the state improved or expanded the two schools established by the colonial administration, Mpemba Boys Home and Chilwa Approved School.

It is in this context that adoptions have become an important possibility of alleviating this problem. Before 2006, adoptions were arranged exclusively in favour of Malawian residents.⁸⁰ This changed with the application for the adoption of David Banda by Guy and Madonna Ritchie in 2006.⁸¹ David was a few months old when the application was made. His mother died when he was just seven days old. Members of his extended family struggled to look after him and subsequently placed him at an orphanage.⁸²

After considering the application, its supporting affidavit and the report of the guardian *ad litem* and satisfying itself that the consent of all persons identified by the Act had been duly obtained, the High Court granted an interim order of adoption for 18 months. By the time the order called for confirmation, the case had attracted considerable local and international attention. The hearing for the final order thus became a matter of huge public interest and prompted the Malawi Human Rights Commission to join the case as *amicus curiae*.

The main point of controversy in this case was that the Adoption of Children Act did not expressly authorise inter-country adoption. As has been observed earlier, the Act set a residence requirement for all prospective adoptive parents. In this case, the applicants were not Malawian residents, let alone citizens. It was clear that they had come to the country primarily to adopt the child.

80 See Chombo J *In re Adoption of CJ (A Female Infant)*, Adoption Case 1 of 2009 (unreported).

81 See *In Re Adoption of David Banda (A Male Infant)*, Adoption Cause 2 of 2006.

82 As above.

In his judgment, Nyirenda J (as he then was) took the view that the residence requirement had to be read in light of the Constitution, which recognised a range of children's rights, including their right to development,⁸³ and the CRC, which recognised inter-country adoption as a means of providing alternative care to children who lack parental care or need protection.⁸⁴ According to the judge, the main consideration in adoption cases was the welfare of the child, a term which he used interchangeably with the principle of the best interests of the child commonly used in international law. He thus held that the residence requirement was subservient to and was intended to serve the child's best interests:⁸⁵

The scheme that comes out very clearly in that the requirement as to residence was and is intended to protect the child, and to ensure that the adoption is well intended. It is for this reason that ... the requirement as to residence, be it important, is merely a means to an end.

Consequently, while noting that the meaning of residence was not defined in the Act, he held that a literal meaning of residence would defeat the purpose of the Act and not pass constitutional muster. In fact, Nyirenda J eschewed the task of defining 'residence', arguing that the requirement had served its purpose and was no longer necessary. He said:⁸⁶

Thus far it can safely be said that the requirement of residence has served its purpose and that in its absence there are much more weighty considerations in the welfare of our needy children which in themselves would suffice and compel a decision in favour of an adoption by those that are not resident in this country.

Essentially, the judge in this case favoured an approach to the determination of inter-country adoption applications that weighed up all relevant factors in order to reach a decision that was most promotive and protective of the child's welfare. Therefore, although he agreed with the view that inter-country adoption was and should be regarded as a last resort, because of its impact on the pre-existing family and on the child's cultural, linguistic and religious background, he nevertheless held that the following factors weighed in favour of his decision to grant the final adoption order: that the child was in desperate need of parental care; that his relatives had failed to take care of him; that no family in Malawi had offered to adopt the child or to serve as his foster parents; that the applicants were capable of looking after the child; and that the applicants had taken good care of the child during the interim order.

In subordinating the requirement of residence to the welfare principle, the judge in fact raised the significance of section 4 of the

83 Sec 30.

84 This treaty forms part of Malawian law and can be enforced by Malawian courts. See n 36 above.

85 *David Banda* (n 81 above).

86 As above.

Adoption of Children Act, which specifies the considerations that the courts must take into account in adjudicating adoption applications⁸⁷ over that of the eligibility requirements for prospective adoptive parents laid down in sections 2 and 3. In doing so, he interpreted the local statute in a way that was consistent with the spirit of international law.

However, it is unclear what this decision means for the rest of the requirements contained in sections 2 and 3, such as those pertaining to the age of the applicant, the age difference between the child and the applicant, the gender of the applicant and the child and the requirements as to consent. Can these also be waived depending on what the welfare of the child requires in a particular case?

It is probably this concern that led Chombo J to take a restrictive view of the residence requirement in *In re Adoption of CJ (A Female Infant)*.⁸⁸ This case concerned the adoption of a three year-old female child, again by Madonna, this time as a single parent. The mother of the child was 14 years old at the time of birth and died shortly after giving birth. As the whereabouts of the father were unknown, the grandmother of the child looked after her for a short while before she was forced by poverty to leave the child at an orphanage. Curiously, the fact that the High Court had approved the adoption in favour of the same applicant three years earlier did not reduce public interest in this adoption. Having regard to the previous High Court decision on similar facts, all facts on the court's file supported the adoption. The family of the child had given consent to the adoption which it confirmed to the court during the hearing of the application. Furthermore, the report of the guardian *ad litem* also spoke in favour of the adoption.

Nevertheless, Chombo J refused to grant the adoption order, arguing that the residence requirement had not been met. In making this decision, the judge adopted a literal interpretation of the term 'residence' as 'dwelling permanently or for a considerable time in a particular place'. This view stood in sharp contrast to that espoused earlier by Nyirenda J.⁸⁹ In this case, Chombo J decided to ignore Nyirenda J's decision and instead followed several foreign cases which had interpreted this term in a similarly literal fashion.⁹⁰ Her reasoning

87 The welfare principle is clearly the most important consideration listed under sec 4.

88 n 80 above.

89 Judges of the High Court are not obliged to follow decisions of fellow judges of the same court, although previous decisions made by them and their colleagues are persuasive. Similarly, judges may have regard to comparative foreign case law which is also considered to be of persuasive value.

90 These included *Brokelmann v Bar* [1971] 3 All ER 29; *In Re Adoption Application No 52/1951* [1952] 1 Ch 16; *Levene v IRC* [1928] AC 217.

was that the requirement as to residence was important to guard against the possible abuse of the adoption procedure. She said:⁹¹

The issue of residence, I find, is the key upon which the question of residence rests and it is the very bedrock of protection that our children need: It must therefore not be tampered with.

According to the judge, the welfare principle and the residence requirement were not inconsistent with each other as far as adoption was concerned. The residence requirement served the welfare principle by protecting children from unscrupulous adoptive parents. Since the applicant was not a Malawian resident, her application could not pass muster on this ground.

However, this was not the only reason this adoption application was rejected. Drawing on the provisions of the CRC and the African Children's Charter, Chombo J held that inter-country adoption was to be taken as a measure of last resort having exhausted all in-country care options. According to her, it was not relevant to ask whether the child could be better looked after by a foreign parent, since the quality of life, especially in the West, was generally better than that in Malawi. What was relevant rather was whether there was a real possibility for the care of the child within the country. As the child was being cared for at an orphanage and it had not been proved that such care was inadequate, she found that inter-country adoption could not serve as a substitute for such in-country care. This was one of the most surprising findings of the court, since the adoption was not opposed in court. Since the judge did not give details of the contents of the report of the guardian *ad litem*, it is not possible to tell whether the report dealt with the conditions of life in the orphanage, the number of other children being looked after there, the sustainability of the orphanage, and other relevant factors. It was crucial for the judge to consider or solicit evidence on this important factor instead of simply shifting the responsibility to the applicant to prove that the orphanage did not provide adequate care. In fact, the Adoption Act does not create any such onus on an applicant for adoption.

All in all, Chombo's decision stunned the world and brought about confusion among Malawians, in particular about the state of the law on inter-country adoption, given that an earlier decision had granted an adoption to the same person and more inter-country adoptions had been granted by the courts in Malawi.⁹² It was widely expected that the case would go to the Malawi Supreme Court of Appeal (MSCA), which it did eventually.

91 C/ (n 80 above).

92 Between 2003 and 2008, 23 inter-country adoptions had been approved in Malawi. In 2009, when this decision was delivered, four inter-country adoptions were authorised. Based on information provided by e-mail by Prof Peter Selman of Newcastle University.

The MSCA (Munlo CJ writing for the court) was unanimous in overturning the decision of Chombo J.⁹³ While noting that the residence requirement was neither unconstitutional nor inconsistent with international law, the Court agreed with Nyirenda J that this term was malleable. Unlike Nyirenda J, who did not venture any specific definition of the term, the MSCA was prepared to offer one. It stated that residence was 'no longer tied to the notion of permanence' and that a person could reside in more than one place, since residence was not constituted by mere physical presence.⁹⁴ The Court went further to state as follows:

Any period of physical presence however short may constitute residence if it is shown that the presence is not transitory; if the period has just began, this will be a question of intention of the party. There is even no need for one to own property in a place in order for him to be capable of residing there.

The MSCA criticised the lower court for ignoring the facts of the case and for preoccupying itself with the protection of 'imaginary children from fraudulent adoptions'. According to the MSCA, the following facts were pertinent: The appellant had come to Malawi to apply for the adoption of a second child; she had shown a willingness to travel frequently to Malawi with both children in order to allow them to relate to their cultural background; and she had proved that she had long-term interests in assisting disadvantaged children in Malawi. All these factors meant, in the words of the Court, that the applicant was not 'a mere sojourner' in Malawi and, hence, that she had met the residence requirement.

As to the second issue, whether inter-country adoption, being a measure of last resort, could not oust available in-country care at an orphanage, the MSCA held that the Adoption of Children Act did not expressly make this a consideration. Nevertheless, the MSCA considered whether allowing the child to continue living in the orphanage was an option in this case that could preclude inter-country adoption and found that it could not. The Court reasoned that the orphanage did not offer the child a family life, and the love and affection that the adoption promised. In the end, since consent to the adoption had been obtained, the adoption was supported by the guardian *ad litem* and the appellant was found to be a suitable adoptive parent, the MSCA held that there was no reason why the adoption could not be sanctioned.

All in all, although the MSCA appeared to hold that the residence requirement remained relevant, contrary to Nyirenda J's view that it had served its purpose and should now be ignored, the meaning that the MSCA attached to the term is so vacuous that it is not a requirement at all. Any person who comes to Malawi and swears on affidavit that they intend to visit the country regularly with the child

93 *In Re Adoption of CJ (A Female Infant)*, MSCA Adoption Appeal 28 of 2009.

94 As above.

would meet the Court's definition of residence. On the other hand, some of the comments the MSCA made as proof of intent to reside in Malawi, such as that the applicant had been committed to helping disadvantaged children in Malawi, pointed to an introduction of more onerous obligations than the statute envisaged. Apart from proving capability to look after the child, it should not be expected of the adoptive parent to commit to helping other children in the country.

Overall, the decisions of Nyirenda J and the MSCA were in effect Solomonian and essentially upheld international law to the extent that they vindicated the best interests of the child. However, these decisions were made in a legal context that did not anticipate inter-country adoptions. For example, unlike the adoption ordered by Nyirenda J, which was preceded by an interim order of 18 months, the MSCA's decision was in effect a final order and no reasons were given why an interim order was not deemed appropriate. The fact that the same parent had adopted the first child from the same orphanage might explain this decision, but the fact that the case related to a different child with different needs required a clear justification for the granting of a final order without it being preceded by an interim order. Furthermore, neither adoption order deals with issues related to the logistics for the transfer of the children concerned, the responsibilities of Malawian authorities in ensuring the settlement of the children in the foreign country and to follow up on the children's wellbeing and, more importantly, the responsibilities towards Malawi and the child of the authorities in the receiving country.

Also noteworthy is the fact that the three judgments considered here differ markedly in the ways in which the information about the adoption was managed.⁹⁵ For example, the two High Court judgments provide little relevant information about the family history of the adoptive child, the eligibility of the adoptive parents and the assessment of the social welfare report. Not only are such factually deficient judgments indicative of the inadequacies in the legal requirements for the consideration of inter-country adoptions, but they also make it difficult for the general public to scrutinise the judgments in a better light, and pose a challenge to the adopted children who would want to know and trace their parents when they become adults.

95 In the first case, Nyirenda J seems to have been constrained by what he called the need to respect the privacy of the child. Paradoxically, the name of the child was clearly cited in the heading of the case. The MSCA's decision, on the other hand, contained more details about the child and his family history, although the case heading cited the abbreviated form of the child's name. In either case, the media in Malawi and around the world freely used the names of the children concerned in their coverage of the cases.

4.2 Uganda

Unlike the case in Malawi, the Ugandan Children Act has a well thought-out scheme for dealing with the problem of alternative child care. Inter-country adoption sits at the very bottom of the care options available. Moreover, it is not a stand-alone care option; rather, it is linked to foster care. For a person to be granted an inter-country adoption order, he or she must have fostered a child for *at least three years* while being *resident* in Uganda. The requirements for fosterage and those for inter-country adoption form a complete whole in a carefully-constructed hierarchical mosaic of alternative care.

Uganda's system would be consistent with children's rights in general and, more specifically, the best interests of the child if it succeeded in providing appropriate alternative care to all children in need of such care. The evidence suggests that it has not done so and, as a result, many children lack appropriate family care.⁹⁶ It is in this context that legal practitioners have devised a means of circumventing the restrictions on inter-country adoption. The first has been to make applications for guardianship rather than inter-country adoption. The second has been to rely on the express provisions on adoption, but to contend that those requirements are merely directory and not mandatory. Both these options have been endorsed by the courts.

The first strategy was successfully tested in *Re Francis Palmer (An Infant)*⁹⁷ and *In Re Howard Amani Little (An Infant)*.⁹⁸ This was a consolidated decision in which the three judges delivered contradictory opinions. The lead opinion took the view that the High Court, by virtue of the fact that it has unlimited original jurisdiction, has the power to grant guardianship orders even though neither the Children Act nor any other Act expressly gives it such power. One judge disagreed with this opinion, arguing that such powers were clearly inconsistent with the provisions of the Children Act. Although a third judge expressed disquiet with the suggestion that the clear provisions of the Children Act could be overridden by resorting to guardianship orders, he nevertheless supported the lead opinion on undisclosed grounds.

The initial discomfort with guardianship orders displayed in this case has since been put to rest. In a recent case of *Re Deborah Joyce Alitubeera & Richard Musaba (Infants)*,⁹⁹ the Court of Appeal had occasion to revisit its earlier ruling. While conceding that the main law dealing with children, the Children Act, did not make specific provision for guardianship, it nonetheless unanimously reaffirmed its earlier decision by appealing to section 139 of the Constitution which

96 See n 7 above and the accompanying notes.

97 Civil Appeal 32 of 2006 (unreported).

98 Civil Appeal 33 of 2006 (unreported).

99 Civil Appeals 70 & 81 of 2011 (unreported).

confers unlimited original jurisdiction on the High Court,¹⁰⁰ and section 98 of the Civil Procedure Act,¹⁰¹ which states that the High Court has inherent jurisdiction to make orders it deems necessary to prevent injustice. The Court also said that the High Court has the power to apply the common law and principles of equity. Read together, the Court of Appeal claimed, these sources of law empowered the High Court to grant guardianship orders.

As an alternative or further basis for this view, the Court relied upon the principle of the child's best interests, which it said was the paramount consideration in all matters concerning the child, and which was codified as a principle of Ugandan law under article 34 of the Constitution,¹⁰² section 3 of the Children Act, the First Schedule to the Children Act, and the two international treaties, the CRC and the African Children's Charter, both of which the Court said formed part of Ugandan law. This principle, it was held, makes it necessary to grant guardianship orders precisely in situations where inter-country adoption may not be granted due to non-compliance with its requirements, as long as such an order redounds to the child's best interests.

None of the provisions the Court of Appeal relied on expressly gave the Ugandan High Court specific power to make guardianship orders. While it is true that the High Court has inherent powers and unlimited original jurisdiction, the exercise of such powers, surely, is subject to the express provisions of the law. A study of the Children Act also reveals that parliament has withdrawn a significant amount of discretion from the courts to determine the child's best interests by providing a pre-determined framework within which decisions on alternative care have to be made.

The reason why the Court of Appeal felt obliged to authorise the guardianship orders in the cases referred to above has to do with real concerns about the failure of justice that would have ensued had the guardianship orders not been made. The scheme established by the

100 This section provides: '(1) The High Court shall, subject to the provisions of this Constitution, have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law. (2) Subject to the provisions of this Constitution and any other law, the decisions of any court lower than the High Court shall be appealable to the High Court.'

101 Ch 71 Laws of Uganda. This section provides: 'Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'

102 The closest this section comes to recognising this principle is in subsection (1): 'Subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up.' Even so, it does not authorise the courts to invoke this principle anyhow, overriding clear laws that give guidance on what the child's best interests are or should be considered.

legislature, while sound at the general level, was arguably unjust in the specific circumstances of these cases. In *Re Deborah Joyce Alitubeera & Richard Musaba (Infants)*,¹⁰³ for example, it appears¹⁰⁴ that one of the children was four years old at the time of the application for guardianship. This child was born to a 15 year-old girl who had conceived from a rape incident. She had abandoned the child two days after his birth, leaving him at the verandah of someone's house, who in turn placed the child at an orphanage. The second child was one year old at the time of the High Court ruling. Soon after her birth, the child's parents quarrelled and separated, the mother leaving the child with the father. However, the father could not take care of the child. The High Court described him as a 'worthless drunkard' and an 'exceedingly irresponsible' man who lived in a rudimentary shelter with four other children and who had fathered a total of 17 other children by different women. The child was taken away from him pursuant to a care order which placed the child in the care of an orphanage operated by an NGO. These facts make it compelling for a court to find an immediate solution to the plight of these specific children.

However, since the Court of Appeal invoked provisions that did not expressly give it powers to make guardianship orders, the Court found itself in a legal vacuum as far as the specific considerations governing the granting of guardianship were concerned.¹⁰⁵ There were no prescribed eligibility requirements for prospective guardians and considerations that the court must bear in mind when making the order. With particular reference to the first consolidated decision of the Court of Appeal referred to earlier, Egonda-Ntende J in *Re Adoption of Muwanguzi Perez (An Infant)*¹⁰⁶ lamented as follows:

The Court of Appeal decision, given the conflicting legal positions taken by each judge, provides no authoritative guidance as to how this court should exercise its powers in granting orders of legal guardianship.

103 n 99 above.

104 The facts of the case are muddled and it is thus not easy to tell which set of facts applies to which child.

105 Thus, in *Re Deborah Joyce Alitubeera & Richard Musaba (Infants)* (n 99 above), the Court of Appeal had to apply some of the requirements for adoption while considering an application for guardianship. After finding that both children were in need of care, it considered the suitability of the guardians. It found as a fact that the parents had no criminal record, that they were capable of adopting the children in terms of financial capacity and their suitability as parents, and that the children's parents or relatives had given consent to the guardianship. Curiously, the Court was under no misapprehension that the guardianship being sought here was for purposes of inter-country adoption, as the facts clearly stated that the appellants intended to take the children out of Uganda.

106 HCT-00-FD-0170-2008 (unreported).

The second strategy, which relies on the view that the requirements for inter-country adoption are merely directory, has been given legislative approval in several cases.¹⁰⁷ These cases were followed in the recent case of *Re Adoption of Sharon Asige (An Infant)*.¹⁰⁸ This case was not an undisguised application for inter-country adoption. The applicant was a seven year-old orphan who had lost both parents when she was very young. Since the death of her parents, she had lived with her paternal uncle and aunt. The judgment states that the applicants were granted a foster care order, but by the time of the judgment, the three-year period of foster care had not expired. The appellants had also not met the three year residential requirement.¹⁰⁹ In allowing the adoption in spite of the lack of compliance with residence and foster care requirements, Oguli Oumo J held, in a brief and sparsely-substantiated ruling, that 'the provisions of section 46 are directory and provide the conditions for which the court may exercise its discretion to grant an adoption order but the guiding principle remains the welfare principle'.¹¹⁰

This ruling does not substantiate its claim that section 46 requirements are merely directory. It is trite that in deciding whether a legal requirement is directory or mandatory, a court has to consider whether the language used is peremptory or not and must extrapolate the mischief that the legislator intended to correct. None of these considerations would support the court's conclusion. The Child Law Review Committee made a clear recommendation that the new child laws should curtail the use of guardianship in order to bypass the requirements for adoption and inter-country adoption.¹¹¹ The Children Act, read as a whole, shows this clear intention. Indeed, by circumventing section 46 requirements, the whole scheme for alternative care established by the Act is rendered nugatory.

5 Evaluation and conclusion

Neither Malawi nor Uganda is coping with the rising number of children who lack parental care. Malawi does not have a hierarchised system of alternative care, although the new Child Care, Protection and Justice Act has set the foundation for the development of such a system. This makes it possible in principle to consider all the available alternative care options in a given case, thereby presenting the possibility of choosing a care option that may better serve the interests of the child. The problem is that inter-country adoption is

107 See *Re Adoption of Paula Robertson & Cynthia June Robertson (An Infant)*, Adoption Cause 31 of 2004 (unreported); *Re JN (An Infant)*, Civil Appeal 22 of 1994 (unreported); *Re Michael Benjamin Pietsch*, Family Cause 102 of 2008 (unreported). With all due diligence, I did not manage to find these cases.

108 Adoption Cause 144 of 2009 (unreported).

109 The requirements as to age were met.

110 n 108 above.

111 n 51 above.

not envisioned as an alternative care solution that will be used regularly. Uganda, by contrast, has a more clearly-defined system that considers inter-country adoption as a measure of last resort after in-country options, such as supervision and care orders, foster care and in-country adoption. This system gives preferential treatment to care options which seek to preserve the child's identity and culture, to home-based solutions and to domestic solutions. It may pass muster from a children's rights perspective only if it ensures that all children in need of parental care are catered for, but not when a considerable number of children are left without parental care or in institutional care.

Because of the peripheral role that both countries reserve for inter-country adoption, the legislative arrangements of both countries place onerous restrictions on inter-country adoption. Some of these restrictions are rational and necessary to ensure the protection of the child; others are irrational. Irrational restrictions include the eligibility requirements for adoptive parents that relate to sex or gender and age. In either country, there has to be at least a 21-year age difference between the adoptive child and parent, and a male parent cannot adopt a female child and *vice versa*. These requirements cannot prevent child abuse, if this is the rationale behind them.

The most problematic restriction, judged from the litigation in both countries, has been that of residence. In Malawi, the relevant law does not define 'residence', while in Uganda, a specific period of three years is stipulated. Furthermore, unlike in Malawi, in Uganda, adoption, whether inter-country or in-country, has to be preceded by foster care.

In both countries, the courts have found it difficult to enforce these restrictions. In Malawi, the courts have either subordinated the residence requirement to the child's best interests or interpreted it in a way that makes it easy for applicants to meet. In Uganda, the courts have either invoked their inherent powers to grant guardianship orders to bypass the restrictions on inter-country adoption, or interpreted residence and fosterage requirements as non-binding.

Curiously, these decisions have been made by the courts in the respective countries with striking similarity and consequences, even though the judges concerned did not have access to the decisions of their counterparts in either country. In both jurisdictions, the courts felt duty-bound to uphold the best interests of the child by rendering clear legal restrictions on inter-country adoption inapplicable. Yet, in doing so, the courts had to engage in significant law making, which has exposed them to the democratic legitimacy attack. The state of the law on inter-country adoption in both countries has also been in a state of confusion caused by some inconsistencies in the decisions made by the courts. A more serious concern relates to the inadequacy of the protective measures that accompany inter-country adoption orders. Since the courts grant these orders in legal environments that do not adequately regulate them, they have found it difficult to

include measures that would ensure that state authorities in their respective countries and the receiving countries monitor the wellbeing of the adopted children effectively for a reasonable period of time.

These case studies suggest that it is perhaps worthwhile to consider inter-country adoption as a central alternative care option and, hence, to make explicit provision for this. The courts must be allowed to consider all relevant rights of the child in determining whether inter-country adoption, or indeed any other form of alternative care, best serves the interests and rights of the child in a particular case.

Concerns about inter-country adoption can be addressed by legislating protective measures that are rational and relevant. Of particular importance are the substantive and procedural requirements to ensure that the right children are adopted and the right parents are allowed to adopt.

The two legal frameworks discussed in the article spend less time defining who the adoptable child is. Ideally, children who are deprived of family or parental care, either as a result of the death of their parent(s), parental neglect or abandonment, and where no relative is available to take them into care, should be considered adoptable. The eligibility of the adoptive parents is crucial to addressing the much talked-about possibility of inter-country adoption being used as a vehicle for child trafficking. The law could be clearer in prescribing requirements related to criminal records and capacity to look after a child, both materially and psychologically.

Once the substantive question of adoptability and eligibility to adopt has been addressed, more attention has to be given to the procedural protections that would guarantee that the adoption process is fair, workable, efficient and not abused. The article has demonstrated that, while residence may be an important protective measure for children, it has served largely as a barrier to the provision of alternative care to children who need it the most. To the extent that it makes it possible for adoptive parents to establish a prior relationship with a child under the supervision of social workers and relevant authorities, the residence requirement could be relaxed either by reducing the period of residence¹¹² or allowing for periodic visits to the country by prospective parents.¹¹³ This may be backed up with a temporary adoption order whereby the adoptive parent is allowed to remove the child from the sending state subject to supervision in the receiving state. A final order could then be made after the consideration of a final report from the authorities in the receiving state attesting to the capability of the adoptive parents to take care of

112 In Uganda, it appears that the residence requirement will be reduced from three years to one year, while the provisions governing the granting of guardianship orders will be amended. Based on an interview with a law reform officer at the Uganda Law Commission, 8 July 2014.

113 Eg, adoptive parents could be allowed to come to the sending state to spend time with the child under supervision for two or more short periods of time, such as a month each, over a year or so.

the child. These measures cannot be implemented without bilateral agreements between the receiving states and sending states. The measures also cannot be implemented without establishing competent institutions to regulate, facilitate and monitor court orders on inter-country adoption.

The provision of alternative care to children is an obligation that states have to children who lack parental care, and everything should be done to ensure that such children grow up in a family environment where they feel loved and can grow to realise their full potential.

A family home, five sisters and the rule of ultimogeniture: Comparing notes on judicial approaches to customary law in South Africa and Botswana

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Summary

Given the striking commonalities between the legal systems of South Africa and Botswana, both in terms of its common and customary law, and considering the propensity of the Botswana courts to engage with South African case law, a recent case of Botswana is of particular interest. In September 2013 in the Ramantele case, the Botswana Court of Appeal ruled on a customary law dispute that had been drawn out for more than seven years. The litigation history reads like a jurisprudential chronicle and demonstrates how traditional justice operates on various levels in a pluralistic justice system, and is a perfect example of legal pluralism in action. The case is interesting for a variety of reasons. First, it considers important principles regarding the meaning, status and ascertainment of customary law. Second, it discusses the influence of the Constitution on customary law and, third, it deals with the very important question as to the application of the Botswana Constitution on customary law. Lastly, it reflects on the role of the judiciary in solving customary disputes which, according to Lesetedi JA, is limited to the interpretation of 'the law to be applied in the dispute' and not to 'traverse issues that do not directly

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arise ... however important they may be'. In light of the fact that the Botswana legal system follows the principle of stare decisis and the fact that courts engage with the judgments of other jurisdictions, this case has the potential to influence the outcome of future cases of a similar nature. Against this background, this contribution investigates the contrasting approaches to constitutional adjudication in the context of customary law in the Botswana High Court and Court of Appeal, especially with reference to the approach followed by the South African Constitutional Court in the Bhe case.

Key words: *primogeniture; ultimogeniture; customary law of succession; human rights; Botswana; South Africa*

1 Introduction

The relationship between multiple legal systems in a pluralistic legal order remains a highly topical theme, especially in a post-colonial setting where transplanted and indigenous laws exist side by side. Botswana and South Africa are two examples. They share more than borders. They have historical links dating back to colonial times,¹ and both have a mixed, pluralistic legal system consisting of a transplanted, uncoded legal tradition (the common law)² and an indigenous, also uncoded, legal system (customary laws).³

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- 1 The territory of Bechuanaland (nowadays Botswana) came under British rule in 1885 but its administration was eventually passed onto the former Cape Colony, which was a British colony. The law in force in the Cape colony, basically Roman-Dutch law with English law influences, was received in Botswana and remains the core of the Botswana legal system even after the relationship between South Africa and Botswana was severed in 1909. See F Morton *et al Historical dictionary of Botswana* (2008) 9-11; DDN Nsereko *Constitutional law in Botswana* (2002) xv-xviii; CM Fombad *The Botswana legal system* (2013) 55-92.
 - 2 In this context, the expression 'common law' refers to the uncoded system of South Africa, which is a combination of English common law and Roman-Dutch law. The common law has been described as a 'virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society' in *Pearl Assurance Co v Union Government* 1934 AD 560 563.
 - 3 Botswana's legal system can be described as dualistic if one refers to the two distinct legal traditions, one based on Western traditions (a combination of received Roman-Dutch law and English law) and the other on African traditions (a plurality of indigenous laws). For a discussion of the Western mix, see CM Fombad 'Botswana and the dynamics of legal modernisation within a dual English common law/Roman-Dutch legal heritage' (2005) 13 *African Journal of International and Comparative Law* 7-24, and for a discussion of the domain of customary law, see CM Fombad 'Customary courts and traditional justice in Botswana: Present challenges and future perspectives' (2004) 15 *Stellenbosch Law Review* 169-170. See also A Griffiths 'Legal pluralism in Botswana: Women's access to land' (1998) 42 *Journal of Legal Pluralism* 123-139, especially 133-136. See C Rautenbach 'Some comments on the status of customary law in relation to the Bill of Rights' (2003) 14 *Stellenbosch Law Review* 107 for a discussion of the position of customary law in South Africa.

In spite of the fact that Botswana is geographically and population-wise much smaller than South Africa,⁴ both have a large percentage of traditional communities living under a system of customary law. In both countries, justice is dispensed within a dual system of mainstream courts⁵ and customary courts, co-existing and interconnected in many ways.⁶

The connection between the common law of South Africa and Botswana is often acknowledged by the Botswana judiciary. In *Kweneng Land Board v Mpofo*,⁷ the High Court of Botswana in Lobatse confirmed that '[t]he common law of Botswana, like that of South Africa, is not the English common law; it is the Roman-Dutch law'. The common law is thus a unified system of law which is territorial in nature: It has legal force in the whole of South Africa and Botswana, although the contemporary content of the common law differs quite considerably in both countries as a result of legal developments and other influences.

Customary law, on the other hand, is neither a unified system of law nor is it territorial. Although the term 'customary law' is used in the literature, legislation and case law of both countries, it is an umbrella term to describe the patchwork of traditional legal systems of traditional communities in South Africa and Botswana. Customary law is a myriad of personal laws intertwined with the different communities that follow their own laws, regardless of the territory in which they live. In the Botswana case of *Sekale v Ministry of Health*,⁸ the court agreed that customary law 'consists of a series of tribal customary laws whose number equates to the number of tribes in Botswana who have their own separate laws' and that it 'emerges from what people do and what they believe and accept to be binding on them'.⁹ In South Africa the situation is the same.¹⁰

4 Botswana is 581 730 square kilometres with a population of just over two million, and South Africa is 1 219 090 square kilometres with a population of almost 54 million people. See CIA 'The world factbook' <https://www.cia.gov/library/publications/the-world-factbook/> (accessed 11 August 2015).

5 These are the statutory courts based on Western principles. See Fombad (n 1 above) ch 5 for an overview of the mainstream court system in Botswana.

6 Informal and formal customary court structures exist both in Botswana and South Africa, and the transfer of cases by means of appeals, reviews or other methods to the mainstream courts is possible. The customary courts in both countries operate on several levels and differ from community to community. See I Schapera *A handbook of Tswana law and custom* (2004) 279-300 for a discussion of the procedures, and also Fombad (n 1 above) 112-115 for an overview of contemporary customary courts in Botswana. For the position in South Africa, see C Rautenbach & JC Bekker 'Traditional courts and other dispute resolution mechanisms' in C Rautenbach & JC Bekker (eds) *Introduction to legal pluralism in South Africa* (2014) 231-253.

7 2005 1 BLR 3 (CA) 15.

8 2006 1 BLR 438 (HC) para 20.

9 As above.

10 TW Bennett 'Application and ascertainment of customary law' in Rautenbach & Bekker (n 6 above) 38.

As a result of the general policies of non-interference and indirect rule of the former colonial powers, the common laws in South Africa and Botswana never supplanted the customary laws and this remains relevant for both countries.¹¹ Although the former policies were conducive to the survival of customary law, it did not entirely escape the winds of change. Over the years, customary law has been influenced by societal and economic changes, legislation, international law and judicial pronouncements in both countries.¹²

In spite of these commonalities between South Africa and Botswana, there are important differences which should be kept in mind, especially pertaining to the recognition, application and ascertainment of customary law. In the case of South Africa, customary law is explicitly recognised by the South African Constitution,¹³ and the courts are compelled to apply customary law where it is applicable.¹⁴ The supremacy of the South African Constitution has certain consequences for customary law, most notably the fact that it is subject to the Constitution. Similar to common law, customary law thus is open for constitutional scrutiny.¹⁵

On the other hand, the Botswana Constitution¹⁶ does not implicitly recognise customary law, but recognises it indirectly by referring to it in connection with the right to a fair trial,¹⁷ the right to equality¹⁸ and the promulgation of statutes.¹⁹ The application and ascertainment of customary law are regulated in terms of the Botswana Customary Law Act,²⁰ which commenced three years after the Botswana Constitution.²¹ Of interest is section 3, which prescribes

11 Fombad (n 1 above) 59; TW Bennett *Customary law in South Africa* (2004) 35-37.

12 For a discussion, see CM Fombad 'Gender equality in African customary law: Has the male ultimogeniture rule any future in Botswana?' (2014) 52 *The Journal of Modern African Studies* 475 487-490.

13 The Constitution of the Republic of South Africa, 1996. See secs 39(2) & (3), 211, 212 & Schedule 4 (Part A). See Bennett (n 10 above) 38-41 for a discussion.

14 The applicability of customary law deals with the topic of 'choice of law' or 'conflict of laws' which is either prescribed by statutes or judicial pronouncements. See Bennett (n 10 above) 41-44. In *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) para 54, the Constitutional Court laid down evidentiary rules for proving customary law, namely, evidence from individuals living under customary law, advisors to traditional leaders, traditional leaders or other experts. See the discussion at 2.7.1 below.

15 See, eg, *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC); *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) (*Bhe* case); *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC); *Pilane v Pilane* 2013 4 BCLR 431 (CC); *Sigcau v President of the Republic of South Africa* 2013 9 BCLR 1091 (CC); and *MM v MN* 2013 (4) SA 415 (CC).

16 LN 83 of 1966, as amended.

17 Secs 10(12)(b) & (e) Botswana Constitution.

18 Sec 15(4)(d) Botswana Constitution.

19 Sec 88(2) Botswana Constitution. Any legislation pertaining to customary law must be done in consultation with the House of Chiefs.

20 51 of 1969.

21 The Botswana Constitution entered into force on 30 September 1966 and the Customary Law Act on 22 August 1969.

the application of customary law in 'proper cases' and, if improper, the common law must be applied. The Act does not explain when a case would be 'proper' and when not, but a number of statutes exclude the application of customary law in various areas which would make it improper to apply customary law.²² Section 11 of the Customary Law Act prescribes the rules which must be applied to ascertain customary law, but only when doubt remains as to its contents after evidence has been led. The court may then consult reported cases,²³ textbooks and other sources, and may receive opinions to determine the customary law. However, if after all this customary law could not be determined, the court must deal with the matter 'in accordance with the principles of justice, equity and good conscience'.²⁴ This direction, according to Fombad,²⁵ gives the courts a wide discretion which must be 'exercised with caution, sensitivity, knowledge and understanding' of their judicial role. There is, of course, always the danger that a judge who has been educated in the common law tradition would choose to apply the common law instead of developing an offending customary law rule, as has happened in the South African *Bhe* case.²⁶

Statutory definitions of customary law exist in both South African and Botswana law. Although neither definition is flawless,²⁷ they do provide some guidance as to the meaning of customary law. In South Africa, the Recognition of Customary Marriages Act²⁸ describes customary law as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'. By contrast, the Botswana Customary Law Act²⁹ defines it 'in relation to any particular tribe or tribal community', as 'the customary law of that tribe or community

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- 22 Fombad (n 1 above) 86 discusses a few examples. One instance is sec 10(8) of the Botswana Constitution which stipulates that criminal offences may only be punished in terms of written law.
- 23 There seems to be no limitation as to which cases may be consulted, except that they must be reported cases. This is a strange instruction, since judges often refer to the unreported judgments of their counterparts.
- 24 Sec 10(2) Customary Law Act.
- 25 Fombad (n 1 above) 483.
- 26 *Bhe* case (n 15 above). In order to fill the void caused by the striking down of the rule of male primogeniture, the court held that the Intestate Succession Act 81 of 1987, with certain modifications regarding polygynous unions, had to be applied to all customary law estates. This approach has been criticised by a number of legal scholars, eg, SM Weeks 'Customary succession and the development of customary law: The *Bhe* legacy' in A Price & M Bishop (eds) *A transformative justice: Essays in honour of Pius Langa* (2015) 215-216; S Sibanda & TB Mosaka 'A cultural conundrum, Fanonian alienation and an elusive constitutional oneness' in Price & Bishop (above) 256-277-278.
- 27 For criticism raised against the South African definition, see JC Bekker & C Rautenbach 'Nature and sphere of African customary law' in Rautenbach & Bekker (n 6 above) 18-24, and for criticism against the Botswana definition, see Fombad (n 1 above) 85-86.
- 28 120 of 1998, sec 1. A similar definition is contained in sec 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 9 of 2009.
- 29 Sec 2.

so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice'. An important difference between these two definitions is the fact that the South African provision does not have an internal repugnancy clause, while the Botswana provision does. This may have important consequences for the way in which the courts approach customary law matters, as will be illustrated below.³⁰

Another tangent point between South Africa and Botswana is the tendency of Botswana judges to routinely refer in their judgments to South African case law and literature.³¹ In *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd*,³² Tebbutt JA declared:

The courts of Botswana have never been reluctant, in their own adaptation of the common law to the requirements of modern times, to have regard to the approach of the South African courts and to the writings of authoritative South African academics.

South African precedents also have persuasive value in Botswana courts, as confirmed in *State v Maitumelo Molefe*:³³

The decisions of the South African courts, or those of any other foreign court ... are not binding on the courts in Botswana; but such decisions *may have very substantial persuasive value, especially those of South Africa* where the common law is also Roman-Dutch law.

Historically, and also in line with the constitutional prescriptions of section 39(1)(c) of the South African Constitution,³⁴ the Constitutional Court of South Africa has considered Botswana cases at least nine times during a period of 16 years.³⁵ The number of citations is not indicative of the importance attached by South African constitutional court judges to Botswana cases, but merely of the fact that South African judges continue to take cognisance of foreign cases

30 See 2.7 below.

31 A number of reasons have been advanced for this being so. Besides historical and other links, South African judges have been acting as presiding officers in Botswana courts and lawyers have been receiving their legal training at South African universities. DDN Nsereko *Criminal law in Botswana* (2011) 43.

32 [1996] BLR 190 (CA) 194-195.

33 [1968-1970] BLR 100 (HC) (my emphasis).

34 This provision empowers the courts to consider foreign law when interpreting the Bill of Rights.

35 The period concerned is 1995 to 2011. The relevant cases are *S v Makwanyane* 1995 (3) SA 391 (CC) para 77 (1 time); *S v Zuma* 1995 (2) SA 642 (CC) paras 15 & 41 (3 times); *S v Williams* 1995 (3) SA 632 (CC) para 40 (1 time); *S v Mhlungu* 1995 (3) SA 867 (CC) para 78 (1 time); *Shabalala v Attorney-General Transvaal* 1995 (2) SACR 761 (CC) para 28 (1 time); *Osman v Attorney-General for the Transvaal* 1998 (4) SA 1224 (CC) para 21 (1 time); and *Bothma v Els* 2010 (1) SACR 184 (CC) para 57 (1 time). The empirical results are available at <http://www4-win2.p.nwu.ac.za/dbtw-wpd/textbases/ccj.htm> (accessed 13 August 2015). For a general discussion of the statistical results during this period, see C Rautenbach 'South Africa: Teaching an "old dog" new tricks? An empirical study of the use of foreign precedents by the South African Constitutional Court (1995-2010)' in T Groppi & M Ponthoreau (eds) *The use of foreign precedents by constitutional judges* (2013) 185-209.

post-1994. It does, however, illustrate that the South African Constitutional Court also engages in constitutional dialogue with its close neighbours.

Given the striking commonalities between the legal systems of South Africa and Botswana, both in terms of its common and customary laws, and considering the propensity of the Botswana courts to engage with South African case law, a recent case of Botswana is of particular interest. In September 2013, in the *Ramantele* case,³⁶ the Botswana Court of Appeal ruled on a customary law dispute that had been drawn out for more than seven years. There is nothing extraordinary about the facts of the case, except that it deals with an inheritance issue, and more specifically with the rule of ultimogeniture,³⁷ which normally is dealt with in a traditional way within the privacy of the family. In this case, however, the family members could not reach consensus and decided to use the available remedies that both the customary and common law of Botswana had on offer to solve their dispute.

The litigation history reads like a jurisprudential chronicle which began on an informal level with family mediation,³⁸ and continued on a formal level, first in the official customary courts³⁹ and, finally, in the mainstream courts – the High Court and subsequently the Court of Appeal. The course of the case demonstrates how traditional justice operates on various levels in a pluralistic justice system, and is a perfect example of legal pluralism in action.⁴⁰ The case is interesting for a variety of reasons. First, it considers important principles regarding the meaning, status and ascertainment of customary law.⁴¹ Second, it discusses the influence of the Constitution on customary law⁴² and, third, it deals with the very important question as to the application of the Botswana Constitution on customary law.⁴³ Finally,

36 *Ramantele v Mmusi* [2013] BWCA 1 (*Ramantele* case). Two judgments were delivered, one by Lesetedi JA with Kirby JP, Twum JA, Foxcroft JA and Legwaila JA concurring. This judgment will be referred to as the *Ramantele* case (main judgment). The other judgment was a separate but concurring judgment by Kirby JP. This judgment will be referred to as the *Ramantele* case (separate judgment).

37 In terms of this rule, the youngest son of a deceased is entitled to inheritance.

38 Customary justice is usually done within informal hierarchical structures commencing with the household, family and descent groups. Sec 3 of the Customary Courts Act (Cap 04:05 of the Customary Law Act 1969) consolidates the law relating to formal customary courts and indirectly sanctions their existence by laying down that the Act shall not apply to 'informal proceedings of an arbitral nature before a body (not established or recognized as a customary court under this Act) constituted under customary law'.

39 In terms of sec 2(1) of the Customary Courts Act, 'customary court' means '(a) a lower customary court; or (b) a higher customary court, established or recognised under the provisions of this Act'.

40 Legal pluralism has been described by J Griffiths 'What is legal pluralism?' (1986) 24 *Journal of Legal Pluralism* 1-2 to mean 'that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs'.

41 See the discussion at 2.7.1.

42 See the discussion at 2.7.2.

43 See the discussion at 2.7.3.

it reflects on the role of the judiciary in solving customary disputes which, according to Lesetedi JA, is limited to the interpretation of 'the law to be applied in the dispute' and not to 'traverse issues that do not directly arise ... however important they may be'.⁴⁴ In light of the fact that the Botswana legal system follows the principle of *stare decisis*,⁴⁵ this case has the potential to influence the outcome of future cases of a similar nature.

Interestingly, both the High Court and Court of Appeal considered South African cases, but reached totally opposite outcomes.⁴⁶ In a comparative context, the legal reasoning followed by the Botswana Court of Appeal regarding a variety of customary law issues will no doubt be of interest for the South African judiciary which has been struggling with similar questions.

Against this background, the aim of the article mainly is to investigate the contrasting approaches to constitutional adjudication in the context of customary law in the Botswana High Court and Court of Appeal, especially with reference to the approach followed by the South African Constitutional Court.

2 Facts of the case and litigation history

2.1 Birth of the dispute

The facts of the case were summarised by Kirby JP, who delivered a concurring but separate judgment in the Court of Appeal.⁴⁷ The late Silabo, a member of the Ngwaketse community, was the owner of a piece of land in Kanye in the Mafhikana ward, on which he established his homestead together with his wife, Thwesane. When he died in 1952, his estate, consisting of livestock and other property, was distributed amongst his heirs, except for his homestead in which Thwesane remained until the day of her death. After their father's passing, the five daughters developed the homestead for themselves and their mother with their own resources.⁴⁸ Neither the two sons (Banki and Basele), nor Silabo's biological son from another relationship (Segomotso) participated in any way in the developments. Thwesane died in 1988, but her estate was not

44 *Ramantele* case (main judgment) para 74.

45 In accordance with this rule, which was adopted from English law, a court is bound to former precedents when the same points arise again in litigation. However, a court will deviate from a former decision under certain circumstances, for example if it is satisfied that the former decision was incorrect. *Kweneng Land Board v Mpofo* 2005 1 BLR 3 (CA) 15.

46 See 2.6 and 2.7 below.

47 See the *Ramantele* case (separate judgment) paras 2-4. See also the *Ramantele* case (main judgment) paras 2-9. For the sake of convenience, only the first names of the parties and other relevant family members will be referred to.

48 They used their own resources to build three dwellings on the homestead. The largest one was built by the first respondent, who has been occupying it since 1991.

distributed. The couple's last-born son, Bashele, died in 1990 and their first-born son, Banki, five years later, in 1995. Their older half-brother, Segomotso, died in 2006. Edith (the first respondent in the Court of Appeal) was widowed in 1991 and returned to her parents' homestead to live in a house that she had built. At the time of the appeal she was already over 80 years old.

After Segomotso's death, his son Molefi (the appellant in the Court of Appeal) claimed that he was the only heir of the homestead via his father, who had allegedly obtained the homestead from Banki through an exchange-agreement, Banki having inherited it from Thwesane as the couple's youngest son.⁴⁹ Edith, on the other hand, conceded that the homestead belonged to their mother, Thwesane, and averred that she and her sisters were her only successors. This dispute became the object of a long and tedious process which finally came to an end in the highest court of Botswana, the Court of Appeal.⁵⁰

In terms of the law of Botswana, the intestate estates of people living under a system of customary law devolve in accordance with the customary rules of a particular community. Section 7 of the Customary Law Act provides that 'customary law shall be applicable in determining the intestate heirs of a tribesman and the nature and extent of their inheritance'. The customary law that applied to the facts of the case was the Ngwaketse rule of inheritance, which is based on the principle of ultimogeniture. In terms of this rule, the last-born son of a deceased is qualified to inherit the homestead of the family to the exclusion of all other siblings, male and female.⁵¹ This rule formed the basis of the dispute between the full-blood daughters of Segomotso and his half-blood grandson, Molefi, who wanted to claim his inheritance and, in the process, have them evicted from the homestead which they still occupied.

2.2 First step in mediation: A family affair

The first step in trying to resolve the dispute was taken on an informal level within the structures of the family unit. In accordance with customary law practices, the uncles and elders of the family at first tried to resolve the dispute, but they could not agree on the outcome.⁵² Some felt that Banki had inherited the homestead from his mother, Thwesane, as the youngest son, in accordance with the Ngwaketse custom. Others maintained that he had died before the estate had been distributed and also that he did not qualify as the heir because he had been banished from the homestead due to his bad

49 His contention was based on the Ngwaketse custom that the last born son qualifies as intestate heir to the exclusion of all female and other male siblings. See *Ramantele* case (separate judgment) para 4.

50 See the discussion at 2.7 below.

51 *Ramantele* case (main judgment) para 23.

52 *Ramantele* case (main judgment) para 15.

behaviour. The Mafhikana headman was also involved in seeking a resolution for the dispute, but was not able to persuade the family members to reach an agreement. Seeing that consensus could not be reached, the dispute was referred to the headman's court to adjudicate.

2.3 Lower customary court: The headman has spoken

The formal litigation between the parties commenced before the customary court of first instance during August 2007. The dispute came before the headman of the parties' ward, Ketsitlile, who, together with three other ward members, found in favour of Molefi after having heard conflicting evidence from a number of witnesses.⁵³ Ketsitlile found that under the Ngwaketse culture, the male child inherited because 'a male child never leaves his parents' home except when he marries, or due to bad behaviour which his parents do not condone', whilst a girl child 'leaves her parents' home when she gets married'.⁵⁴ Accordingly, the headman held that there was overwhelming evidence to prove that the homestead had been given to Segomotso and that Molefi was entitled to the homestead as the heir of Segomotso.⁵⁵

Edith was ordered to vacate the homestead within six months, but she was not satisfied with the outcome and appealed to the chief's court.⁵⁶

2.4 Higher customary court: The chief's ruling

The appeal came before Chief Kgosi Lotlaamoreng II, who dealt with the matter on 4 November 2008. He did not agree with the outcome of the headman's court and held that the dispute had to be decided on the facts. According to him, the facts revealed that all the male issue of Silabo and Thwesane had died before the homestead was distributed. The homestead thus belonged to all the children 'born of Silabo and Thwesane' and they all 'have a right to use it as they wish whenever they have a common event'.⁵⁷

53 There are discrepancies between the High Court and Appeal Court regarding the exact date when the dispute was before the headman's court. See the *Mmusi* case, which refers to 15 May 2007, and the *Ramantele* case (main judgment), which refers to 15 August 2007. The exact date is not of importance for this discussion, however, and such discrepancies often result from the fact that the headman's court is not normally a court of record. The proceedings in the headman's court have been recorded in detail in the *Ramantele* case (main judgment) paras 14-34.

54 *Ramantele* case (separate judgment) para 5A.

55 *Ramantele* case (main judgment) para 30.

56 An overview of the proceedings in the headman's court is provided in the *Ramantele* case (separate judgment) para 5A. The judgment of Dingake J in the High Court, however, states that Edith was given only 30 days to vacate the homestead, and the situation is a bit unclear. See the *Mmusi* case para 10.

57 *Ramantele* case (main judgment) para 31; *Ramantele* case (separate judgment) para 5B.

Kgosi Lotlaamoreng II ordered the elders present at the hearing to convene a meeting to determine which one of Silabo and Thwesane's children should be appointed to look after the homestead on behalf of all the children.⁵⁸

This time it was Molefi who did not agree with the order, and he appealed to the next level of traditional dispute resolution, namely, the customary court of appeal.

2.5 Customary court of appeal: Back to basics

The customary court of appeal did not agree with the order made by the higher customary court (the chief's court),⁵⁹ and made a ruling similar to that of the headman's court,⁶⁰ namely, that the Ngwaketse customary law had to be applied, which meant that Banki, as the last-born son of Silabo and Thwesane, was the rightful heir to the homestead.⁶¹ The homestead thus was the property of Segomotso through the agreement between himself and Banki, and, consequently, the property of Molefi through succession.

Edith was once again notified to vacate the homestead within three months,⁶² but instead of filing an appeal, Edith and three of her sisters (respondents 2, 3 and 4 in the Court of Appeal) brought an application in terms of section 18(1) of the Botswana Constitution⁶³ for review on constitutional grounds before the High Court of Gabarone. The dispute no longer formed part and parcel of the customary dispute resolution mechanisms, but was brought under the realm of the mainstream court system. Similar to South Africa,⁶⁴ the mainstream courts in Botswana are compelled to apply customary law under certain circumstances, especially where the proceedings are between members of traditional communities.⁶⁵

58 *Ramantele* case (main judgment) para 31.

59 See 2.4 above.

60 See 2.3 above.

61 The judgment was delivered on 5 September 2007.

62 *Ramantele* case (main judgment) paras 32-33; *Ramantele* case (separate judgment) para 5C; *Mmusi* case paras 9-11.

63 Sec 18(1) of the Constitution stipulates that '[i]f any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress'.

64 Sec 211(3) of the South African Constitution compels South African courts to apply customary law when it is applicable.

65 See secs 3 and 4 of the Customary Law Act, and also the discussion at 2.7.2 below.

2.6 High Court of Botswana: A constitutional approach

The application for review in the *Mmusi* case was brought in a rather unorthodox way,⁶⁶ but was nevertheless enthusiastically considered by Dingake J, the presiding judge in the High Court. He decided the case on constitutional grounds. Initially, the applicants (Edith and her sisters) argued that the Ngwaketsi rule of ultimogeniture was unconstitutional because of its violation of section 15(1) of the Constitution, which prohibits discriminatory laws '[s]ubject to the provisions of subsection (4)'. The question as to what 'discriminatory' means is answered in subsection 3, namely:

... affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Subsection 4 is an exclusionary clause which excludes the operation of section 15(1) in the case of law that makes provision for, amongst others, 'devolution of property on death or other matters of personal law'.⁶⁷ Subsection 4 proved to be an insurmountable hurdle to the applicants, which is probably the reason why the applicants decided to abandon their reliance on section 15(1) and instead to put their faith in section 3(a) of the Botswana Constitution.⁶⁸ Section 3(a) reads:⁶⁹

Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely -

(a) life, liberty, security of the person and *the protection of the law*.

It was not a problem for the Court that the applicants no longer stood by section 15 to argue their case, because it felt that it was the prerogative of the parties to decide which provisions of the Constitution they wanted to rely on.⁷⁰ After giving a detailed analysis

66 Instead of launching an appeal or review proceedings against the decision of the customary Court of Appeal, which was the logical step to take, the parties filed for review in terms of order 35, rule 1 of the Court Rules. In addition, the review application was procedurally flawed, because it was filed out of time without express grant of leave as set out in order 61(8) of the High Court Rules. Furthermore, Dingake J was criticised for permitting counsel to formulate two contradictory rules of customary law to be tested for their constitutionality while constitutionality was not an issue at all. *Ramantele* case (main judgment) paras 35-36.

67 Botswana Constitution sec 15(4)(c).

68 See *Kamanakao v Attorney-General* 2001 2 BLR 54 para 15, where the Court stated that 'the rights declared in section 3 of the Constitution inhere in every person in Botswana without exception or discrimination'.

69 My emphasis.

70 Para 212.

of the legal position in Botswana and elsewhere, the Court came to the conclusion that the Ngwaketse rule of inheritance, based on ultimogeniture, differentiated between men and women. This differentiation is based on the ground of gender, which is prohibited in terms of section 3(a) of the Constitution, and is thus unfair. On the authority of a South African case, *Harksen v Lane*,⁷¹ known for its formulation of the two-stage enquiry to determine equality, the Court came to the conclusion that culture could not be any justification for the discrimination,⁷² because such an approach would 'amount to the most glaring betrayal of the express provisions of the Botswana Constitution and the values it represents'.⁷³

Consequently, the Court set aside the judgment of the customary court of appeal and made the following order:⁷⁴

- 1 The Ngwaketse customary law rule that provides that only the last-born son is qualified as intestate heir to the exclusion of his female siblings is *ultra vires* section 3 of the Constitution of Botswana, in that it violates the applicants' rights to equal protection of the law.
- 2 The judgment of the Customary Court of Appeal under Civil Case Number 99 of 2010 and dated 22 September, 2010, to the extent that it applied such rule, is hereby reviewed and set aside.

The Court, however, did not make a ruling as to who was competent to inherit if the rule of ultimogeniture did not apply. The Court of Appeal⁷⁵ was highly critical of the fact that the High Court did not determine what remedy the respondents had. It was not clear whether or not they were supposed to go back to the customary law structures to ask for a remedy. The fact that the Court created a *lacuna* which should have been filled was also disapproved of by Fombad, who argues that a *clearly established* rule of customary law must be enforced by the courts except if it is 'incompatible with the provisions of any written law or contrary to morality, humanity or natural justice', as directed by section 2 of the Customary Law Act.⁷⁶ If the customary rule is uncertain, the situation must be resolved by applying section 10(2) of the Customary Law Act, which lays down that the 'courts shall determine the matter in accordance with the principles of justice, equity and good conscience'.

A few other aspects of Dingake J's reasoning also warrant mentioning. First, he believed that it was the functioning of judges to treat the Botswana Constitution as a 'living organism' which must be 'constantly shaped to become a suitable tool to address contemporary challenges'. In poetic fashion, he declared that judges must 'assume the role of judicial midwives' to assist in the 'birth of a new world

71 1998 (1) SA 300 (CC).

72 *Mmusi* case paras 189-215, and more specifically para 200.

73 Para 201.

74 *Mmusi* case para 222.

75 *Ramantele* case (main judgment) para 39.

76 Fombad (n 12 above) 475 482-483.

struggling to be born, a world of equality between men and women as envisaged by the framers of the Constitution'.⁷⁷

The words of the judge finds considerable resonance in the transformative constitutionalism jurisprudence of the South African Constitutional Court.⁷⁸ The South African Constitution has been described as a 'transformative document' and the process of transformation as envisaged by the Constitution as 'transformative constitutionalism'. Transformative constitutionalism and everything it entails have been enthusiastically embraced by the South African judiciary. In general terms, it refers to the mammoth task placed on the shoulders of the Constitution to effect transformation from the old, and everything bad associated with it, to the new and idealistically good.

In some cases, the South African Constitutional Court has applied the notion of transformative constitutionalism in dealing with the complexities created by a pluralistic legal system.⁷⁹ The late Chief Justice Langa explained it as follows:⁸⁰

The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

Transformative constitutionalism provides South African courts with reasons and opens their eyes to the significance of dialogic constitutional reasoning. An animated and eloquent common law style of writing judgments has entered into and established itself in the constitutional sphere, also with regard to customary law. Deputy Chief Justice Moseneke points out that 'courts have a constitutional obligation to develop customary law in order to align it with constitutional dictates'.⁸¹

In light of the overarching importance of the South African Constitution in the development of customary law, it is surprising that

77 Para 67.

78 The term 'transformative constitutionalism' was used for the first time by K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146-188, but has since then found a solid place in the legal scholarship and judgments of the courts, eg *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 232; *S v Mhlungu* 1995 (3) SA 867 (CC) para 8; *Hassam v Jacobs* 2009 (5) SA 572 (CC) para 28; and *Road Accident Fund v Mdeyide* 2011 1 BCLR 1 (CC) para 125.

79 For a discussion of some of these cases, see C Rautenbach & W du Plessis 'African customary marriages in South Africa and the intricacies of a mixed legal system: Judicial (in)novatio or confusio' (2012) 57 *McGill Law Journal* 749 772.

80 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) para 21.

81 *Gumede v President of Republic of South Africa* 2009 (3) SA 152 (CC) para 166.

the Botswana Court of Appeal⁸² and other legal scholars⁸³ are opposed to the constitutional approach of the Botswana High Court. Although one has to concede that the Botswana Constitution does not have the same wording as the South African Constitution, the Botswana Constitution is certainly also supreme law⁸⁴ against which all laws should be tested. In *Attorney-General v Dow*,⁸⁵ the Court cited with approval the *dictum* from *Petrus v The State*:⁸⁶

The supreme law of the land; that it is a written, organic instrument meant to serve not only the present generation, but also several generations yet unborn ... *that the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities, must involve, ours being a plural, dynamic society, and, therefore, more technical rules of interpretation of statutes are to some extent inadmissible in a way as to defeat the principles of government enshrined in the Constitution.*

The Botswana Interpretation Act⁸⁷ defines 'written law' as 'the Constitution, Acts and statutory instruments', thus clearly distinguishing the Constitution from other types of statutes. The fact that the Customary Law Act only recognises the laws of a community as customary law if they are 'not incompatible with the provisions of any *written law* or contrary to morality, humanity or natural justice'⁸⁸ means that customary law which is inconsistent with the Botswana Constitution should not be recognised. This implies that the Constitution could, or even should, be applied to each and every customary rule to determine its constitutionality.

The second aspect of Dingake J's judgment is his favourable approach towards foreign and international law, which is also in line with many other jurisdictions, including South Africa, where the

82 *Ramantele* case (main judgment) para 37: 'It is important to note that a court should not be too quick to consider the constitutionality of a customary law unless it is possessed of sufficient evidence regarding the existence and content of such custom, its application and the rationale thereof. Should a court do so, it is likely to find itself making decisions which have got no contextual and factual foundation, yet with far-reaching consequences.'

83 Fombad (n 12 above) 482 argues that '[i]n dealing with customary law, a court must not easily or hastily rush to the conclusion that it is invalid merely because it appears to be inconsistent with modern law – whether this be the constitution, statutory law, common law or even international human rights instruments'. However, elsewhere the author argues that '[t]he Bill of Rights in the Constitution provides more than enough safeguard that should ensure that any customary laws that are contrary to morality, humanity and natural justice will be invalidated'. It is difficult to imagine how this can be done, without a constitutional investigation of the constitutionality of the customary laws. See Fombad (n 1 above) 90.

84 This can be inferred from sec 86 of the Botswana Constitution which gives legislative powers to the Botswana Parliament subject to the Constitution. See Fombad (n 1 above) 68.

85 (2001) AHRLR 99 (BwCA 1992) para 19.

86 (1984) BLR 14 34 (my emphasis). This quote is from Higgins J in the Australian High Court in *Attorney-General for New South Wales v Brewery Employees Union of New South Wales* (1908) 6 CLR 469 611-612.

87 20 of 1984.

88 My emphasis. See sec 2 of the Act.

courts regularly engage in constitutional dialogue.⁸⁹ The value of comparative law, according to Dingake J, is that it can 'offer much richer range of model solutions'.⁹⁰ There is no need to reinvent the 'wheel of justice' if other systems around the world can offer a great variety of solutions.⁹¹ He was of the opinion that the jurisprudence of other jurisdictions should be 'interrogated and if relevant, applied'.⁹² Fombad is not impressed by the Court's use of foreign precedents. According to him, the 'use of foreign authorities could thus hardly be justified – and, if anything, was a futile attempt to display legal erudition which only obscured the issues which should have been addressed'.⁹³ There is, however, nothing in the judgment of Dingake J to indicate that he was persuaded by foreign cases to reach the conclusion that he did. Citing foreign cases is what judges do, even though they do not always find themselves bound by the ruling of a foreign court. As explained by former Justice Ackermann of the South African Constitutional Court:⁹⁴

[F]oreign law is not in any sense binding on the court referring thereto ... One may be seeking information, guidance, stimulation, clarification, or even enlightenment, but never authority binding on one's own decision. One is doing no more than keeping the judicial mind open to new ideas, problems, arguments, solutions, etc ... Of course, the right problem must, in the end, be discovered in one's own constitution and jurisprudence, but to see how other jurisdictions have identified and formulated similar problems can be of great use.

One more aspect, likely the more critical one, is the constitutional gymnastics performed by the Court to circumvent the effects of section 15 of the Botswana Constitution. For one, Dingake J was of the opinion that it was the prerogative of the applicants to decide in terms of which constitutional provision they wanted to proceed and if they wanted to rely on section 3 and exclude section 15, they could do so. Second, he referred with approval to the judgment of *Dow v Law Society of Botswana*,⁹⁵ where the court examined both sections 3

89 Fombad (n 12 above) 483 identified 22 cases from nine different jurisdictions. For a discussion of this phenomenon, also referred to as 'comparative constitutional jurisprudence', see Rautenbach (n 35 above) 185-209; C Rautenbach & L du Plessis 'In the name of comparative constitutional jurisprudence: The consideration of German precedents by South African Constitutional Court judges' (2013) 14 *German Law Journal* 1539-1578.

90 Para 116.

91 As above.

92 Para 214.

93 Fombad (n 12 above) 483.

94 LWH Ackermann 'Constitutional comparativism in South Africa: A response to Sir Basil Markesinis and Jörg Fedtke' (2005) 80 *Tulane Law Review* 169 183-184.

95 *Attorney-General v Dow* 1992 BLR 119 (CA) 127H. The appellant argued, amongst others, that the Botswana Constitution had to be construed as a whole, resulting in the application of the exclusionary clause in sec 15 in cases of discrimination based on a person's 'sex'. One important difference between this case and that of *Mmusi* is the fact that the former dealt with the omission of the word 'sex' from sec 15(3), whilst the latter dealt with the explicit exclusion of the customary rules of succession from the discrimination clause.

and 15 of the Botswana Constitution. It held that section 3 was a substantive provision and that the fundamental rights entrenched in section 3 could not be abridged by section 15:

In South Africa, it is a well-known principle of constitutional interpretation that individual constitutional provisions must not be considered in isolation but in light of a constitution as a whole.⁹⁶ However, in defence of Dingake J, it is important to remember that the South African Constitution is a modern one where similar provisions excluding customary law from the equality provisions are unlikely to be found. It is thus understandable that the Botswana courts would look for alternative ways to circumvent ostensibly unfair provisions in an outdated Botswana Constitution. The role of the judiciary in developing an out-of-date constitution, such as that of Botswana, was explained as follows by Amisshah P:⁹⁷

The Constitution is the supreme law of the land and it is meant to serve not only this generation but also generations yet unborn. It cannot be allowed to be a lifeless museum piece; on the other hand the courts must continue to breathe life into it from time to time as the occasion may arise to ensure the healthy growth and development of the state through it. In my view, the first task of a court when called upon to construe any of the provisions of the Constitution is to have a sober objective appraisal of the general canvass upon which the details of the constitutional picture are painted. It will be doing violence to the Constitution to take a particular provision and interpret it one way which will destroy or mutilate the whole basis of the Constitution when by a different construction the beauty, cohesion, integrity and healthy development of the state through the Constitution will be maintained. We must not shy away from the basic fact that whilst a construction of a constitutional provision may be able to meet the demands of the society of a certain age such construction may not meet those of a later age. In my view the overriding principle must be an adherence to the general picture presented by the Constitution into which each individual provision must fit in order to maintain in essential details the picture of which the framers could have painted had they been faced with circumstances of today. To hold otherwise would be to stultify the living Constitution in its growth. It seems to me that a stultification of the Constitution must be prevented if this is possible without doing extreme violence to the language of the Constitution. I conceive it that the primary duty of the judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity.

The *Mmusi* case received worldwide acclaim and was particularly welcomed by organisations and individuals striving for the protection of human rights and gender equality.⁹⁸ The jubilation was shortlived,

96 *Matatiele Municipality v President of the Republic of South Africa* 2007 (6) SA 477 (CC) para 36; and *Jaga v Dönges* NO 1950 (4) SA 653 (A) 664H.

97 *Dow* (n 95 above) 166.

98 'Botswana women allowed to inherit' *BBC News* 12 October 2013, <http://www.bbc.com/news/world-africa-19924723> (accessed 6 May 2014). On 18 June 2013 the Women's Link Worldwide gave a Bronze Gender Justice Uncovered Award to the High Court of Botswana for its decision in the *Mmusi* case, in recognition of its significant contribution to promoting gender equality.

however.⁹⁹ Molefi appealed to the Court of Appeal of Botswana, which was highly critical of Dingake J's handling of the case, and his ruling was finally set aside. The substance of the Court of Appeal's concerns had to do with the handling of the court *a quo* of both the facts and certain matters of law, especially its constitutional approach.¹⁰⁰

2.7 Botswana Court of Appeal: Back to the drawing board

As already explained, the judgment of the High Court was set aside in the Court of Appeal in the *Ramantele* case (both main and separate judgments). The Court of Appeal took a totally different direction from that of the High Court, though the outcome was essentially the same.¹⁰¹ The Court of Appeal was of the opinion that the determination of the constitutionality of the rule of ultimogeniture was irrelevant to the real dispute between the parties, which had to do with the question whether Molefi was the rightful heir to the homestead or not. This question needed to be answered on the facts alone and not within the realm of the Botswana Constitution.¹⁰²

The facts that needed to be proven in order for Molefi to succeed with his claim were, according to Lesetedi JA, as follows:¹⁰³ that Banki (the last-born son) had inherited the homestead from his deceased parents; that such inheritance was in accordance with the Ngwaketse custom of ultimogeniture; that the custom entitled the last-born son to do with the homestead as he pleased; that the custom was indeed 'law' that falls under the definition of 'customary law' contained in section 2 of the Customary Law Act; and that there was indeed an agreement between Banki and Segomotso in terms of which Segomotso obtained ownership of the homestead. According to the Court, there was evidence of Edith's possession of the homestead for over 20 years and no evidence that Banki had obtained ownership that could be transferred to Molefi. As a result, Molefi's case had to fail

99 Legal scholars were less enthusiastic about the approach taken by Lesetedi J. See eg GR Lekgowe '*Mmusi & Others v Ramantele & Another: An opportunity missed to begin the burial of Attorney-General v Unity Dow?*' (2012) *University of Botswana Law Journal* 81-90, which criticises the Court's failure to appreciate the important differences between secs 3 and 15 of the Constitution.

100 The Court of Appeal (both the main and separate judgments) was highly critical of Dingake J's consideration of secs 3 and 15 of the Constitution in isolation. See *Ramantele* case (separate judgment) paras 11-13 and *Ramantele* case (main judgment) paras 58-65.

101 The Court of Appeal came to the conclusion that the order of the court *a quo* had to be set aside and replaced, but that its outcome 'namely that the respondents retain the family homestead will remain the same'. According to the Court, this also meant that Molefi (the appellant) essentially lost his case and he had to pay the costs of the application in both the Court of Appeal and the court *a quo*. See *Ramantele* case (main judgment) paras 103-105.

102 *Ramantele* case (main judgment) paras 37, 41-42. According to Lesetedi JA, '[i]t is a well-recognised general rule of decision making that where it is possible to decide a case before the court without having to decide a constitutional question, the court must follow that approach'. See para 41.

103 *Ramantele* case (main judgment) para 43.

on this fact alone and it was thus unnecessary to look at the other facts to resolve the dispute.¹⁰⁴

There were also other hurdles which Molefi could not overcome, which will not be discussed here,¹⁰⁵ and the Court finally set aside the order of the High Court, declaring that the Ngwaketse law of inheritance did not exclude female or other siblings from inheriting their deceased parents' homestead. In addition, the Court declared the decision of Kgosi Lotlaamoreng II¹⁰⁶ to be valid, but added that if the surviving children of Silabo and Thwesane were unable to agree who amongst them was responsible for taking care of the homestead, the matter had to be referred to the elders and uncles for resolution and, failing this, the children had to be assisted by a person appointed by Kgosi Malopi II of the Bangwaketse community. After a long battle in the courts, the matter was referred back to the family members to resolve the dispute between the parties, thus right back to where it all began. This has to be a rather frustrating situation for Edith and her sisters, and I agree with Fombad that the final decision of the Court of Appeal is rather disappointing in this respect.¹⁰⁷ Given the fact that similar situations are likely to arise again, it would have been judicious for the Court, as highest court in legal matters, to have provided guidelines to be followed by the lower courts.¹⁰⁸

Regardless of the fact that the case was finally resolved by a proper interpretation of the facts, the case and its progress through the various levels of dispute resolution illustrate some of the intricacies a pluralistic legal system foregrounds. These issues primarily have to do with the status and application of indigenous laws in relation to the transplanted colonial laws, the developmental function of the judiciary in the context of indigenous laws, and the influence of constitutionalism on these laws. On each of these issues the Court of Appeal had something to say, and in the light of the importance of these statements for future litigation, it would be interesting to discuss some of these.

2.7.1 Meaning, status and ascertainment of customary law in Botswana

The first point the Court of Appeal deliberated on,¹⁰⁹ which is equally problematic in South African law,¹¹⁰ is the elusive meaning of customary law.¹¹¹ In line with the approach taken by some legal scholars, most of whom received their legal training in uncodified

104 *Ramantele* case (main judgment) para 29.

105 For more information, see *Ramantele* case (main judgment) paras 45-47.

106 See 2.4 above.

107 Fombad (n 12 above) 485.

108 As above.

109 *Ramantele* case (main judgment) paras 47-48.

110 See Bekker & Rautenbach (n 27 above) 17-23.

111 Legal scholars have been grappling with the same problems. See Nsereko (n 1 above) 25-32 164-202.

mixed legal systems, the first step is to determine whether customary law is statutorily defined. As explained earlier, the definition in section 2 of the Botswana Customary Law Act¹¹² provides some guidance as to the meaning of customary law, but qualifies it by, firstly, linking it to a 'tribe or tribal community'¹¹³ and, secondly, by requiring it not to be inconsistent with other laws, morality, humanity or natural justice.¹¹⁴ Some scholars maintain that customary law refers to 'those established usages and observances that have developed over a period of time and have been generally accepted by the tribe concerned as binding'.¹¹⁵ This is in accordance with Schapera's explanation that the basic source of Tswana law is to be found in the customary usages and observances of the community, which have 'already established themselves in practices and become accepted through tradition'.¹¹⁶

The requirement that the customs on which customary law is based should have longevity certainly presents challenges, as it does not take cognisance of the fact that societies are on the move, and so are their customs. Lesetedi JA in the *Ramantele* case (main judgment) recognised this phenomenon and confirmed the dynamic and flexible nature of customary law as being susceptible to change in accordance with societal changes.¹¹⁷ It is notable that the Lesetedi judgment does not require the prolonged existence of customary law, but regards it merely as 'a comprehensive tapestry of interrelated and interdependent rules, covering every aspect of family and societal life'.¹¹⁸

The indefinable nature of customary law filters through to other important issues, such as its status and ascertainment. The (perceived or real) inferior status of an indigenous legal system versus a transplanted one is indeed a bone of contention in many pluralistic legal orders. Botswana is no exception.¹¹⁹ As a result of Britain's policy of indirect rule, customary law was never replaced by the legal systems of Botswana's colonial powers, but co-existed side by side

112 A similar definition is given in sec 2 of the Customary Courts Act.

113 Sec 2 of the Customary Law Act defines a tribe as 'a section of a tribe' (a definition that makes no sense at all) and a tribal community as 'any community which is living outside a tribal territory but is organised in a tribal manner'.

114 Often referred to as the 'repugnancy clause'. See Nsereko (n 1 above) 31.

115 See Fombad (n 1 above) 85.

116 Schapera (n 6 above) 38-39.

117 *Ramantele* case (main judgment) para 77. In his separate judgment, Kirby JP confirmed that customary law has two outstanding characteristics, namely, its 'evolutionary nature and its flexibility' – see *Ramantele* case (separate judgment) paras 26-28.

118 *Ramantele* case (main judgment) para 25.

119 The theory of legal pluralism and its categories is a highly complex and debated topic. I do not intend engaging in these debates, but accept for the purpose of this discussion the divisions made by Griffiths (n 40 above) 1-55 between deep (or official) pluralism and weak (or unofficial) legal pluralism. This is also the distinction G van Niekerk & C Rautenbach 'The phenomenon of legal pluralism' in Rautenbach & Bekker (n 6 above) 6-7 prefer to make. The narrow interpretation

with it.¹²⁰ After colonialism, legal reforms did not alter the dual nature of the Botswana legal system much. In fact, most of the reforms seem to affect primarily the common law, while very little change has been brought about in the area of customary law.¹²¹ Although Kirby JP was of the opinion that customary law is equal in status to the common law of Botswana, this could hardly be true.¹²² For one, according to Kirby JP, unlike the common law, a court cannot take judicial notice of a rule of customary law; it is a question of fact which must be proven, especially in the mainstream courts, where the judges have little or no knowledge of customary law.¹²³ Secondly, in order for it to be enforceable, it must pass the scrutiny of the repugnancy clause in the definitional provision of the Customary Law Act, which requires that it must not be 'incompatible with the provisions of any written law or contrary to morality, humanity or natural justice'.¹²⁴ Thirdly, the application of customary law is limited by a number of statutes, for example section 10(8) of the Constitution, which provides that '[n]o person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a *written law*'.¹²⁵ As already explained, written law includes the Botswana Constitution and other statutes; customary law is thus excluded. The subsidiary position of customary law is also evident from the statement of Lesetedi AJ in the *Ramantele* case (main judgment), who attached the existence of a customary law to the fulfilment of certain conditions:¹²⁶

A customary rule to receive the status of a law and thus be enforceable by the courts must not be inconsistent with the values of or principles of natural justice. It must not be unconscionable either of itself or in its effect. Nor should it be inhuman. Customary law must be applied in accordance with the set out principles of morality, humanity or natural justice with the object of achieving justice and equity between the disputants.

of legal pluralism in the context of family law is the co-existence of officially-recognised state laws, whilst deep legal pluralism can be regarded as the factual situation which reflects the realities of a society in which various legal systems are observed, some officially and others unofficially. See also C Rautenbach 'Deep legal pluralism in South Africa: Judicial accommodation of non-state law' (2010) 60 *Journal of Legal Pluralism* 143-178.

120 Although this could hardly be described as an equal relationship. See also Fombad (n 1 above) 59-62.

121 Some of the developments are discussed by Fombad (n 1 above) 62-65.

122 *Ramantele* case (separate judgment) para 25. Kirby JP drew an analogy to the well-cited South African case of *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC), which held that the South African common law and customary law are on a par with each other.

123 It must be proven by means of expert evidence. See *Ramantele* case (separate judgment) para 29.

124 See sec 2 of the Customary Law Act, and also *Ramantele* case (main judgment) para 47. Fombad (n 1 above) 90 is highly critical of the repugnancy clause and argues that it has no place in modern Botswana law, where the Constitution should provide more than enough safeguard against human rights abuses.

125 My emphasis. See the definition of 'written law' at 2.6 above.

126 Para 49.

Lesetedi JA found that the customary rule that denied Edith and her sisters the right to share in the deceased estate 'goes against the notion of fairness, equity and good conscience' and that, therefore, it did not 'qualify to be given the status of a law'.¹²⁷ There was thus no customary rule which could have been subjected to constitutional scrutiny. It therefore seems that the test for the existence of a customary law rule in Botswana is different from the test in South African law. In *Shilubana v Nwamitwa*,¹²⁸ Van der Westhuizen J summarised the modern approach to ascertaining customary law:

Where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of s 39(2)¹²⁹ must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law.

More recently, in *Mayelane v Ngwenyama*,¹³⁰ the South African Constitutional Court also explained what the requirements for dealing with customary law are:

- (a) Customary law must be understood in its own terms, and not through the lens of the common law.
- (b) So understood, customary law is nevertheless subject to the Constitution and has to be interpreted in the light of its values.
- (c) Customary law is a system of law that is practised in the community, has its own values and norms, is practised from generation to generation and evolves and develops to meet the changing needs of the community.
- (d) Customary law is not a fixed body of formally-classified and easily-ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life.
- (e) Customary law will continue to evolve within the context of its values and norms, consistently, with the Constitution.
- (f) The inherent flexibility of customary law provides room for consensus seeking and the prevention and resolution, in family and clan meetings, of disputes and disagreements.
- (g) These aspects provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy communitarian traditions like *ubuntu*.

127 *Ramantele* case (main judgment) para 50.

128 2009 (2) SA 66 (CC) para 49.

129 Sec 39(2) of the Constitution provides: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

130 2013 (4) SA 415 (CC) para 24 (footnotes omitted). See also Bennett (n 10 above) 51.

However, in order to prove what the customary rules are, the Court accepted well-established rules of evidence, namely, testimony and affidavits from individuals living in accordance with Tsonga law, an advisor to traditional leaders, traditional leaders and other experts.¹³¹ Regardless of the customary law so found, it must be brought 'into line with the values of the Constitution'.¹³²

This brings us to the third issue. How is customary law, consisting of flexible unwritten rules, determined in Botswana? In other words, considering that customary law has to remain relevant to the lives of people and, therefore, must constantly adapt to changing circumstances, how can it be ascertained? Lesetedi JA alluded to this problem and acknowledged that it would not be an easy task for a court to 'identify a firm and inflexible rule of customary law for the purpose of deciding upon its constitutionality or enforceability'.¹³³ Although customary law is recognised in terms of the Constitution and the Customary Law Act, Lesetedi AJ held, on the basis of the definitional provisions in the Customary Law Act read with section 10(2),¹³⁴ that the party relying on a customary law rule still has the onus to prove not only that the rule exists, but also that it is an enforceable rule and that it is not repugnant to statutory law, morality, humanity or natural justice.¹³⁵

As already explained, section 11 of the Botswana Customary Law Act provides guidelines for the ascertainment of customary law, but this provision becomes operational only after a court has doubts as to the existence of a rule of customary law in spite of evidence led by the parties. Section 11 stipulates as follows:¹³⁶

If any court entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings, after having considered such submissions thereon as may be made by or on behalf of the parties, *it may consult reported cases, textbooks and other sources, and may receive opinions either orally or in writing to arrive at a decision in the matter:*

Provided that -

- (i) the decision as to the persons whose opinions are to be consulted shall be one for the court, after hearing such submissions thereon as may be made by or on behalf of the parties;
- (ii) any cases, text books, sources and opinions consulted by the courts shall be made available to the parties;

131 Para 131.

132 Para 54.

133 *Ramantele* case (main judgment) para 29.

134 This provision stipulates that '[i]f the system of customary law cannot be ascertained in accordance with subsection (1) or if the customary law is not ascertainable, the court shall determine the matter in accordance with the principles of justice, equity and good conscience'.

135 *Ramantele* case (main judgment) paras 45-47. Fombad (n 1 above) 90 finds it surprising that the repugnancy clause was retained in the Botswana legislation after independence, because of its evident bias against customary law.

136 My emphasis.

- (iii) any such oral opinion shall be given to the court in the same manner as oral evidence.

It is important to consider that, although the court must seek the answer in written sources, customary law does not become a written law; it remains unwritten. Therefore, the written sources are merely records 'of the position of a given custom as it prevailed at a particular point in the life or history' of a traditional community, but not afterwards.¹³⁷ Although these sources may be useful to demonstrate how a rule of customary law developed, the content of the rules must be determined by the 'prevailing societal ambience of the concerned community', which can be found in contemporary records such as recent case studies and oral evidence.¹³⁸

The conundrum created by ever-changing customary rules and the inflexibility of a written rule illustrates the problem the courts are faced with. A written rule cannot easily be changed. It is certain, but it does not allow for transformation in accordance with societal changes. On the other hand, flexible, unwritten customary rules relinquish certainty but keep up with contemporary changes in society.

Of course, the common law¹³⁹ is not indifferent to or detached from society. It is also described as an age-old but 'living' legal system that constantly adapts to changes in society.¹⁴⁰ Therefore, the courts of Botswana have never shied away from adapting the common law to contemporary changes.¹⁴¹ Both legal traditions are rooted in the value systems of the communities from which they originated: The common law is rooted in Western values and the customary law in African values. Although scholars usually focus on the differences

137 *Ramantele* case (main judgment) para 77.

138 As above.

139 The concept 'common law' is equally ambiguous, especially to scholars not familiar with the legal history of Botswana and South Africa. Fombad (n 1 above) 72-74 points out that the expression 'common law' may have at least three meanings. First, it may be used to refer to the law of Botswana in general, in other words the law 'common' to Botswana. Second, it may refer to those legal systems (Botswana inclusive) that have been influenced by English common law, and thirdly it may be used to refer to the unwritten laws (excluding customary law) of Botswana. The latter includes the transplanted combination of Roman-Dutch and English rules. For the purpose of this discussion, the latter explanation of the meaning of the common law is followed.

140 Also AJ Kerr 'The reception and codification of systems of law in Southern Africa' (1958) 2 *Journal of African Law* 82 100 declared: 'Southern African experience then shows that with a textbook or textbooks of persuasive authority, with legislation where necessary for reform and regulation, with the beneficial work of the courts and with particular custom allowing changes to be made directly by the people themselves, a body of law rich in material and capable of development may be built up.'

141 In *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd* [1996] BLR 190 (CA) 7, the court quoted with approval the classic passage in *Pearl Assurance Co v Union Government* 1934 AC 570 (PC): 'Roman-Dutch law is a virile living system of law, ever seeking, as every system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society.'

between the values or norms of the common and customary law, the fact that both are flexible and adaptable legal systems cannot be ignored.

2.7.2 Application of the Constitution to customary law

The application of customary law in the mainstream courts of Botswana is regulated in terms of the Customary Law Act and, although the provisions dealing with application are not formulated in altogether clear language, the issue of application does not seem to create much difficulty in the courts.¹⁴²

More controversial, however, is the question whether or not the Botswana Constitution is applicable to customary law. Both the main and the separate judgments of the Court of Appeal agreed that the court a quo erred in its application of the Constitution to resolve the dispute.¹⁴³ Both judges followed the conservative approach taken in some South African judgments, where the viewpoint was that 'where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'.¹⁴⁴

Although the starting point in the Court of Appeal was that the Botswana Constitution did not apply, Lesetedi AJ was at pains to explain what the approach should be if it was indeed a constitutional issue. According to Lesetedi AJ,¹⁴⁵ a proper constitutional analysis commences with an inquiry about the content of a legal rule. When the content of the rule has been ascertained, the next step is to consider whether the rule can be construed in accordance with the Constitution. Only if it could not would it be in violation of the Constitution and thus unconstitutional. The onus is on the party alleging the violation to provide *prima facie* proof of the violation, after which the onus rests on the other party to prove either that there is no such violation, or that the violation is in the public interest. Sections 15(4)(c) and (d) of the Botswana Constitution contains permissible derogations from the absolute prohibition against discrimination contained in section 15(1).¹⁴⁶ However, section 15 must be read with section 3 of the Constitution,¹⁴⁷ which is an umbrella provision that qualifies the other human rights provisions in

142 See sec 4 (customary law must be applied where it is proper to apply it); sec 4 (customary law must be applied in civil cases and other proceedings where the parties are tribesmen); and sec 5 (customary law must be applied in accordance with an agreement).

143 *Ramantele* case (main judgment) paras 58-48 and *Ramantele* case (separate judgment) paras 21-30. This viewpoint is contrary to the South African Constitution, which applies to all law including customary law. See Rautenbach (n 3 above) 107-114 for a discussion of the status of customary law in relation to the South African Constitution.

144 This was the viewpoint of Kentridge AJ in *S v Mhlungu* 1995 (3) SA 867 (CC) para 59.

145 *Ramantele* case (main judgment) paras 48-58.

146 See 2.6 above for the wording of this section.

147 As above.

chapter II (the Bill of Rights), including the right to equality in section 15. In other words, section 3 is a general provision that affords the rights and freedoms in chapter II to everyone, but subject to general limitations based on 'respect for the rights and freedoms of others and for the public interest to each and all'. Section 15, on the other hand, is a specific clause that sets out the right to equality explicitly, including its particular limitations. In addition, section 15 must be tested against the general limitation clause contained in section 3. Thus, even the derogations in sections 15(4)(c) and (d) must be checked against the Constitution to determine if they are¹⁴⁸

rational and justifiable either as being intended to ensure that the rights and freedoms of any individual do not prejudice the rights and freedoms of others or as being in the public interest.

In its interpretation of the Botswana Constitution, in general, and the Bill of Rights, in particular, the Court must adopt a generous and purposive approach in line with Botswana's liberal democratic values and in line with international guidelines.¹⁴⁹ On the other hand, derogations such as those contained in section 15(4) must be construed in a strict and narrow manner, having regard to the exceptions contained in section 3 of the Constitution.¹⁵⁰

Kirby JP, who agreed entirely with the reasoning and order made by Lesetedi JA, also gave his viewpoint on what the proper approach should be when a court is faced with a challenge to the constitutionality of a rule of customary law.¹⁵¹ As already explained, according to him the first rule is to try and decide the case without applying the Constitution.¹⁵² As a corollary to this rule, the second rule is to try and solve the case by an appeal or review proceedings without bringing an application under section 18(1) of the Constitution for constitutional relief.¹⁵³ There was no need to measure the customary rule of ultimogeniture against the Constitution, because the existing legal framework provided for in the Customary Law Act¹⁵⁴ was sufficient to determine whether the rule was 'contrary to morality, humanity or natural justice'.¹⁵⁵ The customary rule excluded women from inheritance solely on the ground of gender, and there was no doubt in the mind of Kirby JP that it was, therefore, not in accordance with humanity, morality or natural justice.¹⁵⁶ There might nevertheless be circumstances justifying the discrimination, such as 'family cohesion, certainty of succession, support of the widow and provision of a home of last

148 *Ramantele* case (main judgment) para 72.

149 *Ramantele* case (main judgment) para 69.

150 *Ramantele* case (main judgment) para 71.

151 *Ramantele* case (separate judgment) para 21.

152 *Ramantele* case (separate judgment) para 22.

153 See 2.5 above for the wording of this provision.

154 See secs 2, 7, 10 & 11.

155 *Ramantele* case (separate judgment) para 35.

156 *Ramantele* case (separate judgment) para 36.

resort to indigent family members' which would render the rule unobjectionable.¹⁵⁷ However, Kirby JP was unable to find any evidence *in casu* which justified the rule of ultimogeniture, and agreed with the main judgment that the judgment of the court *a quo* had to be set aside.¹⁵⁸

2.7.3 Role of the judiciary in the development of customary law

The South African judiciary's approach to legal pluralism issues¹⁵⁹ is determined within the parameters of the supreme South African Constitution.¹⁶⁰ One notable influence on their approach is inspired by section 39(2), which requires a court to 'promote the spirit, purport and objects of the Bill of Rights when it interprets any legislation, or when it develops the common law or customary law'. There is thus no escaping the constitutional democratic values of human dignity, equality and freedom, regardless of the type of law being interpreted.¹⁶¹ Another factor is the influence of the values of the South African Constitution on the *boni mores* (public policy) of South African society, which requires a transformation from a divided, pluralistic society to one that is united in its diversity. The South African Constitutional Court has reiterated that the content of *boni mores* must be 'determined with reference to the founding values underlying our [the South African] constitutional democracy', which is based on the values and beliefs of the greater sector of South African society.¹⁶² Both the common and customary law of South Africa must be developed and legislation interpreted to be consistent with the Bill of Rights¹⁶³ and international obligations to reflect the 'change in the legal norms and values of our [South African] society'.¹⁶⁴

That the law should develop in line with modern demands was recognised by Dingake J, who perceived the function of the judiciary to¹⁶⁵

keep the law alive, in motion, and to make it progressive for the purposes of rendering justice to all, without being inhibited by those aspects of culture that are no longer relevant, to find every conceivable way of avoiding narrowness that would spell injustice.

157 *Ramantele* case (separate judgment) para 28.

158 *Ramantele* case (separate judgment) paras 41-42.

159 For a discussion of the South African judiciary's approach, see Rautenbach (n 118 above) 143-177.

160 Sec 2 of the South African Constitution stipulates: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' The terms 'law' and 'conduct' are wide enough to include legal and social norms (eg customs).

161 For the values of the South African Constitution see, amongst others, the Preamble and secs 1 & 8.

162 *Amod v Motor Vehicle Accident Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) para 26.

163 Contained in ch 2 of the South African Constitution.

164 *Daniels v Campbell* 2004 (5) SA 331 (CC) para 56.

165 *Mmusi* case para 211.

His observations are in accordance with the viewpoint of many South African judges that the South African Constitution is supreme law to which all other laws, even customary law, must yield.¹⁶⁶

It is somewhat disappointing that the Court of Appeal of Botswana did not share Dingake J's sentiments regarding its role in the development of customary law in line with liberal constitutional values. According to Lesetedi JA, the primary role of a judge is to resolve disputes and to interpret the law to be applied to disputes before the court. Lesetedi JA was of the opinion that, although the judiciary is renowned for its enforcement of constitutional values in cases where it was necessary, '[n]o rebirth was called for in this case'.¹⁶⁷

In defence of Lesetedi JA, one must acknowledge that he did qualify his assertion that a court should not be quick to consider the constitutionality of a customary rule with the qualification that it should do so only when there is sufficient evidence regarding the existence and content of such a rule, its application and rationale.¹⁶⁸ Evidently, this was not the position *in casu* and, therefore, the Constitution could not be applied. It is notable that the South African Constitution provides that 'law and conduct inconsistent with it is invalid',¹⁶⁹ elevating it as supreme law above all law and conduct, which could resolve the issue that there was no proof that the rule did indeed exist in the *Ramantele* case.

3 Conclusion

In conclusion, it is important to note that South African and Botswana laws treat customary law differently. In South Africa customary law receives direct constitutional recognition, while in the Botswana Constitution there is no direct recognition. In South Africa, customary law is subject to the South African Constitution, but in Botswana it is subject to the internal repugnancy clause contained in the Customary Law Act. Contrary to the similar status between the common and customary law in South Africa, customary law seems to be subordinate in Botswana. A Botswana litigant who relies on a customary law rule needs to prove two things: that the customary rule exists, and that it is not repugnant to statutory law, morality, humanity or natural justice.

The two opposite judicial approaches to customary law emanate from the facts of the five sisters who fought a battle to keep the family home. The liberal constitutional approach taken by Dingake J in the *Mmusi* case was short-lived. At the end of the day, it was a 45 year-

166 *Mmusi* case paras 143 & 201.

167 *Ramantele* case (main judgment) para 74.

168 *Ramantele* case (main judgment) para 37.

169 Sec 2 South African Constitution.

old repugnancy clause¹⁷⁰ that won the battle against the 48 year-old Botswana Constitution in the Court of Appeal.¹⁷¹ The five sisters seem to have lost their battle. The case was referred back to the family members and, if they failed to reach an agreement, to the elders and uncles and, failing them, back to the customary court of Kgosi Malope II. They are thus back to where they started, and we do not yet know what the family members have decided.

The contribution of the judiciary towards creating a transformed society where the rights and freedoms of individuals, especially women and other vulnerable groups,¹⁷² are protected and promoted, cannot be underestimated. Judges make new law when they hand down a judgment with influential value, especially where the rule of *stare decisis* is one of the prominent features of the legal system. A judgment such as the one of the Court of Appeal of Botswana had the potential to enhance the development of human rights, especially the rights to equality of women who have been excluded from succession in many traditional communities, as illustrated by this case. Edith and her sisters, although they had been the matrons of their parents' homestead for many years, could easily have been denied the right to remain there after the death of their last surviving parent because of a rule that favours a descendent that no longer resided on the property.

The final decision of Lesetedi JA to confirm the order of Kgosi Lotlaamoreng II in the higher customary court in part, namely, that the homestead belonged to 'all the children born to Silabo and Thwesane' to use as they wished whenever they had a common event, surely left a few questions unanswered. If they (presumably Edith and her surviving sisters) are co-owners of the homestead, who is the next successor in line if one or all of them were to die? Furthermore, the power conferred upon the elders and uncles and, if they fail, on a person appointed by Kgosi Malope II, to decide the fate of the homestead, if the four remaining sisters are unable to reach an agreement as to who is to take care of the property, leaves a feeling of disquiet in one's mind. In the modern era of equal rights and equal worth, the fate of women is once again left in the hands of males. Surely, this could not be what has been described by Dingake J in the *Mmusi* case¹⁷³ as a product of the 'justices of this court view[ing] the Constitution as the "mirror reflecting the national soul"'. A national soul that denies the influence of constitutional values on discriminatory traditional practices must certainly be seen as a step

170 Sec 2 Customary Law Act.

171 *Ramantele* case (main and separate judgments).

172 Rautenbach (n 119 above) 172.

173 *Mmusi* case para 83.

backwards for women's rights in Botswana. The Botswana Constitution is supreme, and there is no reason why it should be avoided in customary law cases. One should take heed of Dingake J's warning:¹⁷⁴

It would be offensive, in the extreme to find, in this modern era, that such a law [ultimogeniture] has a place in our legal system, having regard to the imperative that constitutional provisions should be interpreted generously, to serve not only this generation, but generations yet to be born, particularly recalling that the Constitution should not be interpreted in a manner that would render it a museum piece.¹⁷⁵

174 *Mmusi* case para 204.

175 See, however, the criticism raised against this statement by Lesetedi JA in the *Ramantele* case (main judgment) para 74.

The court record and the right to a fair trial: Botswana and Uganda

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Summary

The court record is everything to the judicial process. Budgetary constraints and administrative challenges facing judicial services in the African countries studied here leave courts with inefficient modes of generating and maintaining full and reliable court records, hence defeating the ends of justice. Evidence is lost in the process of recording and during the preservation of court records through fires and malpractices. The court record is the basis for a fair trial. Any determination of a court is founded on the material in the record and such decision is placed and preserved on the face of the record. Fair trial guarantees of appeal and review are initiated by the court record. An appeal is a trial of the record. The competence of a court that cannot accurately record its proceedings and preserve the records to guarantee a fair trial is questionable. There is a need to facilitate a reliable mode of producing and maintaining the court record, towards a culture of fulfilling the right to a fair trial in Africa. This analysis focuses mainly on the experiences of the courts of Botswana and Uganda.

Key words: *court record; competence; fair hearing; justice; trial rights*

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1 Introduction

The capacity of the courts of several African countries, such as Kenya,¹ Nigeria,² South Africa³ and Zambia,⁴ to foster a reliable system of taking and maintaining the court record is constrained by budgetary compromises and resource constraints that adversely affect the realisation of the right to a fair hearing. Fair trial guarantees are facilitated by a court record that fairly and accurately represents the proceedings and the findings. The record is what accords juridical value to what would otherwise be ordinary information. The court record also initiates judicial processes such as appeal, review and revision, which are significant to trial fairness. An appeal, particularly, is decided on the record only.⁵

Several courts of law in Africa use outdated gadgets, while many others, especially at the lower level, rely on handwritten notes of

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- 1 E Maseh 'Managing court records in Kenya' (2015) 25 *African Journal of Library Archives and Information Science* 85: 'Results show that records management in the Kenyan judiciary faces several challenges such as persistent backlogs of cases – a factor which is attributed to poor records management resulting in lost, misfiled or damaged files, delays in registering cases, locating records and filing documentation, the lack of records management policies and inadequate staff capacity, limited awareness about the value of sound records management for enhanced service delivery, limited use of ICT and inadequate budgets. The implications of poor management of court records in the Kenyan judiciary are that decisions are made without full information about cases. Besides, the absence of systematic record keeping and controls leaves scope for corruption and collusion between court officials and lawyers. Furthermore, court time is wasted and the Judiciary's standing is lowered.' See also M Musembi 'The management of legal records in Kenya: A case study' in M Roper (ed) *Managing public sector records: Case studies* (1999) Cases 13-24.
 - 2 A Abioye 'Court record management and efficient administration of justice in Nigeria' (2014) 24 *African Journal of Library, Archives and Information Science* 36: 'The management of records in Nigerian courts falls short of the acceptable standard with dire consequence on efficient administration of justice in Nigeria.'
 - 3 See 'Modernise court systems: Mogoeng' *ioL News* 28 November 2014 http://www.ioL.co.za/news/crime-courts/modernise-court-systems-mogoeng-1.1788118#.VjnU_8LovIU (accessed 4 November 2015). In the words of the Chief Justice to Parliament's Justice Portfolio Committee while explaining problems facing the court system: 'South Africa is in an unfortunate situation where dockets disappear even in the custody of prosecutors.' See also International Records Management Trust *Case studies: Legal and judicial records and information systems in South Africa* (2002).
 - 4 P Nabombe 'An assessment of records management at the courts of law in Zambia: The case of court registries' contribution towards Access to Justice, University of Zambia, <http://datad.aau.org/handle/123456789/57381>. The study found administrative risks in the court registries, which negatively affected the records management function, and reputation risks that eroded public confidence in the courts of law and court registries in particular. There is a general lack of infrastructure development in the courts of law that has contributed to congestion in court registries, bad record management in court registries resulting from a failure to comply with regulations stipulated in the National Archives Act of Zambia, the lack of a records management policy, and a poor work culture among registry clerks, among other findings.
 - 5 *S v Magalefe* CLHFT-000 033/2008 [2008] BWHC 280 para 5. See also *Ntungamili v S* CLHFT-000018-12 [2013] BWHC 6.

judicial officers in circumstances where stationery may be inadequate and storage facilities are exposed to risks of fire and theft. Evidence is lost during the taking and storage of the court record. There are no video or audio recordings of proceedings, thus leaving the aforementioned notes as the only evidence of the proceedings. The court record, in such circumstances, reflects what the adjudicating officer believes to have heard;⁶ mistakes and mishearing are humanly possible. Cases of incomplete and fragmented records of handwritten notes of proceedings have been challenged on appeal as occasioning a miscarriage of justice.⁷ An incomplete record does not aid the delivery of justice to the parties.⁸ Common omissions include actual questions put to a witness;⁹ the full submissions of the parties;¹⁰ and the sworn status of a witness.¹¹

The record should contain all the questions and answers.¹² It is difficult to understand the meaning of responses given in examination if the questions asked are not recorded. In cases where only answers to questions are recorded, the context in which a response is given and the intended meaning of the response are not clear to an appellate tribunal.¹³ However, the High Court of Botswana has been hesitant to hold all records that do not reflect questions incomplete.¹⁴ Omissions may result from incomplete transcriptions, such as in the case of *S v Israel*,¹⁵ where certain portions of the record were not typed. The courts have been moved to redress inadequacies of court records. An issue arises as to whether a court that lacks the capacity to maintain a full record of its proceedings is a competent court in the language of article 14 of the International Covenant on Civil and Political Rights (ICCPR).

The right to a fair trial is a civil right enshrined in article 14 of the ICCPR.¹⁶ Of the 54 countries of Africa, 52 are member states to the

6 *Monyandiwa & Others v S* CLHFT-000136-06 [2009] BWHC 174.

7 See eg *Bishanga Silagi v Bataha Joselin* HCT-05-CV-CA-0015-2011 [2012] UGHG 202.

8 *Matilda Baidoo v Alfreda Davis* Suit HI/180/07 Court of Appeal of Ghana, judgment of 12 May 2011.

9 See eg *Nabakooza v The State* Cr App F36/2005 [2005] BWHC 95, *S v Monnawatlala* CRHFT-000 010-07 [2007] BWHC 64.

10 *Jng Express (Pty) Ltd v Botswana Insurance Company Limited* Civil App 017-06 [2007] BWHC 55.

11 See *S v Saidoo* CHLB-000092-07 [2008] BWHC 49. The typed record did not indicate whether a witness was sworn in but the manuscript clearly stated that he was duly sworn in.

12 *S v Alfred* CLHFT 000 081/2006 [2008] BWHC 199 para 8.

13 *S v Pitlagano* CRAF-18-05 2008 BWHC 349 para 17.

14 *Tsitsino v S* CLHFT-000070-10 [2010] BWHC 186 para 15.

15 *S v Israel & Another* CLHFT 000 013-07 [2008] BWHC 469.

16 Also expressed as the right to be heard in art 7 of the African Charter on Human and Peoples' Rights adopted on 27 June 1981, entered into force on 21 October 1986, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2013) 29.

ICCPR.¹⁷ The obligation to fulfil this civil right, as other rights in the Covenant, takes immediate effect for all state parties.¹⁸ The resources required to foster a reliable standard of taking the court record raise questions as to whether this is an aspect of fair trial that demands progressive but steady realisation.

In principle, the right to a fair trial applies, with similar effect, to civil and criminal matters. However, it has an inherent inclination towards criminal trials by according specific guarantees to the accused person, constituting definitive elements of the right. This article may manifest that bias, but its findings apply to both civil and criminal matters. This is a study of two jurisdictions: Botswana (Southern Africa) and Uganda (Eastern Africa). Both countries are state parties to the ICCPR. Botswana serves as an example of a progressive jurisdiction that created a computer-based system known as the court records management system (CRMS), which is currently operational in some of its courts. Since its initiation in 2005, the electronic court records management system has improved the efficacy of the record among participating courts.¹⁹ This has set the momentum for other jurisdictions, such as South Africa, which have demonstrated a willingness to follow suit. However, paper records exist parallel to electronic records by law and, partly because of several challenges to the implementation of CRMS, this debate is equally relevant to Botswana. Uganda predominantly operates a paper-based manual court record management system. The judiciary of the East African nation is struggling with the operationalisation of a court case management system known as the court case administration system (CCAS).²⁰ In 2011, the International Records Management Trust found that the CCAS was not compliant with international good practice standards for electronic court records management.²¹ The system has, however, assisted with workflow management among

17 See <http://www.cccprcentre.org/select-country/> (accessed 9 November 2015).

18 General Comment 31 [80] 'The nature of the general legal obligation imposed on states parties to the Covenant' para 5.

19 See Justice Maruping Dibotelo 'Enhancing court efficiency – Judicial case management and performance measurement' Conference on Access to Justice 7-10 July 2011. See also L Motsathebe & N Mnjama 'The management of High Court records in Botswana' (2009) 19 *Records Management Journal* 173; and *Gaopalelwe Jacob v The State* Court of Appeal Cr App CLCGB-065-12 Judgment 1 February 2013 para 9: Magistrate's courts do not have mechanical recording systems.

20 See J Ssinabulya 'ICT in the Uganda judiciary' paper presented at the AfricanLII Workshop 14, 17 August 2015 <http://slideplayer.com/slide/5760971/> (accessed 9 August 2015).

21 International Records Management Trust *Managing records as reliable evidence for ICT/e-government and freedom of information: Uganda court case study* (2011) 15 http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CBsQFjAAahUKEwiRgj-tnoPJAhWFtA8KHSMzCRE&url=http%3A%2F%2Fwww.irmt.org%2Fdocuments%2Fresearch_reports%2FIDRC%2FUGANDA%2520COURT%2520CASE%2520STUDY.doc&usq=AFQjCNGSoKdOB6wcrEQknOuW1hA8Scnhzw&bvm=bv.106923889,d.ZWU (accessed 9 November 2015).

participating courts and enabled partial electronic working.²² The judiciary of Uganda has an ICT Policy and Strategic Plan which prioritises the implementation of a digital court recording and transcription system at all commercial courts,²³ before extending it to other courts. This is yet to fully materialise. Many of the processes of even the Commercial Court are still manual, and paper records are widely used.²⁴ The aforementioned African jurisdictions experience common challenges in records management that are demonstrably rife among several African countries.

The article addresses an untreated area of fair trial and introduces a debate, in the context of information science, to human rights discourse. It consists of four parts. Part 1 explores the meaning and significance of the court record, while highlighting the importance of such records to trial and appeal processes. This is followed in Part 2 by a discussion of the practicalities of producing the court record in the jurisdictions studied and the problematic situations that arise during its generation and storage. Part 3 focuses on the impact of these inadequacies in the record on the realisation of the right to a fair trial, while highlighting the minimum rights of the person on trial that are directly affected. This is followed by a discussion of remedies available to aggrieved parties.

2 Meaning, nature and significance of the court record

'Court record' is a broad term denoting the case file, containing all the material admitted into a case by the court and that which the court produces in that regard. This includes documentary evidence; exhibits; summons; correspondence between the parties; affidavits of service; judgments; final orders of court; and the transcript or record of proceedings. The civil record book and criminal record book kept by the registrars and clerks of the High Courts and magistrate's courts of Botswana are designated forms of the record.²⁵ The criminal record book is referred to as the 'criminal case record'.²⁶ Examples of what a record should comprise of include any judgment or ruling; any

22 As above.

23 Court recording and transcription system (DCRTS) that aims at producing a transcript within 12 hours of the court proceeding. See Ssinabulya (n 20 above) 14.

24 International Records Management Trust (n 3 above). See also Ssinabulya (n 20 above) 24, alluding to the lack of enthusiasm to embrace ICT and resistance to change towards the use of ICT in the judiciary, insufficient training of staff and end users of the system.

25 Civil Record Book (Order 3 Rule 2, Rules of the High Court, 2011 Statutory Instrument 1 of 2011; Order 3 Rule 1, Rules of the Magistrate's Courts Statutory Instrument 13 of 2011), Criminal Record Book (Order 48 Rule 1, Rules of the Magistrates' Courts; Order 67 Rule 7, Rules of the High Court, 2011).

26 See Order 48 Rule 1, Rules of the Magistrate's Courts.

evidence given in court; any objection made to such evidence; the proceedings of the court, including any inspection *in loco*; any matter demonstrated by any witness in court; and any other portion of the proceedings which the judge may specifically order to be recorded.²⁷ The record books of the courts of Botswana contain the following common features: the serial number of the case; the names of the parties; the cause of action; the date the document was filed and the party filing it; the hearing date; and the judgment, among others.²⁸ These specifics are similar to the contents of the record of proceedings of local council courts of Uganda.²⁹ The aforementioned details give the case an identity and a time value. They also substantiate and legitimise the claim or charge. The record *per se* serves the following functions: It initiates proceedings, safeguards the memory of the case, acts as evidence, and often supports the legal rights and obligations of stakeholders.³⁰

The form and manner of taking, keeping, and the disposal or destruction of the court record are subjects of law. The Rules of the High Court and the magistrate's courts of Botswana instructively lay down the procedure to be followed in the generation and maintenance of the court record.³¹ The statutory foundation, rule basis and systematic character of recording and custody of the court record accord legal force and character of due process to an otherwise administrative task. In Uganda, the Rules Committee is mandated to prescribe the form and manner in which court records are to be kept and disposed of or destroyed.³² However, it is not clear whether such rules exist. Of note, proper generation of the record is crucial among courts with original (trial) jurisdiction, such as the magistrate's courts and the high courts of the countries studied. Botswana enacted an Act enabling the admissibility of electronic records as evidence in legal proceedings.³³ As more activity is being conducted electronically, the primary or best evidence is manifesting more in electronic form, such as e-mails. The special features of an e-mail, such as the place where it was generated, the time it was written and the gadget that was used, have evidential value. Technological advancements, such as electronic case files, aid the fact-finding process.

27 See Order 45(16) (a)-(e), Rules of the High Court, 2011.

28 See Order 3 Rule 2, Rules of the High Court, 2011; Order 3 Rule 1, Rules of the Magistrate's Courts.

29 Sec 22 (a)-(k), Local Council Courts Act, 2006. See *Uganda v Rugarwana Constance & Another* [2005] UGHC 90: They include the serial number of the case; the statement of claim; the date of witness summons; the hearing date of the case; names and addresses of the parties and their witnesses; a brief description of the case; the documentary exhibits; the judgment and final orders of the court, including the dates of such judgments and final orders; the particulars of execution of judgment and the date of payment of the judgment debt.

30 See Motsaathebe & Mnjama (n 19 above) 174.

31 See eg Order 45 Rules 17-21, Rules of the High Court (Civil Record Book), Order 48 Rules 2-3, Rules of the Magistrate's Courts (Criminal Case Record).

32 See eg sec 41(2)(i) Judicature Act Cap 13; sec 18(a) Children Act Cap 59.

33 Electronic Records (Evidence) Act 13 of 2014.

It is desirable that the record contains all that transpired in the court *verbatim*.³⁴ Reference to the court record for what unfolded in the judicial process is the only way to determine whether the manner by which the decision was made was proper.³⁵ In the language of the Supreme Court of Uganda in the case of *Ozia*, 'the written proceedings are the official and authentic history of the case and the judgment intended to remain a perpetual and unimpeachable memorial of the proceedings and judgment'.³⁶ The Court further alluded to the significance of recording the actual words of trial participants as a means of preserving the truth for future verification.³⁷ The record often contains pleadings;³⁸ the court's findings; procedural steps taken;³⁹ observations such as site visit reports; comments on the demeanour of witnesses; the evidence; and the identity of participants such as counsel, interpreters and the parties. The record aids crucial judicial processes, such as review, appeal and revision, by setting down the proceedings in writing, while revealing their compliance or irregularity (if any). The grounds of the judgment *per se* must derive from the record.⁴⁰ Of note, an error which is apparent on the face of the record accords distinct privileges to an aggrieved party, such as nullification of the trial and a retrial of the case. Such an error can only be revealed by a proper record. An irregularity qualifies as an error apparent on the face of the record if it can be ascertained merely by examining the record without having recourse to other evidence.⁴¹ The doctrine of precedent also brings the record to the core of a common law-based system.

Courts of judicature are also distinguished by the legal obligation to maintain records. There is a distinction between a court of record and a court of no record. The definition of a court of record is important, but it is difficult to articulate a fully satisfactory formulation.⁴² A

34 As held in *Motai & Others v DPP* CLHFT-000 097/2006 [2008] BWHC 198 para 11. See also Order 48 Rule 2(1), Rules of the Magistrate's Courts that obliges the court reporter to record the specified portions of the proceedings *verbatim*.

35 *Nakedi v Commander of Botswana Defence Force & Another* MAHFT 000086/2006 [2007] BWHC 92; See also *S v Mphodi* MCHFT-000076/2007 [2007] BWHC 96. The facts and the evidence given at the trial together with the presiding officer's reasons for his or her decision should ordinarily be found in the record of proceedings.

36 *Patrisi Ozia v R* [1957] EA 36 37.

37 As above.

38 See *Salongo Lutwama v Emmanuel Ssebaduka & Another* Civil App 11/2010, [2012] UGHC 238: Pleadings are a critical component of a record of proceedings under consideration on appeal.

39 In documenting procedural steps, the record acts as a report card for due process rights.

40 See *Ononge v Okallang* (1986) HCB 63, cited in *Okullu Ferdinando v Abok David* Civil App 8/2003 [2009] UGHC 56: Observations must not appear in the judgment from nowhere.

41 See *Chartis Uganda Insurance Company Limited v Insurance Regulatory Authority of Uganda & Another* HCT-00-CC-MC-25-2012 [2013] UGCOMM 64.

simple description is advanced as that court whose proceedings are recorded.⁴³ In the words of Blackstone, a court of record is⁴⁴

that where the acts and judicial proceedings are enrolled for a perpetual memorial and testimony, which rolls are called the records of the court, and are of such high and super eminent authority that their truth is not to be called in question.

Thus, the integrity of the record of proceedings must be undisputable. Scholars have elevated the status of documents produced by a court of record to forming part of the law itself.⁴⁵ The distinction between a court of record and a court of no record is weakened by the good practice of keeping records among all entities that exercise juridical or quasi-judicial functions.

The courts of record in Uganda include the Supreme Court, Court of Appeal, High Court (as superior courts of record),⁴⁶ and magistrate's courts (Chief Magistrate, Magistrate Grade I, Magistrate Grade II).⁴⁷ Local Council Courts are not established as courts of record but are required by law to keep records of their proceedings in writing.⁴⁸ Superior courts of record in Botswana include the Court of Appeal, at the highest level,⁴⁹ followed by the High Court.⁵⁰ These are preceded by two parallel streams of subordinate courts: the magistrate's courts comprising of regional magistrates; chief magistrate's courts; principal magistrates; senior magistrates; Magistrate Grade I, Magistrate Grade II and Magistrate Grade III; and customary courts consisting of the Customary Court of Appeal; higher customary courts; and lower customary courts. Magistrate's courts are required, by law, to generate and maintain records of proceedings.⁵¹ The Customary Courts of Appeal of Botswana also keep records of proceedings.

3 Making the court record: The practicalities

The court record is a valuable asset that is vital to the dispensing of justice.⁵² The significance of the record to the integrity of the judicial process makes the capacity of courts to facilitate the record a core

42 See 'Courts of record' (1889) 29 *Central Law Journal* 67. See also 'What is a court of record' (1900) 34 *American Law Review* 70.

43 *Rubarema Godfrey v Uganda* [1999] KALR 141,142, Kibuuka J.

44 Reiterated in 'Courts of record' (n 42 above).

45 See Musembi (n 1 above).

46 Arts 129(1)(a), (b) & (c) Constitution of Uganda.

47 Sec 4(2) Magistrate's Courts Act (MCA) (1971) Cap 16 stipulates the grades of magistrates in Uganda.

48 Sec 22 Local Council Courts Act 2006.

49 Sec 99(4) Constitution of Botswana.

50 Sec 95(3) Constitution of Botswana.

51 Order 28 Rules of the Magistrate's Courts.

52 See Maseh (n 1 above) 77.

component of court competence. The process of generating the court record is therefore worth noting.

In Botswana, the aforementioned process is guided by the rules of the courts. There is no elaborate procedure, but the rules contain fragments of instructive guiding principles. Of note is Order 45 Rules 16-19 of the Rules of the High Court, which set out (i) the composition of the record; (ii) the means by which the record is to be kept; (iii) the circumstances under which the record may be transcribed; and (iv) the means by which a party may access the record.⁵³ Directives on the record of civil proceedings among magistrate's courts are contained in Order 28 of the Rules of Magistrate's Courts, setting out (i) the contents of the minutes of court proceedings; (ii) the role bearers; (iii) the manner in which the record is taken; (iv) the circumstances under which the record may be transcribed; and (v) the mode of correcting errors.⁵⁴ The Magistrate's Court Rules also set standards for the taking of the criminal case record.⁵⁵ Key observations are that the adjudicating officer maintains substantial control of and undertakes considerable responsibility for the process. In fact, the official minutes of judicial officers constitute the record.⁵⁶ The record often appears first in manuscript (a handwritten version), whereupon it is typed. Second, there is no standardised form in which the record is to be taken and kept: the record may be taken down and filed in longhand, shorthand, mechanically or electronically.⁵⁷ The magistrate's courts' Rules envisage an open category of 'other means' that permits any other form of producing the record.⁵⁸ Third, transcribing and duplicating the record occur, as of necessity, at the request of an adjudicating officer or a party intending to lodge an appeal.⁵⁹ Transcription has proven strenuous for the courts. The High Court of Botswana noted that there were not sufficient transcribers to expedite the production of records for matters going on appeal and to process current court orders and judgments.⁶⁰ Fourth, an accused person has the right to a copy of the proceedings upon payment of a fee, subsequent to the judgment of the offence.⁶¹ Fifth, every court reporter of a magistrate's court or stenographer of the High Court of Botswana is required to take an oath or affirm, before assuming duty, that they would faithfully and to the best of their ability record and transcribe the

53 This section applies specifically to civil trials. There is no synonymous provision for the procedure of taking the record in criminal trials.

54 Correction of errors is not provided for in the Rules of the High Court, 2011.

55 See Order 48 Rules 1-4, Rules of the Magistrate's Courts.

56 See eg *Monyadiwa & Others v S* CLHFT-000136-06 [2009] BWHC 174 para 43: The official record was the minutes of the magistrate.

57 See also Order 45 Rule 17, Rules of the High Court, 2011.

58 Order 28 Rule 9, Rules of the Magistrate's Courts.

59 Order 45 Rule 18(2), Rules of the High Court, 2011.

60 *Boapotswe v S* MCHFT-000186-12 [2013] BWHC 3 para 17.

61 Sec 10(3) Constitution of Botswana.

record of proceedings, if required to do so.⁶² This implies that such court reporter, stenographer or transcriber may be cross-examined on the contents of the record and their role in the process of generating it. The significance of this good practice cannot be underestimated. The rule-based partial electronic record management system of Botswana illustrates that an improved system of court record management is possible in Africa.

In Uganda, a strategy has been devised to implement an electronic record management system known as CCAS. This system is currently partially operational in the Commercial Court. However, the majority of the courts of Uganda rely on handwritten notes of the proceedings taken down by adjudicating officers.⁶³ The Civil Procedure Rules oblige judges to take down or direct the taking down in writing of the evidence of witnesses.⁶⁴ The paper-based manual case management system is predominant. The procedure of taking down the record is not regulated by law. The boundaries of the role of court officials in managing the record are vague. Judicial officers take notes, but it is not clear whether they have any responsibility for the manner in which the record is kept. The means of facilitating even the handwritten record are not sufficient. The case file covers are similar to those found at the Lobatse High Court; they are torn up easily and cannot accommodate voluminous papers.⁶⁵ In subordinate courts, the stationary is inadequate.⁶⁶ Nigeria is facing a similar situation: Record books are not readily available in its subordinate courts.⁶⁷ These ill-facilitated subordinate courts are the fora for the bulk of cases. The Constitution of Uganda provides that the distribution of powers and functions as well as checks and balances among various organs and institutions of government provided for in the Constitution shall be supported through the provision of adequate resources for their effective functioning at all levels.⁶⁸ Subordinate courts are equally assigned the role of administering justice; the funding of operations should be proportionate to the task.

Similarly, a person who is subjected to a criminal trial is entitled to a copy of the proceedings, upon payment of a fee, subsequent to the judgment of the offence.⁶⁹ The practice is to provide typed records of proceedings which are often required for purposes of lodging appeals.

62 Order 28 Rule 5(2), Rules of the Magistrate's Courts; Order 45 Rule 21, Rules of High Court, 2011.

63 Author's observation that has been confirmed by practising attorneys and judicial officers.

64 Order XVIII Rule 5, Civil Procedure Rules Statutory Instrument 71-1.

65 Motsaathebe & Mnjama (n 19 above) 183.

66 Author's observation.

67 TF Yerima & HA Hammed 'Magistracy and internal security challenge in the administration of criminal justice in contemporary Nigeria' (2014) 20 *East African Journal of Peace and Human Rights* 107.

68 See National Objectives and Directive Principles of State Policy para viii, Constitution of Uganda 1995.

69 Art 28(6) Constitution of Uganda 1995.

It is then that the transcription of the record becomes vital. Transcription brings the system to test. The few transcribers⁷⁰ in Uganda are often ill-equipped, sometimes with outdated manual typewriters. Unpredictable power supplies also hinder the consistent use of even the available electronic gadgets. In *Damas Malagwe v Lanex Forex Bureau Ltd & 4 Others*,⁷¹ the Commercial Court was faced with the dilemma of recording material of inferior quality. The tapes used to record the proceedings turned out to be counterfeit and the entire recorded proceedings were lost. It took a very long time (not specified) to resolve the matter until all the parties agreed that the lawyers provide the Court with their handwritten notes to guide it and form the court's record. It should be remembered that the Commercial Court is the best equipped court in Uganda in view of the government's policy to improve the investment climate by expediting commercial disputes.

Other factors that affect the taking of the court record include the audibility of participants in the trial. Court room communication should be of such quality as to allow competent recording. Participants should speak clearly, audibly and at a reasonable pace to enable the person transcribing the proceedings to hear, process and capture the proceedings in writing. In a system where there are no audio or video backups of proceedings, this is crucial. Audio aids such as address systems are also limited.

The accuracy of typed records has similarly been a subject of controversy in both Uganda and Botswana. Inconsistencies between the typed record and the original rendition have been identified.⁷² In the case of *S v Sepeni*, a judge of the High Court of Botswana recommended that the original handwritten statement (in this case the confession) be preserved as a means of solving discrepancies.⁷³ The judge further acknowledged some advantage in having the typed version approved by the maker of the statement, although it may not seem necessary. Thus, in situations where the record is originally handwritten, it would constitute the authoritative version.

70 On insufficient staffing, see Ssinabulya (n 20 above) 25.

71 HCT-00-CC-CS-358-2006 [2011] UGCommC 1.

72 See eg *Obane v Directorate of Public Prosecution* CLHFT-000096-12 [2013] BWHC 56; *Mandla v The State Criminal Trial F49/2004* [2006] BWHC 67 para 9: The transcribed record used the word 'stabbed' instead of 'slapped'. The magistrate in her own handwriting had used the word 'slapped'; *Marumo & Another v S* CRAF 11-05 2008 BWHC 347 para 3: The typed version of the record revealed that the witnesses were not sworn in while the original handwritten notes indicated that the witnesses were duly sworn in; *S v Mokopi* CLHFT-000140-06 [2008] BWHC 362: The typed record erroneously indicated that the appellant had given his evidence under oath. The handwritten original of the record of proceedings did not indicate that any oath had been administered to him.

73 *S v Sepeni* CLCLB-054-06 [2007] BWHC 54, See also *S v Mokwatso & Others* CLHFT -000079-08 [2008] BWHC 412 para 8: 'It is important to place original handwritten notes of the presiding officer on the record of proceedings to facilitate the correction of errors that may appear in the typed record.'

Further, records that constitute a mixture of both handwritten and typed notes cause confusion. In *S v Phalaagae*,⁷⁴ while the charge sheet was primarily typewritten, the statement of offence for count 4 was handwritten. The appellant claimed that the handwritten portion must have been inserted some time after the judgment. Although his allegation was rejected as unimpressive and baselessly ascribing bad motive to the magistrate, the lesson is valid.

It is important to address the question of whether the taking of the court record is an administrative or judicial function. There is currently no clear identity of this role; the office of the registrar seems to be accountable for this facet of trial, yet judges also make records. The taking of the court record often manifests as a purely administrative role, sometimes as a judicial duty and at times as an administrative function executed by judicial officers or an administrative duty under the supervision of judicial personnel.⁷⁵ As a judicial function, it would be subject to judicial processes of appeal, review and revision, hence availing aggrieved parties judicial remedies. The practice of using the minutes of adjudicating officers as the record constrains the availability of complaint mechanisms to aggrieved persons. In principle, a person who assumes the role of a transcriber should be able to attest to the correctness of the record made. The likelihood of subjecting a judicial officer to such a procedure is daunting.

There are three problematic situations in relation to the court record: (i) a missing record (where there is no record at all); (ii) an unavailable or misplaced record (one that is inaccessible); and (iii) an inadequate record (one that is not easily legible or comprehensible).

3.1 Missing court records

All registry staff of the Lobatse High Court in Botswana that participated in a study on the management of legal records at the court in 2007 revealed that they had lost and misplaced files, and they could not tell the number of files they lost in a year.⁷⁶ This experience is not peculiar to Botswana.⁷⁷ It was found that the manual file tracking system was difficult and did not assist in expediting filing or tracking borrowed files. The Court had no prescribed period for which an action officer could keep a file, and unfiled documents piled up in registries.⁷⁸ Records were seldom kept under lock and key, hence exposing them to improper access. These are some of the factors that contributed to misplacing or losing records.⁷⁹

74 Cr App 126/04 [2007] BWHC 127.

75 See *Boitumelo Mmereki v The State* Cr App F112/2003 [2004] BWHC 33: 'It is the duty of every magistrate when proof reading the record to ensure that the typists produce the said record *verbatim*.'

76 See *Motsaathebe & Mnjama* (n 19 above) 182.

77 See *Maseh* (n 1 above) 85.

78 *Motsaathebe & Mnjama* (n 19 above) 182.

79 As above.

The disappearance of court files and documents from the record jeopardises the successful and efficient conclusion of cases. While a civil matter loses its place on the court calendar when the court record is missing,⁸⁰ a criminal matter is not scheduled for hearing without the record, which can lead to prolonged detentions. Records are lost due to negligence and sometimes administrative inefficiency. Tampering with the records of proceedings amounts to a malpractice that leads to a miscarriage of justice.⁸¹ The High Court of Uganda discovered an obvious malpractice in the case of *Salongo Lutwama v Emmanuel Sebaduka & Another*.⁸² A case file was reported missing although the suit had been entered in the register. A fictitious suit was superimposed over the suit of the alleged lost file and was being used interchangeably with another suit. The court regretted being unable to make sense of the anomalies because the record of proceedings in respect of the latter suit was incomplete, as it did not include the pleadings or final submissions.

A missing record may lead to loss of evidence. In the case of *David Muhenda*,⁸³ the sketch drawing of the *locus in quo* which the trial magistrate had made got lost and was not available to the Appellate High Court judge. The Appellate Court had to visit the *locus in quo*, hence descending into the arena of the trial court. Even then, the learned appellate judge did not make notes of what had transpired during his visit at the *locus in quo*. Although this did not occasion a miscarriage of justice, the Supreme Court took note of the failure to fulfil that duty.⁸⁴ The costs of both trial time and resources spent by the court on the subsequent fact-finding mission are significant.

A case of a missing record leads to a retrial or trial of the matter *de novo* (anew). In the case of *Byabagambi v E Kenzirekwija*,⁸⁵ the record was unavailable. A party to the case raised the plea of *res judicata* (a matter judged), alleging that the matter had already been heard. The High Court of Uganda held:⁸⁶

The availability of a judgment and record of proceedings of the [Local Council] I Court would have put this matter to rest at the earliest opportunity ... There is no judgment or record of proceedings from which this court may ascertain if the issues in the first case were about inheritance, trusteeship or ownership. It may well be explained that the

80 See *Eric Ntungura v Jane Mwesigwa* Civil Suit 71/2005 [2010] UGHC 130 – delay of 4 years due to a misplaced court file; *S v Charuka* CLHLB-000067-07 [2008] BWHC 393 para 1: There was scanty progress with an appeal for 5 years due to misplacement of the case file. Even the partially-reconstructed trial record lacked certain relevant documentation such as details of previous convictions and the committal warrant.

81 *Turyahikayo James & Others v Ruremire James* HCT Civil App 43/2010 [2012] UGHC 157.

82 [2012] UGHC 238.

83 *David Muhenda & 3 Others v Margret Kamuje* Civil App 9/1999 [2000] UGSC 7.

84 As above.

85 HCT-05-CV-CA-48-2003.

86 *Byabagambi* (n 85 above) 4 5.

[Local Council] I of that time and indeed many of them even today do not keep records. It may be for this reason that the [Local Council] system, appellate courts start cases *de novo*. But this does not provide the excuse rather it makes it difficult for any party who wants to raise a plea of *res judicata* to do so without supporting evidence. I cannot guess what the proceedings were in order to rule on this ground. I would say that it is not substantial and it fails since issues that were determined in the first case cannot be ascertained.

Similarly, the court record has evidential value in circumstances where a person seeks to challenge double jeopardy: In such cases the record of the previous conviction or acquittal is essential. It is a fair trial warrant that a person cannot be tried or punished for an offence for which they already have been convicted or acquitted (article 14(7) of the ICCPR). In short, the record makes the trial a reality and in so doing aids fair trial guarantees. The absence of the record renders a trial unsupported.

3.2 Unavailable court records

The general rule is that the court record is a public document accessible to all persons and may be in both soft and hard copy.⁸⁷ However, the intervention of a court may be required to obtain the record of proceedings.⁸⁸ There are instances when the court is not able to access the record. An unavailable record is distinguishable from a missing record because the former may exist but is simply inaccessible or cannot be acquired in a practical or effective way. Unavailable or misplaced records of proceedings prolong trials. In the case of *Tendani Mahube*,⁸⁹ the record of proceedings had been misplaced by the trial court. The matter before the High Court of Botswana could not proceed for three years because the registrar's office had not typed the record of proceedings as requested by the attorneys handling the matter. This delay was not only inordinately excessive, but it was also unexplained.⁹⁰ There were two obstacles to the accessibility of the court record in the aforementioned case: the misplacement of the record by the trial court and the subsequent delay in typing it by the registrar's office. Delays in accessing the record may also arise from searching for the relevant file among the bulk of paper files of a court. Several trials and hearings of interlocutory matters are delayed by the length of time it takes to type and produce the court record.⁹¹

87 See *Shell (U) Ltd & 9 Others v Rock Petroleum (U) Ltd & 2 Others Misc Applic 645/2010*. See also International Records Management Trust (n 3 above) para 60.

88 See *Commissioner General Uganda Revenue Authority & Another v Kyotera Victoria Fishnet Company Limited & Another Misc Applic 362/2012, [2012] UGCOMM 96*.

89 *Tendani Mahube v The State Cr Applic F76/2004 [2005] BWHC 92*.

90 Distinction drawn in *S v Setlhare MCHLB-000059-07 [2009] BWHC 4 para 3, 14*.

91 *S v Kebojakile CTHLB-000014-06 [2007] BWHC 197*.

3.3 Inadequate court records

This category includes documents that are written in illegible handwriting; incorrect records; incomplete records; and mutilated records such as those that are partly destroyed by fire, are torn or faded.

3.3.1 Illegible material

This mainly relates to handwritten material. The pressure upon an adjudicating officer who has to capture the proceedings in writing affects the quality of the handwriting and eventually the output. The quality of handwritten material also depends on the abilities of the writer; there is no guarantee of uniformity or comprehensibility of the material produced in this manner because there is no standard handwriting. A judicial process should promote certainty and precision among its sectors, including the preparation of the court record, by utilising modern and standardised modes of recording.

3.3.2 Incorrect records

A court record may be wholly or partially incorrect. A record that gives a different rendition of the proceedings may be misleading during a trial. In the case of *Kitti*,⁹² the facts on the record were disputed by the appellant. The High Court of Botswana found that that which appeared on the record as facts was what was written by the court clerk, presumably after the court proceedings. What compounded the situation was that even the clerk of the court who prepared the record conceded that part of the record had been prepared by the police at the police station. There was no sufficient proof that the record of proceedings accurately reflected the statement of the facts as dictated by the prosecutor at the trial.

In the case of *Gabasie*,⁹³ the appellant averred that the incorrect recording of his age as 28 rather than 23 years had an impact on the sentence. Although this possibility was ruled out as his youthfulness had been considered as an extenuating factor, it is a viable illustration.

3.3.3 Incomplete and mutilated records

The judge in *Dichabe v The State*⁹⁴ was confronted with the problem of an incomplete recording of the evidence. In his language, the judge noted:⁹⁵

I must observe that the evidence on record, as is usually the case in the magistrate's court, was not taken *verbatim*. It is impossible to know what questions were put to the complainant or indeed to any witness in cross-

92 *Kitti v Attorney-General & Others* MAHLB-000217-08 [2008] BWHC 156.

93 *Gabasie v The State* MCHFT 000 088/2006 [2006] BWHC 47 para 11.

94 Cr App F142/03, [2005] BWHC 7.

95 *S v Raditsebe* CLHLB-00126-07 [2008] BWHC 394: The magistrate briefly recorded selective aspects of the evidence of the witnesses.

examination or re-examination because only the witness' responses and not the questions asked are recorded.

An appellate court in Hong Kong found that where the evidence taken down is in question and answer form, it is vital that it should be recorded *verbatim*.⁹⁶ The deficiency of the court record, in the aforementioned regard, raised the likelihood of bias as the failure to connect the responses to the questions obscured the direction of the inquiry, and also the evidence that informed the judge's determination.⁹⁷ A court record should be made in light of its objective and purpose as a full representation of the proceedings in a case.

An incomplete or improper record may also deprive evidence adduced of character, validity and value. In *Ojaka Yeko & 2 Others v Onono Philips*,⁹⁸ the record did not state whether the evidence of the parties and witnesses had been taken under oath. The court made a finding that this negated the quality of the evidence. The record is everything to a judicial process; it is a means of justice.

Courts have sternly redressed matters of incomplete records. In the case of *Bishanga Silagi v Bataha Joselin*,⁹⁹ the record of the proceedings, both typed and handwritten, did not indicate that the witnesses had been sworn or affirmed before giving their evidence, and it did not indicate who asked the questions in cross-examination and who answered them, among several errors. The first successful ground of appeal was that the trial magistrate had erred in law and fact by relying on a tangled record of the proceedings and sketchy unintelligible evidence to make a decision, and this error occasioned a miscarriage of justice. The Appellate Court held:¹⁰⁰

The manner of receiving and recording evidence adopted by the trial court was grossly irregular, and exhibits a tangled mesh-mash of confusion. One only derives from the record a general hazy impression of what the case is all about due to the poor methods of receiving and recording the evidence by the trial court ... The record is obviously tainted with multiple gross irregularities which could not be left to stand as they certainly led to a miscarriage of justice.

Thus, an incomplete and inadequate record may jeopardise a case. In 1975, a Hong Kong law journal suggested that consideration should be given to the tape recording of all trials in Hong Kong. It advanced the view that 'machines, by their very nature, are unbiased, and when used properly they can prevent suspicions directed at more fallible creatures'.¹⁰¹ All lower courts in Pretoria, South Africa, were found to

96 *Or Chung-yan v R* Fct Cr App 964 of 1973 in (1975) 5 *Hong Kong Law Journal* 365 (notes of cases).

97 *Or Chung-yan* (n 96 above) 366.

98 Civil App 36/2007 [2008] UGHC 111.

99 HCT-05-CV-CA-0015-2011 [2012] UGHC 202.

100 *Bishanga Silagi* (n 99 above) 4.

101 *Or Chung-yan* (n 96 above) 365 366.

record all cases on audio cassettes.¹⁰² These carefully-tracked recordings form the basis of transcriptions, and the transcriptions are verified by the magistrate who heard the case.¹⁰³

Poor handling and storage of records may expedite their wear and tear.¹⁰⁴ Crowded facilities of uncontrolled temperatures are unfavourable for paper records.¹⁰⁵ The state of magistrate's courts in Nigeria, as observed by Ali,¹⁰⁶ is shared by several lower courts in other African countries. Those courts do not have proper or secure places to keep court records and exhibits.¹⁰⁷ The records are exposed to the risk of fire and other hazards such as theft. The form in which these records are kept (as paper files) is also more prone to such dangers. In July 2004, fire gutted the old Mahalapye magistrate's court house in Botswana, reducing all the court records to ashes. The records of proceedings in two part-heard matters of *State v Lebakeng* and *State v Ngahino*¹⁰⁸ were among the records that were completely destroyed.¹⁰⁹ These cases had to be commenced afresh, thus causing a delay of justice to the accused and victims.

The destruction of records in the *Lebakeng* case was found to be the result of criminal arson at no fault of the state.¹¹⁰ The fire at the Mahalapye magistrate's court was proof of the management problems regarding court records in Botswana, and constituted one of the driving factors for the project to computerise court records.¹¹¹ Indeed, the state should assume the responsibility of facilitating courts with modern means of storing and backing up records. Court competency in the ambit of a fair trial should encompass the capacity by a court to secure records. A competent court should embrace technological advancements in handling information securely and efficiently.

102 International Records Management Trust (n 3 above) para 105.

103 International Records Management Trust paras 143 & 144.

104 Abioye (n 2 above) 36: 'In some cases, wooden racks were used for the storage of records while records were also dumped on the floor unorganised.'

105 Motsaathebe & Mnjama (n 19 above) 183. See also Abioye (n 2 above) 36.

106 See YO Ali 'Delay in the administration of justice at the magistrate court: Factors responsible and solution' http://www.yusuali.net/articles/delay_in-the_administration_of_justice.pdf (accessed 2 November 2015).

107 As above.

108 MCHFT 000 046, 047, 054/2006 [2006] BWHC 28, [2006] 2 BLR 331.

109 See also *Phuthego v The State* Cr App F17/2004 [2006] BWHC 60: The record of proceedings was destroyed in a fire which gutted the old Mahalapye magistrate's court house where the appellant had been tried and convicted on three separate charges of theft. The conviction and sentence of 7 years were set aside. The trial records in *S v Sebitola* MCHLB-000005-07 [2007] BWHC 24 were destroyed. The court exercised its inherent powers to grant the orders requested by the accused, that his sentence run concurrently, without further consideration. In *Mochela v Director of Public Prosecutions* MCHFT 000 111/2006 [2007] BWHC 273, the conviction and sentence were set aside because the record was burnt in a fire that engulfed the magistrate's court at Mahalapye and could not be reconstructed.

110 *S v Lebakeng* MCHFT 000 046, 047, 054/2006 [2006] BWHC 28, [2006] 2 BLR 331 para 19.

111 Motsaathebe & Mnjama (n 19 above) 178.

4 Effect of the court record on the right to a fair trial

The contribution of the court record to the realisation of the right to a fair trial is assessed on the basis of the impact that the record has on the fulfilment of the minimum guarantees. A person who is charged with a criminal offence is entitled to the following minimum rights: (a) the presumption of innocence; (b) information on the nature of the offence; (c) adequate time and facilities for the preparation of the defence; (d) the presence and legal representation of the accused at trial; (e) legal aid; (f) the assistance of an interpreter; and (g) facilitation to examine and cross-examine witnesses.¹¹² The ICCPR and the African Charter on Human and Peoples' Rights (African Charter) supplement this list with the guarantee of appeal, among others.¹¹³ The court record directly facilitates four minimum rights: (i) presence at the trial; (ii) adequate time and facilities for the preparation of a defence; (iii) a trial without undue delay; and (iv) appeal.

4.1 Presence at the trial

The general principle is that an accused person is entitled to effective presence at his or her trial.¹¹⁴ Effective presence entails a facilitated state of competency to participate in the proceedings. This involves the practical possibility of informing the record, accessing the content of the record, and seeking to effect necessary changes to the record, such as corrections and additional information, among others. A person appears in a suit by filing pleadings.¹¹⁵ In summary, presence is participation and participation is by way of filing documents.

In criminal proceedings, the court record is often the basis upon which the accused appears before the court, and in civil proceedings, it is the reference for scheduling hearings. By facilitating the appearance of the accused before the court, the court record is the foundation of the right to be heard.¹¹⁶ The disappearance of case files is a common and absurd cause of the prolonged detention of persons charged, especially in subordinate courts in Uganda.¹¹⁷ Files disappear as a result of malpractices such as bribery of court officials to destroy evidence,¹¹⁸ arson as well as accidental fires, negligence or

112 Art 28(3) Constitution of Uganda; art 10(2) Constitution of Botswana, with the exception of the guarantee of legal aid.

113 Art 14(5) ICCPR; art 7(1)(a) African Charter.

114 Art 28(3)d Constitution of Uganda, 1995, as amended; sec 10(2)(d) Constitution of Botswana, 1966, as amended.

115 See Order VIII Civil Procedure Act.

116 CS Namakula 'Language fair trial rights in the Uganda criminal justice system' (2014) 20 *East African Journal of Peace and Human Rights* 131.

117 As above.

118 See also, in Nigeria, Yerima & Hammed (n 67 above) 118.

poor filing practices. Missing court records also adversely affect the computation of sentences or prison terms.¹¹⁹

Civil matters are eroded by missing records or mutilated documentary evidence. The record serves as the basis of a claim, without which the matter is unsubstantiated or obscure.

4.2 Adequate time and facilities for preparation of the defence

A person on trial is entitled to adequate time and facilities to defend himself or herself.¹²⁰ Adequate facilities include a functional record that fully and effectively represents the proceedings. The record is particularly important in situations of appeal,¹²¹ a change of counsel, a change of the adjudicator, and to refresh the memory of the adjudicator(s) at the time judgment is to be made. The Commercial Court of Uganda held:¹²²

To be afforded a fair hearing, a litigant must have adequate time, resources and facilities to prepare and present his or her case. Some of these factors must be afforded by the state or the court system or by the individual person himself. In the case of appeals, the person must be afforded by the court system adequate time and the necessary records to be able to prepare an appeal and present the same for hearing.

The time considered adequate to prepare an appeal starts from the date the registrar of the court notifies a litigant that the court record is ready for collection.¹²³ The availability of the record is a significant milestone in the appeal process.

The High Court of Uganda observed that the records of proceedings in lower courts often are not available¹²⁴ and that, if they exist, they are inadequate. The records of local council courts at levels I and II came under intense scrutiny when a matter originating from a local council court was referred to the High Court of Uganda for revision in the case of *Uganda v Rugarwana Constance & Another*.¹²⁵ The record of Local Council Court I, particularly, left a lot to be desired: It lacked precise details of the date when the case was heard, the statement of claim and the names and addresses of witnesses.

119 *Sibanda v S* MCHLB -000035-08 [2009] BWHC 162 para 7.

120 Art 28(3)(c) Constitution of Uganda, 1995; sec 10(2)(c) Constitution of Botswana.

121 See *James Mutoigo t/a Juris Law Office v Shell (U) Ltd* HCT-00-CC-MA-0068-2007 [2007] UGCommC 35.

122 As above.

123 *James Mutoigo* (n 121 above) para 11.

124 See *Otile Charles v Onedo Beneyokasi* Civil App 45/2007, [2009] UGHC 47. The statutory courts of South Sudan try almost all cases originating from customary courts *de novo* due to the inadequacy of records. See P Mertenskoetter & SD Luak 'An overview of the legal system and legal research in the Republic of South Sudan' (2012) http://www.nyulawglobal.org/globalex/South_Sudan.html (accessed 20 October 2015).

125 HCT-05-CV-0001-2005 [2005] UGHC 90.

There are obvious defects in generating reliable records at the local council courts level.¹²⁶ These defects are mainly due to a lack of facilities to generate a competent record, and also the limited personal abilities of the officials even to use the available facilities. A court that lacks facilities to execute its functions has no capacity to offer adequate facilities to its clients. The issue is whether such a court is competent enough to guarantee a fair trial.

The inadequacy of case files has been a cause for adjournments and standing over of cases, sometimes characterised by a further remand of accused persons. A senior magistrate of a court in South Africa revealed to the International Records Management Trust that seven out of ten cases brought to court lacked information, and if the prosecutor was not satisfied with the ripeness of the case, he or she would ask the presiding officer that the accused be remanded pending further investigation.¹²⁷ Whereas some of this information may be missing because it had not been obtained, some of it may simply be misplaced, misfiled or lost.¹²⁸

Justice is the result of a contest among streams of information. This contest involves the extraction, analysis, comparison, maximisation and development of information as captured on the record. The court depends on the record to deliver justice. Motsaathebe and Mnjama correctly note:¹²⁹

The daily operations of the court depend on availability of accurate, authentic and reliable information, presented in a timely manner, hence the need to maintain an effective and efficient record keeping system for the [judiciary].

The record and justice are interconnected. The proper management of case files and security of evidence are important facets of a defence. By filing its pleadings and evidence with the court, the defence entrusts the court with its 'assets', especially from the prosecution, which is often viewed as one with the court.

4.3 Trial without undue delay

An accused person must be tried promptly and expeditiously.¹³⁰ There has to be a trial; the trial should commence in good time, should proceed at a reasonable pace, and it must be completed within a reasonable period. This process is driven by the evidence, on record, before an adjudicating officer.¹³¹ The primary source of all court actions and decisions is the case file. Properly managed court

126 See eg *Otile Charles v Onedo Beneyokasi* Civil App 45/2007 [2009] UGHC 47: The local council courts could not provide authentic records of the complete trial.

127 International Records Management Trust (n 3 above) para 100.

128 International Records Management Trust para 167.

129 Motsaathebe & Mnjama (n 19 above) 174.

130 Art 28(1) Constitution of Uganda, 1995; sec 10(1) Constitution of Botswana.

131 *Obadia Kuku v Uganda* Cr App 5/1998 [1999] UGCA 5.

records aid the expediency of trials. This is illustrated by the following examples:

- (1) A record of evidence given by a witness at a trial has the same force and effect as the witness testimony; it is enough to tender that record in evidence, without recalling the witness.¹³² A court record secures the authenticity of actions taken in the course of legal proceedings; it suffices that those actions were properly taken once in the trial.
- (2) A document produced before any court in Uganda as a record of evidence given in a judicial proceeding or before an authorised officer is presumed genuine and its contents accurate.¹³³
- (3) Foreign judicial records are equally presumed genuine and accurate by the courts of Uganda, subject to the conditions laid down in section 86 of the Evidence Act, Cap 6. There would be no need for further transboundary actions so as to obtain evidence that is not controversial.
- (4) The function of the record of evidence taken as a true and correct representation of proceedings allows for the trial to proceed without undue delay by accused persons absconding from hearings or obstructing their own trials and having to be removed.¹³⁴ Such persons are provided with the record of proceedings so as to follow their trial.

A modern court record facilitates efficient modes of perusing the case file. Searchable databases and documents allow targeted screening that potentially saves time. Video and audio recordings of the proceedings that can be sorted according to the dates of hearings also offer an efficient way of examining the court record. The High Court of Botswana has pronounced itself on this matter, holding:¹³⁵

Despite the shortfalls of evidence by video link or video recordings such as the lack of opportunity for a judge to ask further questions to the witness, seeing and listening to a good video recording is very close to hearing the witness directly as opposed to the paper record especially in as far as it enables the judge to examine the demeanour of the witness.

On the other hand, poor court record management practices cause delays in registering cases, and filing and locating documentation.¹³⁶ An adjudicating officer who is obliged to write out the proceedings on paper needs more time to hear the case than one who has the assistance of a trained typist or stenographer. A failure to make records available to the court on time, for whatever reason, slows down a trial. In South Africa it was found that dockets created by the police were supposed to be in court three days before the date set for the trial, but delays are frequent.¹³⁷ The police allege a lack of means

132 Sec 69 Criminal Procedure and Evidence Act Cap 08:02.

133 Sec 79 Evidence Act Cap 6.

134 Sec 100 Criminal Procedure and Evidence Act Cap 08:02.

135 *First National Bank of Botswana Limited v Eastgate Enterprises (Pty) Ltd & Others* CACLB-059-07 [2008] BWHC 3.

136 *Motsaathebe & Mnjama* (n 19 above) 180 182; *Maseh* (n 1 above) 78.

137 *International Records Management Trust* (n 3 above) para 109.

of transport to convey dockets to court, but court officials claim that there is a lack of discipline on the side of the police.¹³⁸ This leads to adjournments that could otherwise have been avoided. Such delays translate into the increased cost in litigation, in addition to the stress associated with long periods of waiting for justice to be done.¹³⁹ Delays also erode confidence in the judiciary by the public.¹⁴⁰ Frustrated litigants sometimes withdraw their cases.¹⁴¹

An expert has recommended that 'records should be classified in a manner that facilitates systematic storage and speedy retrieval of information'.¹⁴²

4.4 Appeal/review/revision

Appeal, review and revision are identical functions. A person aggrieved by a decision of a court may appeal to an appropriate forum.¹⁴³ Every person convicted of a crime has the right of his or her conviction or sentence to be reviewed by a higher tribunal according to the law.¹⁴⁴ The review of a case is scrutiny of the record.¹⁴⁵ In the exercise of its powers of revision, the High Court of Uganda may call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate's court.¹⁴⁶ Revision is principally an examination of the record of proceedings.¹⁴⁷

An appeal can only be adequately and reasonably prepared upon receipt of the record of proceedings and the reasons for the decision made, from which the appeal arises.¹⁴⁸ In fact, an allegation by an appellant has merit only if it is supported by the record.¹⁴⁹ The limited fact-finding mandate of an appellate court confines the court

138 As above.

139 Abioye (n 2 above) 27 28.

140 Abioye 27 30.

141 International Records Management Trust (n 3 above) paras 109 & 173.

142 Motsathebe & Mnjama (n 19 above) 174 180.

143 Art 50(3) Constitution of Uganda, 1995. The Constitution of Botswana does not provide for the right to appeal. However, this right may derive from the ICCPR and the African Charter, to which Botswana is a state party.

144 Art 14(5) ICCPR. The Constitution of Botswana accords the right to judicial review to various categories of persons, such as detainees (sec 16(2)(c) Constitution of Botswana), and persons whose freedom of movement is restricted (sec 14(4) Constitution of Botswana), among others.

145 See sec 50 Criminal Procedure Code Act Cap 116; Order 61 Rule 9, Rules of the High Court, 2011.

146 Sec 48, Criminal Procedure Code Act Cap 116.

147 As above. Higher magistrate's courts may also revise proceedings of inferior magistrate's courts under sec 49 of the Criminal Procedure Code Act Cap 116.

148 *James Mutoigo* (n 121 above) para 9.

149 *Molosiwa Resheng v The State* Cr App F4/2003 [2003] BWHC 19.

to the record of proceedings in deciding whether a judgment was made correctly.¹⁵⁰ The record, therefore, is among the documents which initiate the processes of appeal and review.¹⁵¹ A certified record of proceedings has to be attached to the documents of appeal.¹⁵² The duty of the first appellate court to evaluate and scrutinise the evidence afresh and to come to its own independent conclusion, is facilitated by a competent and reliable court record. In the case of *Getrude Nakanwagi v Stanislaus Muwonge*,¹⁵³ the court reiterated the significance of this duty of the first appellate court, while noting that the record filed in that case regrettably was 'so jungled to the extent that a significant claim and the proceedings thereon were not on the record of evidence'. A second appellate court may also be compelled to re-evaluate the evidence and to make an appropriate order where it finds that the first appellate court erred in law in that it failed in its duty to treat the evidence as a whole to that fresh and exhaustive scrutiny to which an appellant is entitled.¹⁵⁴ This reinforces the importance of an adequate record as a tool in the appeal process.

A proper record saves the time of an appellate court and enables it to deliver justice expeditiously. The Supreme Court of Uganda lamented the wasting of time during the hearing of the appeal of *Katuramu*.¹⁵⁵ The Court was asked to verify whether the trial court had actually sentenced the appellant after having convicted him. The original handwritten notes of the trial judge and the typed record were missing. Only a formal typed order, extracted from the original, was available but was unsigned. The Court had to trace the commitment warrant signed by the trial judge, which acted as evidence that the appellant had been duly sentenced. The Supreme Court pronounced itself on the matter as follows:¹⁵⁶

We are constrained to direct the Registrar and all others responsible for and concerned with compiling the records of appeal, and the custody of the

150 See *Keganne v Law Society of Botswana & Others* Misc Case 439/2004, [2005] BWHC 2.

151 *Edward F Kisitu (Administrator of the estate of the Late Kagombe Sepiriya) v Sam Bateesa Makabugu* Civil App 56/2011 [2014] UGHC 26: An appellate court as of necessity relies on the record as compiled or recorded by the lower court. *Sinden v Attorney-General of Botswana* Misc Civil Applic F175/2003 [2005] BWHC 17: 'The submission of the record of proceedings is a step preliminary to the hearing of any review application. The record enables the court to properly review the proceedings and the decision concerned.'

152 See *Orient Bank Limited v Avi Enterprises Limited* Civil App 2/2013 [2013] Ugcommc 182: Handwritten unauthenticated notes were filed on appeal as a record of proceedings. The court refused to rely on a document that was not authenticated by certification. See also Order 59 Rule 3, Rules of the High Court, 2011; Order 60, Rules of the High Court, 2011: The record of an appeal, in a civil matter, must contain a correct and complete copy of the pleadings, evidence and all other documents necessary for the hearing of the appeal.

153 HCT Civil App 52/07 [2010] UGHC 16.

154 *Margaret Kato & Another v Nuulu Nalwoga* Civil App 3/2013 [2013] UGSC 07.

155 *John Katuramu v Uganda* Cr App 2/1998 [1998] UGSC 14 (SC).

156 As above.

original court files, to pay more attention to accuracy of the record, and preservation of the original court file intact.

In the interests of fairness, there should be an acceptable time frame within which the court record should be made available. This is a problematic area for courts. In *S v Letsholo*,¹⁵⁷ the appellant was sentenced on 21 July 2000. He lodged his appeal timely, but the record of the case was made available only in 2004 after the intervention of the ombudsman. The court held that this was an unacceptable state of affairs for an institution administering justice, although it did not state or recommend a time frame for making the record of appeal available.¹⁵⁸ The lack of reliable facilities to manage court records makes a commitment to time frames unrealistic. It is to be noted that the Rules of the High Court of Botswana set the date from which a copy of the record in a civil matter on appeal may be availed at not less than four months from the date of receipt of a notice of appeal.¹⁵⁹ There is no commitment to a deadline.

Conversely, the appeal process is also abused by persons who take advantage of flaws in court record management systems and fraudulently procure the disappearance of their court files. In the words of Chief Justice Mogoeng of South Africa, explaining problems facing the court system:¹⁶⁰

A trend has emerged where records of proceedings disappear after people are convicted and sentenced ... and it happens that a person in prison somehow knows that the records are gone and then institutes an appeal. With their records missing, it means the court would have difficulty in executing the appeal effectively.

Such cases may have to be dismissed and the accused released. The absence of systematic record keeping and control creates an opportunity for such corrupt practices, often involving collusion between lawyers and court officials.¹⁶¹

Thurston correctly observed:¹⁶²

Dysfunctional records management undermines legal and judicial reform. Decisions are made without full information about cases, and the absence of systematic recordkeeping and controls leaves scope for corruption or collusion between court officials and lawyers. Court time is wasted, delays are created, and the judiciary's standing is lowered. The large volume of records passing through a typical court system, their sensitivity, and time pressures on courts makes effective records management essential.

157 CRAF-221/2004 [2007] BWHC 236.

158 *S v Letsholo* CRAF-221/2004 [2007] BWHC 236 para 2.

159 Order 59 Rule 1, Rules of the High Court, 2011. See also Order 60 Rule 2, Rules of the High Court, 2011, which accords an adjudicator of a criminal matter appealed against 10 court days to provide a summary statement of the facts and justification for his or her findings and decision. This forms part of the record but it is not a record of the proceedings.

160 See 'Modernise court systems' (n 3 above).

161 See Maseh (n 1 above) 85.

162 A Thurston 'Fostering trust and transparency through information systems' (2005) 36 *ACARM Newsletter* 2.

5 Remedies

A person whose rights are violated is entitled to an effective remedy.¹⁶³ Inefficient court records may be an infringement of the right to a fair trial, hence entitling the aggrieved party to a remedy. The objective is to avoid prejudice to an accused person, or to restore a party in a matter to the position in which he or she would have been if the defect in the record had not occurred. This is an exercise of judicial discretion, and the jurisprudence illustrates some of the courses of action adopted by the courts, including (i) correction of the error; (ii) the quashing of an order made on the basis of a defective court record; (iii) discharge of the accused person; (iv) setting aside of the verdict; (v) retrial; and (vi) a permanent stay of prosecution.

5.1 Correction

Any person having received a copy of the typed record of proceedings may apply, by notice to the court and the prosecutor, for an error in the record to be corrected.¹⁶⁴ This remedy facilitates the addition of excluded material to the record, and correct records which purportedly do not express what transpired in court, because omissions and variations of the content of the court record are not matters to be addressed on appeal. In appeal proceedings the court is bound by the four corners of the court record.¹⁶⁵ Similarly, a judge of the High Court has the discretion to correct clerical or arithmetic mistakes made in judgments or orders, or errors arising from any accidental omission.¹⁶⁶

5.2 Quashing orders

A defective court record is the subject of judicial review which can lead to the quashing of orders of a tribunal.¹⁶⁷ In the words of a judge of the High Court of Botswana:¹⁶⁸

The law is to the effect that where there is an error on the face of the record, judicial review will lie even if the body being reviewed has kept within its jurisdiction and the main remedy where there is an error on the face of the record is a quashing order.

163 Art 2(3)(a) ICCPR.

164 Order 28 Rule 10, Rules of the Magistrate's Courts. See also *S v Mpofo* CLHFT-000049/2007 [2008] BWHC 490 para 5.

165 *S v Motlhalane* MCHLB-000048-08 [2006] BWHC 135: The applicant alleged that some of his propositions put to witnesses had not been recorded on the record. *S v Othusitse* CLHFT-000-107/2006 [2008] BWHC 203 para 3: In hearing an appeal, the court is restricted to the record of proceedings. See also *Malope Rankalo v The State* Cr Applic F113/2004, [2005] BWHC 76: An appeal court proceeds with a matter based on the record as it is.

166 Order 32 Rule 6, Rules of the High Court, 2011.

167 *Ouma Andrea v Attorney-General & Another* HCT-04-CV-MA-0095-2012 [2012] UGHC 145.

168 As above.

A material irregularity may also found a decision to declare proceedings null and void.¹⁶⁹

5.3 Discharge of the accused person

Ongoing proceedings may be discontinued on account of deficiencies in the court record. In the case of *Mudongo*,¹⁷⁰ the charge sheet had been irretrievably lost. The court concluded that the appellant had been put through trial while no formal charge had been laid against him. The appellant was discharged.

5.4 Setting aside of verdicts

A conviction and sentence may be set aside in the following circumstances: where a record cannot be sufficiently reconstructed to make a just hearing on appeal or the proper consideration of a review possible;¹⁷¹ and where a convicted person cannot lodge an appeal because the record of proceedings had been lost irretrievably and could not be reconstructed.¹⁷²

There are standards for setting aside a verdict. Section 10(1)(d) of the High Court Act of Botswana¹⁷³ provides:¹⁷⁴

No conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record of proceedings unless it appears to the Court that a failure of justice has resulted therefrom.

Thus, unless an irregularity or defect in the record goes to the very root of the matter and results in a miscarriage or failure of justice, a conviction is not to be set aside if there is ample evidence in the record to support it.¹⁷⁵ The test to be applied may be stated as follows: But for the irregularity or defect, would a court properly directed on the evidence in the record have convicted the accused?¹⁷⁶ This consideration mainly relates to defects in substance in the court record as opposed to form. The test reflects a

169 *S v Seutwetse & Others* CRHLB-000015-07 [2008] BWHC 11: failure to take plea.

170 *Mudongo v S* CLHLB-00081-08 [2010] BWHC 409.

171 *Seabelo & Another v S* CLHFT-000071-09 [2010] BWHC 138 para 8, citing *Whitney & Another* 1975 (3) SA 1453 1456.

172 *Tshabang v The State* [2002] 1 BLR 102 (CA), reaffirmed in *Phuthego v The State* Cr App F17/2004 [2006] BWHC 60: Only a portion of the record was available. The court ordered that his conviction and sentence be set aside and that he be discharged from custody.

173 Cap 04:02.

174 Reiterated in the case of *Samuel Motshegare v The State* Cr App 6/1999 (CA) 6-7, Korsah JA. See also sec 325 of the Criminal Procedure Act Cap 08:02.

175 *Moapei Garemoitse v The State* Cr App F11/2003 [2003] BWHC 17; *S v Diteko & Another* CLHFT-000016-06 [2008] BWHC 184.

176 *Moapei Garemoitse* (n 175 above). See also *S v Alfred* CLHFT 000 081/2006 [2008] BWHC 199 para 8: The applicant had to show how the failure to record the questions prejudiced him.

constitutional principle that justice should be administered without undue regard to technicalities.¹⁷⁷

In the case of *Nthowa*, a conviction of rape and a sentence of 10 years were set aside because the record could not be found on appeal.¹⁷⁸ This was done to avoid prejudice to the accused person.

5.5 Retrial

Retrials are ordered in cases where crucial procedural aspects, such as the swearing in of witnesses¹⁷⁹ and plea taking,¹⁸⁰ are absent from the record.

A retrial was ordered in the case of *Odur Tonny v Odur George*,¹⁸¹ because the total of handwritten and typed record of proceedings failed to contain the evidence for an appellate court to re-evaluate. The record did not indicate whether the witnesses were sworn in or affirmed before testifying.

However, problems with court record management should not accord an unfair advantage to an accused person. The court retains the responsibility for administering justice. The judge in the case of *Lebakeng* correctly observed that what had been destroyed were not the proceedings themselves, but the record of proceedings. With the police dockets available, it is possible to reinstitute the proceedings.¹⁸² The court distinguished cases which had been heard and completed, in which it would be unfair to order a retrial, from part-heard cases in which proceedings were extant.¹⁸³ An application to reinstitute proceedings was also made by the Director of Public Prosecutions who had the means to do so. It avoided a retrial on those grounds.

5.6 Permanent stay of prosecution

This is a drastic remedy which should only be reserved for exceptional cases where the court is fully satisfied that an accused person cannot

177 Art 126(2)(e) Constitution of Uganda, 1995.

178 *Nthowa v Director of Public Prosecutions* MC HFT 000 134/2006 [2007] BWHC 274.

179 *Boitumelo Mmerekhi v The State* Cr App F112/2003 [2004] BWHC 33: The typed record of proceedings did not indicate whether witnesses were ever sworn in, affirmed or admonished. The court held that if indeed the witnesses were not sworn, affirmed or admonished, the end result would be a mistrial rendering whatever outcome a nullity.

180 See *Gaolatheope Oki @Mokwenda v The Director of Public Prosecutions* MCHFT 000 086/2006 [2006] BWHC 45 para 13. If the plea is not recorded but the trial proceeds on the basis of a plea of not guilty, the major consideration would be whether the appellant was prejudiced by the apparent omission to record his or her plea or by the manner in which the trial was conducted.

181 Civil App 44/2003, [2008] UGHC 93.

182 *S v Lebakeng* MCHFT 000 046, 047, 054/2006 [2006] BWHC 28 [2006] 2 BLR 331 para 8.

183 See *Lebakeng* (n 182 above) para 19.

be afforded a fair trial even if an order was made for the trial to proceed speedily.¹⁸⁴ It applies to situations where the defect in the record translates into a serious breach of the rights of the accused person that go to the root of the jurisdiction of the court. A court cannot base its jurisdiction on egregious breaches of human rights.¹⁸⁵ A permanent stay of execution is distinguishable from the discharge of an accused person: In the latter case, the accused may be retried on the same facts.

6 Conclusion and recommendations

To a court of law, the record is everything. The court record refers to the entire court file. A court can only guarantee a fair trial based on a record that is complete, substantially accurate and authentic. It has also become crucial that courts develop their capacity to maintain electronic case files so as to capture the best evidence. The fair trial guarantees of presence at trial, adequate time and facilities to prepare one's defence, trial without undue delay and appeal, are facilitated by the court record. Justice derives from an efficient court record management system.

A good record management system should contain standards that ensure that records are cared for in a systematic and planned manner in accordance with the legal and administrative requirements of the establishment.¹⁸⁶ It is not enough to computerise filings. Uganda, among other jurisdictions, needs a normative framework constituted of legislation, policies and procedures to guide the management of records.¹⁸⁷ Botswana deserves commendation for legislating on the key aspects of court record management, including the admissibility of electronic evidence. Challenges facing the management of court records are twofold: administrative inefficiencies and *lacunae*, leading to a lack of proper guidance on how court records should be taken, maintained and disposed of. Courts are faced with problems of storage, retrieval, and the loss and misplacement of records.¹⁸⁸ These problems with record management are confirmed by court findings.

A situational analysis reveals that the courts of law in several African jurisdictions, including Kenya, Nigeria, South Africa and Zambia, have limited capacity to generate and manage court records efficiently. Understaffed courts have poor facilities, and while many courts struggle with outdated transcription machines, subordinate courts even may lack stationery. There is a manifest disproportionality between the facilities of higher courts and those accorded to subordinate courts. The storage facilities of mainly paper files are

184 *S v Setlhare* MCHLB-000059-07 [2009] BWHC 4 para 6.

185 See *Jean-Bosco Barayagwiza v P* ICTR-97-19-AR 72 para 112.

186 Motsaathebe & Mnjama (n 19 above) 175.

187 See Maseh (n 1 above) 81.

188 See Motsaathebe & Mnjama (n 19 above) 178.

prone to fire that has previously destroyed records and compromised cases. Unpredictable power supplies constrain even the use of the available electronic equipment. There is no standardised form of taking court records: A record may be handwritten, typed or both. This has aided practices such as inserting material in the record. Delays in making typed records available to parties have caused trials to be prolonged. The competency of a court to guarantee a fair trial should include its capacity to generate adequate court records and to manage these efficiently.

Whose role it is to take the court record is not certain. As partly a judicial role, it is subject to the judicial processes of appeal, review and revision. It is also a rule-based procedure which is subject to due process standards. Courts have awarded the remedies of correction, the quashing of orders, the discharge of accused persons, the setting aside of verdicts, retrials and, in limited circumstances, a permanent stay of prosecution, to aggrieved parties. This important role needs to be carried out professionally.

The following best practices can be nurtured and promoted to advance court record efficacy: developing the capacity of courts to maintain electronic case files and developing the capacity of staff to utilise the systems effectively; ensuring that court reporters, transcribers and stenographers take an oath before assuming duty; protecting records from improper access, accidental loss, theft, damage or unwanted destruction;¹⁸⁹ keeping records under lock and key or securing databases with secret passwords; backing up court records with electronic files and recordings; considering a reliable power supply for courts of law; improving court room communication with the use of audio aids such as public address systems; and making a sufficient budget allocation to record management in the judiciary.

189 Motsaathebe & Mnjama 184.

Interpreting the human right to water as a means to advance its enforcement in Uganda

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Summary

The water supply and mechanisms for the delivery of water currently available to improve access to water for citizens remain a challenge for many African states. In Uganda, although executive policy has made some progress in alleviating the various impediments to enjoying access to water, these impediments have not been completely removed. Evidence from other jurisdictions has shown that the judicial interpretation of socio-economic rights may go a long way to crystallise the exact nature and scope of these rights and, thus, contribute to removing barriers to the enjoyment of these rights. The article explores the manner in which the right to water currently is spelt out in Uganda's Constitution. The article explores how the Constitutional and Supreme Courts of Uganda have used interpretive paradigms as a strategy to better articulate other constitutional socio-economic rights. The article finds that a teleological approach to interpreting socio-economic rights has not been utilised fully by Ugandan courts. It proposes that, if such an expansive approach to the interpretation of implicitly-protected human rights is adopted, it may enhance current conceptualisations and ultimately improve citizens' enjoyment of the right to water.

Key words: *human rights; socio-economic rights; water; right to water*

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1 Introduction

In June 2015, the United Nations (UN) Committee on Economic, Social and Cultural Rights (ESCR Committee) published its concluding observations in response to Uganda's initial report on the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹ While this is a significant milestone, the ESCR Committee's concerns and recommendations are more so. For instance, the Committee was concerned that not all Covenant rights were protected in the Constitution or laws of Uganda and, hence, were not justiciable in courts. It thus recommended that the country incorporates the ICESCR into national law and ensure its applicability in the domestic courts.² Even though such recommendations must be commended, no express reference was made to water. In the article, I particularly focus on opportunities for realising a human right to water within the context of socio-economic rights, and highlight the challenges existing under the current constitutional and policy framework of Uganda. I argue that there are means by which the Constitution of the Republic of Uganda (1995 Constitution) may be interpreted to read into its articles an enforceable right to water. Following from this, I argue that the judicial interpretation of a human right to water may well be a more efficient means of enforcing the 1995 Constitution in a manner which determines substantive entitlements accruing to citizens and, thus, provide a more enduring means of guaranteeing the right.

I start by exploring the unique features of the 1995 Constitution which facilitate executive and judicial interaction with human rights, including a human right to water.³ In the third section, I explore the manner in which a human right to water may be inferred from the constitutional text. In section four, I interrogate the extent to which executive translations of the right to water have authentically given the 1995 Constitution aspirational meaning and thus give content to the right to water. Section five interrogates whether it is possible to judicially enforce the human right to water. Considering that the right to water has not yet been adjudicated upon by the courts, I examine the approach of the Constitutional Court in adjudicating other socio-economic rights. As a result, much of this section speculates on the

1 http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fUGA%2fCO%2f1&Lang=en (accessed 15 July 2015).

2 Para 5, Concluding Observations on the initial report of Uganda.

3 For a thorough account, see Republic of Uganda *The Report of the Uganda Constitutional Commission: Analysis and Recommendations* (1993) UPCC; Republic of Uganda *Official Report of the Proceedings of the Constituent Assembly* (1994) UPCC; J Oloka-Onyango 'Economic and social human rights in the aftermath of Uganda's fourth Constitution: A critical reconceptualisation' (2004) Working Paper 88, Centre for Basic Research 1; GW Kanyeihamba *Kanyeihamba's commentaries on law, politics and governance* (2006) 1 19-38; FE Ssempebwa 'The Constitution as a basis of political and socio-economic development: Some issues' in RO Wengi (ed) *Founding the Constitution of Uganda: Essays and materials* (2011) 31-41.

extent to which the jurisprudence of the Ugandan courts would allow an elaboration and, ultimately, the enforcement of the right to water. Finally, I draw conclusions on the potential and impediments to constitutional interpretation as a means to enhancing the enjoyment of the human right to water in Uganda.

2 Bill of Rights and its enforcement in the 1995 Constitution

The 1995 Constitution contains an elaborate Bill of Rights which enumerates most human rights recognised under international law.⁴ This Bill of Rights guarantees several qualified as well as unqualified rights. Although some of the rights enumerated are not elaborated upon, the Bill of Rights details the scope of many of the rights contained therein. The 1995 Constitution further contains a limitations clause, which also spells out the extent to which the rights can be enjoyed and enforced. Except for those rights that are non-derogable, the rights recognised in the Bill of Rights are subject to a general limitation to the effect that:⁵

In the enjoyment of the rights and freedoms prescribed in this chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

The 1995 Constitution further determines that public interest may not permit any limitation of the enjoyment of the rights and freedoms prescribed by the Bill of Rights, beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is explicitly provided for in the 1995 Constitution.⁶

Although the application of international human rights law within the domestic context is not explicitly articulated, and scholars have questioned its application, as discussed later in the article, it can be inferred within the National Objectives and Directive Principles of State Policy (NODPSP) and main part of the 1995 Constitution. The NODPSP stipulates that the state's foreign policy shall espouse respect for international law and treaty obligations.⁷ Article 287 affirms that international treaties which were in force prior to the promulgation of the 1995 Constitution continue to be binding on Uganda. While these

4 Ch 4 Protection and Promotion of Fundamental and Other Human Rights and Freedoms. Eg, the right to education, culture, a clean and healthy environment and the rights of workers are enumerated in ch 4 of the Constitution. Civil and political rights, such as a right to life, liberty, forced labour, privacy, the right to a fair hearing as well as civic rights are also expressed in ch 4.

5 Art 43(1). Non-derogable rights are enumerated in art 44. These are freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair hearing; and the right to an order of *habeas corpus*.

6 Art 43(2)(c).

7 Objective XXVIII.

provisions do not explicitly determine that the principles and interpretations of international law are applicable within the domestic system, it is plausible to argue that the application of international law may be inferred from the purpose and intent of the NODPSP and article 287. Particularly, as will be elaborated upon in the section which follows, this proposition may be extended to support the argument that any interpretations of the 1995 Constitution ought to be read in light of applicable international law.

In the context of articulating a role for the courts, the 1995 Constitution envisages for the Constitutional Court an interpretive function, which includes the interpretation of the rights enshrined in the Bill of Rights.⁸ Article 137(1) provides that 'any question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court'. It appears that, while fulfilling its interpretive role, the Constitutional Court is mandated to scrutinise the legislative outcomes and executive action against standards imposed by the rights in the Bill of Rights.⁹

The 1995 Constitution envisages the judicial enforcement of the Bill of Rights as well as judicial remedies for violations of the human rights enumerated therein. First, the 1995 Constitution stipulates that citizens can bring claims against the state and its institutions for rights violations. Article 50 provides:¹⁰

Any 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.

Even where violations or threats of violations arise from statutory enactments or executive actions, the courts are constitutionally obliged to provide redress to citizens. Article 137(3) stipulates that:¹¹

A person who alleges that -

- (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or
- (b) any act or omission by any person or authority

is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate.

The 1995 Constitution, thus, bestows on courts wide discretionary powers to remedy violations of rights in the Bill of Rights. For instance, in the exercise of judicial review, the Constitutional Court may make a

8 Art 137(1). The Constitutional Court has original jurisdiction in matters of interpretation of the Constitution. However, the Supreme Court is the highest appellate court and has appellate jurisdiction (sitting as a Constitutional Court of Appeal in all matters of constitutional interpretation).

9 Arts 137(3)(a) & (b).

10 Art 50(1).

11 Arts 137(3)(a) & (b).

declaration of unconstitutionality and, where necessary, determine the appropriate redress.¹² This envisages that, in the enforcement of rights, courts may be required to go beyond the rhetoric of mere declarations and may, in appropriate circumstances, have to provide substantive relief to successful claimants.¹³

3 Inferring a constitutional right to water from the 1995 Constitution

The international law conceptualisation of a human right to water constructs a universal entitlement to sufficient, safe, acceptable, physically-accessible and affordable water for personal and domestic use.¹⁴ There is no such conceptualisation of a right to water in the justiciable Bill of Rights of the 1995 Constitution. Explicit reference to a human right to water is only made in the NODPSP, which recognise the freedom to access water and freedom from interference with existing water supplies. The NODPSP stipulate:¹⁵

The state shall endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall in particular, ensure that -

....

All Ugandans enjoy rights and opportunities and *access* to education, health services, *clean and safe water*, work, decent shelter, adequate clothing, food, security and pension and retirement benefits.

In furtherance of this ideal, the NODPSP add that '[t]he state shall take all practical measures to promote a good water management system at all levels'.¹⁶

The significance of these objectives is emphasised by an amendment to the Constitution, in article 8A(1), which stipulates that the country shall be governed based on principles of national interest enshrined in the NODPSP, and enjoins parliament to make appropriate laws to give effect to this clause.¹⁷ Since the NODPSP are fundamental to governing the state, several scholars have argued that the directives and aspirations relating to socio-economic rights have been given equal force as those rights set out explicitly in the Bill of

12 Arts 137(3)(b) & 137(4).

13 See eg the position of the Supreme Court on the jurisdiction of the Constitutional Court in *Attorney-General v Major General David Tinyefuza Constitutional Appeal 1 of 1997*, judgments of Oder JSC, Tsekooko JSC, Mulenga JSC; and *Uganda Journalists Safety Committee & Another v Attorney-General Constitutional Petition 6 of 1997* (unreported). For a detailed exposition on the potential of remedies, see M Ssenyonjo 'The domestic protection and promotion of human rights under the 1995 Constitution' (2002) 20 *Netherlands Quarterly of Human Rights* 445 476.

14 Para 2 General Comment 15 UN Doc E/C.12/2002/11.

15 Objective XIV Constitution of the Republic of Uganda, 1995 (my emphasis).

16 Objective XXI.

17 Art 8A(2).

Rights.¹⁸ Although this has not been tested before the courts, it is arguable that universal access to safe and clean water ought to be read into the rights that have been enumerated explicitly in the Bill of Rights.

Constitutional impetus for reading the right to water into the Bill of Rights is provided by the state's obligation to comply with international human rights law standards, even in relation to non-enumerated rights. Article 45 of the 1995 Constitution reads:¹⁹

The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this chapter [Bill of Rights] shall not be regarded as excluding others not specifically mentioned.

If article 45 is given a generous interpretation, the absence of an explicit reference to the right to water in the Bill of Rights does not entirely exclude the right from constitutional recognition and, ultimately, enforcement. It is plausible that article 45 allows a reading into the constitutional text of other rights espoused in international law, such as the right to water.

There are several rights in the Bill of Rights into which aspects of the human right to water may be read. For instance, it is stated that '[e]very Ugandan has a right to a clean and healthy environment'.²⁰ Considering that the ESCR Committee's General Comment 15 regards the sustainability and quality of water resources as integral components of the right to water, it is possible to argue that a human right to water may be read into interpretations of environmental rights in the 1995 Constitution.²¹

In article 22, the right to life is guaranteed. The Constitution stipulates:²²

No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda.

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- 18 C Mbazira 'Public interest litigation and judicial activism in Uganda: Improving the enforcement of economic, social and cultural rights' (2009) Working Paper 24 Human Rights Peace Centre 1 11-14; J Oloka-Onyango *Reviewing Chapter Four of the 1995 Constitution, Towards the progressive reform of human rights and democratic freedoms in Uganda* (2013) HURINET-U 1 56-57; See JJ Barya 'Citizens' socio-economic rights and Uganda's poverty eradication action plan' (2009) *East African Journal of Peace and Human Rights* 398 407-409; B Twinomugisha 'Protection of the right to health care of women living with HIV/AIDS in Uganda: The case of Mbarara hospital' (2007) Working paper 5 Human Rights Peace Centre 1 19-20.
- 19 Also see BK Twinomugisha 'Exploring judicial strategies to protect the right of access to emergency obstetric care in Uganda' (2007) 7 *African Human Rights Law Journal* 283 294.
- 20 Art 39 Constitution of the Republic of Uganda, 1995.
- 21 See paras 11 and 12 General Comment 15 UN Doc E/C.12/2002/11.
- 22 Art 22(1).

Given the UN Human Rights Committee's view that the right to life should be interpreted generously, to encompass more than merely a restricted protection from the arbitrary taking of life, it is possible to read basic survival requirements into a right to life. Given that water is a basic survival requirement, it is, therefore, plausible to argue that a right to life may infer a right to water.²³ In relation to water, it is then possible to argue that the state has an obligation to fulfil and promote the right to life by putting in place measures which would prevent citizens from succumbing to illnesses arising from consuming contaminated water, or from a lack of water for growing food for subsistence.

The human right to water may also be read into constitutional guarantees pertaining to the wellbeing of children. In article 34(3) a child's right to medical treatment, education or any other social or economic benefits is guaranteed. In article 34(7) the need for special protection of orphans and other vulnerable children is recognised. When these provisions are read against the broader international law definition of a right to health, it is possible to argue that they may be generously interpreted as embodying a right to access safe water for daily use and consumption in order to sustain wellness.

The 1995 Constitution provides that no person shall be subjected to inhuman or degrading treatment.²⁴ Considering that the ESCR Committee's General Comment 15 espoused the right to water in a manner which seeks to protect the autonomy of the individual, it is possible to infer that the 1995 constitutional guarantee of human dignity may allow a reading which embodies aspects of the human right to water to the extent that, where citizens are deprived of access to water, they are subjected to an undignified existence.²⁵

In addition, the right to water may be read into the 1995 Constitution's guarantees of a right to equality. For instance, article 21 of the 1995 Constitution stipulates:²⁶

All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

Two dimensions may be inferred from this clause. First, it implies that laws must treat citizens equally. Second, it appears to require that the mechanisms established by the state to distribute resources such as water must be distributed equally. Given that the Constitution further envisages that it will redress the social and economic imbalances in

23 General comment 6 The right to life HRI/GEN/1/Rev 9 (Vol 1) para 5; Oloka-Onyango (n 18 above) 11-12.

24 Art 24. Inhuman and degrading treatment is defined as any conduct which causes unnecessary suffering and shame on the dignity of a person; *Salvatori Abuki v Attorney-General* Constitutional Case 2 of 1997.

25 Oloka-Onyango (n 18 above) 17.

26 Art 21(1).

Ugandan society, it is possible to read a guarantee of universal access to water into this provision.²⁷

The notion of equal opportunity espoused in the 1995 Constitution further resonates with some important aspects of a human right to water. For example, equal opportunity is implied by article 33(2) of the 1995 Constitution, which provides that the state must provide the facilities and opportunities necessary to enhance the welfare of women. The Constitution adds that women shall have the right to equal opportunities in economic and social activities.²⁸ Given that General Comment 15 recognises that women and children are the greatest victims of violations of the human right to water through the various impediments to access which cause them to either walk long distances or spend long hours collecting water for their families, it may be possible to read some aspects of the right to water into this constitutional guarantee.

I now consider the responsibility of the state for actualising the right to water. The 1995 Constitution provides that the rights and freedoms enshrined in the Bill of Rights shall be respected, upheld and promoted by all organs and agencies of government and by all persons. This provision may be read as facilitating a direct interface with the ESCR Committee's tripartite typology of state obligations to respect, protect and fulfil.²⁹ In relation to water, the obligation to respect appears to envisage deference to the constitutional norms by all organs and agencies of government as well as persons.³⁰ The obligation to protect seems to infer a responsibility to look after natural resources, which include water bodies such as lakes, rivers, springs and streams, on behalf of citizens.³¹ The obligation to promote appears to infer taking all practical measures to advance a good water management system,³² and to promote sustainable development and public awareness of the need to manage water resources in a balanced and sustainable manner for present and future generations.³³ The obligation to fulfil appears to envisage that the state ought to endeavour to fulfil the fundamental rights of all Ugandans to social justice and economic development and, in particular, to ensure that all development efforts are directed at ensuring the maximum social and cultural well-being of the country's people.³⁴

To sum up, the 1995 Constitution appears to guarantee an implicit right to water, along the same lines as international law conceptualisations of the right. The 1995 Constitution also appears to

27 Oloka-Onyango (n 18 above) 6-8.

28 Art 33(4).

29 See paras 20-29 General Comment 15 UN Doc E/C.12/2002/11.

30 Art 20(1); Objective V(i) NODPSP.

31 Objective XIII.

32 Objective XXI.

33 Objective XXVII.

34 Objective XIV(a).

guarantee a right to water, which at least operates as a directive principle to the executive and judiciary. It seems that, at most, the right to water can be read into the constitutional text by applying generous interpretations to other explicitly-guaranteed rights which can be vindicated by citizens. Even then, its exact internal content and external reach remain abstract. I thus explore the extent to which the right to water is fleshed out in Uganda's national policy framework and consider whether this framework portrays the aspirations of the 1995 Constitution.

4 Elaborating the human right to water within executive policy

Initiating and implementing national policies that, ideally, embrace a rights-based approach to delivering water services is a function that is in the executive's constitutional mandate. Urging a closer reading of executive policies, commentators have cautioned that the country's economic policy framework may well be responsible for the impediments to the full actualisation of socio-economic rights in Uganda. These commentators argue that the economic policy framework has over the years promoted the liberalisation of the economy and privatisation of national institutions hitherto responsible for the delivery of basic services in a manner which does not reflect the spirit of the 1995 Constitution.³⁵ In this sub-section, I explore the extent to which the NODPSP have influenced policies relating to water, as well as the policies' impact on the enjoyment and elaboration of a human right to water for Ugandans.

There are several policies pertaining to water use and management that have been developed and implemented over the years. Initially, I particularly focus on the National Development Plan, as it provides a benchmark for current national planning processes and is instructive of the perception of water within the planning organs of state. Thereafter, I consider specific water-related policies, particularly the National Water Policy and the pro-poor strategy for water and sanitation, since they elaborate on water supply for domestic needs. Finally, I briefly consider the water privatisation policy and the ways in which it has impacted on the actual delivery of water services.

35 Oloka-Onyango (n 3 above) 23-26; J Oloka-Onyango 'The problematique of economic, social and cultural rights in globalised Uganda: A conceptual review' (2007) Human Rights and Peace Centre Working Paper 3, 5-6 10-12 24; J Oloka-Onyango 'Poverty, human rights and the quest for sustainable human development in structurally adjusted Uganda' (2000) 18 *Netherlands Quarterly of Human Rights* 23 30-33.

The first National Development Plan was developed and adopted by parliament in 2010.³⁶ It aimed at ensuring poverty eradication, with an emphasis on 'economic transformation and wealth creation'.³⁷ Without much shift in strategy from the first plan, the second National Development Plan, launched in June 2015, anticipates that human capital development will be enhanced with improvements in access to safe water.³⁸ As a driver for planning water service delivery at the national level, these plans suggest that the executive may have been influenced by the NODPSP in articulating its vision for development. However, a closer look at both the first and second National Development Plans shows that the emphasis is on market-based approaches to alleviate poverty, without much attention being paid to advancing a rights agenda to the delivery of water services.

The National Water Policy, adopted in 1999, is the single most specific policy document elaborating on water delivery. It explicitly recognises that the policies enumerated in it are founded on the 1995 Constitution's directive to provide clean and safe water and the state's responsibility to manage water resources sustainably. In view of this, the policy recognises that domestic water use must be given the highest priority when addressing water development and use. Indeed, the water policy stipulates that the key criteria to be used in allocating water resources will be the provision of water 'in adequate quantity and quality to meet domestic demands'.³⁹ Having been formulated after the promulgation of the 1995 Constitution, the policy appears to adhere to the ideals of the directive principles by conceptualising water supply within the context of meeting universal basic human needs envisioned by the 1995 Constitution.

The National Water Policy elaborates on the nature of water necessary to meet basic human needs by making implicit reference to the quality of water sources from which water for human consumption ought to be sourced. For instance, the Water Policy anticipates that 'water' for domestic use is to be sourced from protected springs, hand pump-equipped shallow wells or boreholes,

36 Government of Uganda *The National Development Plan 2010/11-2014/15* (2010); *The National Development Plan II 2015/16-2019/2020*. These replaced the Poverty Eradication Action Plans of 1997; 2001 and 2004/5-2007/8. Even these have been criticised for lacking an authentic human rights-based approach to ameliorating socio-economic needs. See eg Oloka-Onyango (2007) (n 35 above) 24-27.

37 Government of Uganda *The National Development Plan* (2010) 1 3. Prior to the NDP, the Poverty Eradication Action Plans of 1997; 2001 and 2004/5 contained the primary national strategic planning objectives. These included a specific sector plan to improve rural and urban access to water. See also PM Mpanga 'Plenty of water, but scarcity still persists: Surveying the status of the right to water in Uganda' (2007) Human Rights and Peace Centre Working Paper 10, 1 19-20; Barya (n 18 above) 398 407-409.

38 Government of Uganda *The National Development Plan II* (2015/16- 2019/20) 1 202-205.

39 Government of Uganda *National Water policy* (1998) 8. Also refer to the meaning of 'domestic use' in the Water Act referred to earlier.

or from a tap on a stand.⁴⁰ This is presumably because these water sources can be monitored carefully to guarantee sufficient quality and availability of water channelled through them.

In addition to recommending sources of water suitable for human consumption, the National Water Policy embeds the responsibility of the state to make safe water available to citizens. The policy stipulates that the water quality should be that recommended by the World Health Organisation (WHO) until such time as the country develops its own national water quality standards.⁴¹ In 2009, the National Water Quality Management Strategy proposed to put in place national drinking water guidelines.⁴² In the context of access to water, the National Water Policy stipulates a reasonable distance to a water source in urban and rural areas by setting a recommended standard for the distance from a rural public water point as being preferably within 1 500 metres of households. In built-up areas and peri-urban zones, it is recommended that a public water point be located within walking distance not exceeding 200 metres. The policy stipulates that individual public water points in urban areas should not serve more than 300 persons.⁴³ Finally, the water policy recommends that in urban areas, the government's focus should be on the poorest communities in order to improve their access to water.⁴⁴

The National Water Policy specifies the amount of water that is ideally necessary for citizens' wellbeing. In both rural and urban areas the basic service level for water supply means providing 20 to 25 litres *per capita* per day. This national standard is in line with that recommended by the WHO and would appear compliant with international law standards.

The National Water Policy envisages the involvement of communities in determining the kind of technology that may be offered to them when developing their specific water supply systems. It emphasises a demand-driven approach which entails involving citizens in determining where water points should be located. In addition, it stipulates that in selecting the kind of water sources to be deployed in particular areas, consideration must be given to the use of low-cost technologies in order to keep the costs of operation and maintenance of water sources affordable.⁴⁵ This is an indication that the policy takes into consideration the specific needs of citizens in its conceptualisation of the right to water, as one which must be acceptable to citizens.

40 *Water policy* (n 39 above) 14-15.

41 *Water policy* 15.

42 National Water Quality Management Strategy 39-40. This strategy document is in effect an adoption of the WHO standards for water quality which is the benchmark for international water quality standards.

43 *Water policy* (n 39 above) 14.

44 *Water policy* 15.

45 *Water policy* 17.

The National Water Policy envisages the monitoring of the policy in order to ensure its implementation and to assess its effectiveness. This function is carried out by the Directorate of Water Development which is required to set out clear goals and monitoring indicators. Some of these include the initiation of legislation, bye-laws and regulations, the setting of standards, as well as establishing water management institutions and systems.⁴⁶ This may show that the policy abides by the state's constitutional obligation set out in the NODPSP, namely, to fulfil the realisation of a human right to water.

In sum, it appears that the National Water Policy adheres to the NODPSP and has conceptualised water delivery for domestic needs within a rights-conscious framework. In addition, it refines specific standards of water delivery which, if well implemented, can go a long way towards enhancing the enjoyment of the right to water.

The Pro-Poor National Strategy was designed to promote equity in access to water by improving access to water sources in urban and peri-urban areas, where the negative impact of population growth to water services appears to be most felt.⁴⁷ The strategy aims at extending the water infrastructure to areas that previously had no access to the water supply network. For instance, the strategy set out to pave the way for extending water pipes to rural and urban slum settlements which hitherto had no existing water infrastructure. In addition, the requirement for a connection fee was waived in these areas. Considering that the initial cost of connecting to a water supply was known to impede citizens' access to water, subsidies received from Uganda's development partners were used to waive these charges in the urban slum settlements.⁴⁸ The Pro-Poor National Strategy proposes to improve the ease with which citizens can reach water. The executive has implemented this undertaking by increasing the number of stand pipes and public service points in urban slum settlements. In many of these areas, the stand pipes are pre-paid stand taps which allow several users to share a water source while retaining the responsibility of individuals to pay for the water consumed.⁴⁹

However, there are still contradictions indicating that the translation of a right to water through executive policy cannot entirely actualise the enjoyment of the right for citizens and realise the constitutional aspiration for social transformation. By way of example, the Pro-Poor National Strategy indicates that the motivation for the

46 *Water policy* 33-34.

47 Government of Uganda Ministry of Water and Environment Pro-Poor Strategy for the Water and Sanitation Sector Uganda February 2006, 1 & 6.

48 Pro-Poor Strategy (n 47 above) 7. I understood the exact form of subsidisation through an interview with the Assistant Commissioner for Urban Water and Sanitation, Ministry of Water and Environment which was conducted in August 2013.

49 Government of Uganda Ministry of Water and Environment, Water and Environment Sector Performance Report 2013, 1 77.

strategy arose from the fact that rates charged for water remain inequitable among citizens.⁵⁰ Particularly, where the water delivery system breaks down in urban slum settlements, the cost at which water is supplied by private water vendors tends to be higher than the cost at which consumers with in-house connections access water.⁵¹

Even where the government has proposed a series of initiatives for promoting equity by the introduction of pre-paid meters, price control for water sold at public yard taps or stand pipes, and by encouraging consumers to use yard taps as opposed to buying water from commercially-driven private water vendors, it has withdrawn the benefits of such initiatives without much consideration for the lived realities of the poor and vulnerable.⁵² For instance, within three years of introducing water subsidies, and at a time when the benefits of easily-accessible water had begun to trickle down to the poor, government proposed that the increased numbers of people accessing potable water were indicative of a potential source of tax revenue for the state. It then proposed to use the growing base of water connections as a means to raise national revenue.⁵³ Although the tax was aimed at private domestic water users who neither receive water through the pre-paid mechanism nor from public stand pipes, in some parts of Kampala, the capital city, water rates were immediately increased by water vendors on account of the value added tax.⁵⁴ This shift in focus from enhancing water access for the poor to increased national revenue provides evidence that a weak legislative basis for the right to water impedes its full enjoyment and realisation.

However, the impact of the executive's proposal to introduce a value-added tax on water services may have indirect advantages. One immediate advantage appears to have been the dialogue which

50 Government of Uganda Ministry of Water and Environment Pro-Poor Strategy 1; Tariff Policy for Small Towns, Rural Growth Centres and Large Gravity Flow Schemes September (2009).

51 Information gathered from an interview with the Assistant Commissioner for Urban Water and Sanitation, Ministry of Water conducted in August 2013 revealed that private vendors charge up to Uganda shillings 500 (\$0.19) for 20 litres of water in comparison to the recommended rate of Ug shs 20 (US \$0.01). On the other hand, water supplied through an in-house water connection which guarantees a regular water supply costs approximately Ug shs 28 (interview transcript on file with author). To put this challenge in perspective, during interviews in the community, I learnt that in some areas the pre-paid water stand taps had broken down and remained so for at least nine months (interview of 22 August 2013; transcript on file with author).

52 Ugandan Ministry of Water and Environment *Tariff policy for small towns, rural growth centres and large gravity flow schemes* (September 2009) 7.

53 The Value Added Tax (Amendment) Act 8 of 2012 had included the supply of water for domestic use among exempt supplies. However, subsequently the Finance Bill 2013 had proposed to re-introduce VAT on water for domestic use.

54 This information was gleaned from an interview with a resident from an informal settlement of Kampala who doubled as a women's representative on the lowest local council unit (the LCI) conducted in August 2013 (transcript on file with author).

ensued between parliament and the executive relating to this proposal. During the last two years, parliament's committee on natural resources debated and consistently recommended that government drop proposals of a value-added tax on domestic water supply, in order not to forestall access to safe water where citizens cannot afford clean and safe water.⁵⁵ This would appear to have generated the much-desired dialogue between the executive and legislature on at least one component of the human right to water. Even though the tax was nevertheless implemented, the debates and dialogue it stirred point to the potential of a rights-based approach, to the extent that it can compel the justification of executive policy where this is likely to impede the enjoyment of the right to water.

The Water Privatisation Policy has impacted on the manner in which water is conceptualised and delivered to citizens. Even though the National Water and Sewerage Corporation (NWSC), which is responsible for water delivery in many urban centres, was not divested to a private company as was initially planned, the delivery of water services was adapted to accommodate private companies in the delivery of water. The privatisation of water delivery has taken the form of performance-based contracts between the government and the NWSC, as well as other private companies mandated to supply water in local government water supply areas. This unique model of involving private companies in the delivery and supply of water services was adopted after a long debate about whether the outright sale of the NWSC would be more effective in improving water services than a rigorous private enterprise reform.

Whereas the privatisation of water services enhanced the availability and accessibility of water and facilitated the improvement of water quality, it does not appear to have facilitated a rights-based approach to water delivery. A close reading of the performance management contract model does not reflect rights consciousness. For instance, in the performance management system which was devised for measuring the NWSC's performance in delivering services to citizens, four key aspects were prioritised. These were articulating targets for improving efficiency in billing and collection; ensuring that corporate planning and budgeting best practices were complied with; incentive payments of up to 25 per cent of senior managers' salaries; and performance contract review in order to recommend appropriate bonuses for staff.⁵⁶ Subsequent performance contracts have

55 See eg the Parliament of Uganda *Report of the Committee on Natural Resources on the Ministerial Policy Statements and Budget Estimates for the Financial Year 2012/2013* August 2012 1 23; and Parliament of Uganda *Report of the Committee on Natural Resources on the Ministerial Policy Statements and Budget Estimates for the Financial Year 2013/2014* August 2013 1 33; 'Value-added tax on water rejected' *The New Vision* 2 May 2013.

56 Y Jamal & L Jones 'Impact of privatisation in Africa: Uganda water' (2006) 7-8 <http://siteresources.worldbank.org/EXTNTFPSI/Resources/UgandaWater.pdf> (accessed 15 July 2015).

expounded on the scope of targets to include extending services to the poor in urban areas.

While the direct effect of the privatisation of water services which may have entrenched harsh market-oriented policies to water delivery, appears to have been avoided through the preferred public enterprise reform approach that was applied to water services delivery, the negative effects of privatisation were not completely avoided.⁵⁷ Public enterprise reform was not devoid of neo-liberal tendencies and may have created impediments to the enjoyment of water services for many Ugandans.

Returning to the question of whether the directive principles have impacted on the elaboration of policy and the ultimate enjoyment of a human right to water, it would seem that the NODPSP in the 1995 Constitution have gone a long way towards enhancing the enjoyment of the human right to water. It is possible to argue that the Water Policy and Pro-Poor Water Strategy exhibit human rights-based consciousness to conceptualising and delivering water to citizens, which was likely implored by the NODPSP.

The policies discussed in this section have all been implemented. They have also been subjected to periodic review and have not remained stagnant. From its own reports, the executive appears to demonstrate that these programmes and policies have substantially increased the number of households with access to clean and safe water in urban and rural areas. For instance, the reports provide evidence to the effect that during the period 2007-2012, remarkable progress was made in increasing the number of additional people served by the water supply systems, both in rural and urban areas.⁵⁸ Indeed, these reports have enumerated gains made in terms of the five core components of the human right to water: universality of access to water; adequacy of water; safety of water; quality of water; and affordability of water.

However, while the human rights-based consciousness apparent in the water-specific national policy must be lauded, examples from the lived experiences of citizens, such as that provided by the urban poor, appear to show that the social contexts in which the state policies operate appear to undermine the likely strengths of these policies.⁵⁹

57 'Uganda's NWSC on track for privatisation' (2002) 3 Issue 12 <http://www.globalwaterintel.com/archive/3/12/general/ugandas-nwsc-on-track-for-privatisation.html> (accessed 1 April 2016).

58 Government of Uganda 'Joint Water and Environment Sector Strategic Plan Final Programme Document' 2013-2018, 9-10 (on file with author). At the same time, the programme anticipates that between 2013-2018, an additional total of 3,4 million Ugandans will benefit from the plan by accessing clean and safe water from the programme.

59 World Bank Global Water Practice; S Mutono et al *Water and sanitation for the poor and bottom 40% in Uganda: A review of strategy and practice since 2006* (2015) 57-58.

In the end, it appears that a well-articulated right lacking the threat of justiciability may remain only on paper.

Finally, considering that the right to water seems to be recognised only to the extent that it is a non-justiciable right, it is possible to argue that this distinction between rights and justiciability may have re-surfaced in the model applied to elaborating the policy on water. While policies may be designed to be human rights-conscious, they lack the force of law and have failed to absorb the inequity still associated with water delivery.

5 Potential and challenges of adjudicating the right to water in Uganda

Notwithstanding the mandate granted to the courts under the 1995 Constitution, the adjudication of socio-economic rights issues in Uganda has remained infrequent and no decision has involved the right to water. This section considers the challenges which appear to have impacted on how the courts have so far vindicated socio-economic rights in the cases before them and how these rights have been interpreted. Although not directly concerned with the enforcement of socio-economic rights in the NODPSP, there are a few Supreme Court and Constitutional Court decisions which have addressed the broader interpretations of the right to a means of livelihood and, albeit only tentatively, the right to health. It is from these decisions that I seek to map out the potential and pitfalls of adjudicating the right to water, which appears to be elaborated mainly in the sphere of executive policy within the current adjudicative paradigm.

5.1 Courts' application of international law

Given that the 1995 Constitution does not explicitly refer to the application of international law by the courts, some scholars have questioned whether there is a legitimate basis upon which international law can be applied in the interpretation of domestic law.⁶⁰ However, the jurisprudence emerging from the courts provides an explicit answer. The courts are willing to interpret constitutional provisions in light of international law. This indicates that international law is considered an aid to interpretation of the Constitution.⁶¹ Although the decisions in which international law has been referred to

60 By international law, I refer to the main sources of international law defined by the ICJ Statute. Also see B Kabumba 'The application of international law in the Ugandan judicial system: A critical enquiry' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 84; G Tumwine-Mukubwa 'The Uganda Constitution, 1995 and human rights: Interpretation and enforcement of chapter four rights and freedoms' in PM Walubiri (ed) *Uganda: Constitutionalism at crossroads* (1999) 14-15.

61 For a detailed account, see Kabumba (n 60 above) 84 90-96.

in interpreting the constitutional text do not involve socio-economic rights, there is nothing to suggest that these rights are excluded from this willingness.

Two principles emerging from the courts' decisions illustrate this position. When interpreting the 1995 Constitution, courts have maintained that international law must be taken into account. Where there are several plausible interpretations applicable to the constitutional text, as a rule courts avoid those interpretations which are inconsistent with international law.⁶² Secondly, courts will take cognisance of the fact that Uganda has acceded to international covenants.⁶³ It is, therefore, possible that their stance relating to international law enables them to consider international law conceptualisations of socio-economic rights when called upon to adjudicate constitutional rights. Drawing from these scholarly writings and court interpretations of other rights, discussed in the penultimate section of this article, I contend that it is possible for Ugandan courts to recognise a justiciable right to water.

5.2 Constitutional Court's approach to adjudicating socio-economic rights claims

Several principles of constitutional interpretation which are pertinent to understanding the adjudication of socio-economic rights in the Ugandan context have emerged from decisions of the Constitutional Court and the Supreme Court. First, the Constitutional Court has affirmed that, in the interpretation of the Bill of Rights, it will take cognisance of the fact that a constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come. The constitutional provision, accordingly, will be given the widest possible construction in order to realise the full benefit of the guaranteed right.⁶⁴

Summarising the cardinal principles of constitutional interpretation in *Davis Wesley Tusingwire v The Attorney-General*,⁶⁵ the Constitutional Court re-stated three additional principles of interpretation which are of relevance here. It affirmed that, in interpreting the Constitution, the rule of harmony or completeness must be applied. This means that constitutional provisions are looked at as an integrated whole meant to sustain each other and should not be looked at in isolation.⁶⁶

62 *Major General David Tinyefuza v Attorney-General* Constitutional Petition 1 of 1996, judgment of Egonda Ntende JA (Ag) 18; and *Attorney-General v Susan Kigula & 417 Others* Constitutional Appeal 3 of 2006 (SC).

63 *Kigula* (n 62 above), judgment of Egonda Ntende JSC and *Susan Kigula & Others v Attorney-General* Constitutional Petition 6 of 2003, judgment of Twinomujuni JA.

64 *Attorney-General v Uganda Law Society* Constitutional Appeal 1 of 2006 (SC); and, more recently, in *Davis Wesley Tusingwire v The Attorney-General* Constitutional Petition 2 of 2013. (on file with author).

65 *Tusingwire* (n 64 above).

66 Also relied upon in *Paul Ssemwogerere v Attorney-General* Constitutional Appeal 1 of 2002 (Supreme Court); *Kigula & Others* (n 62 above).

Second, where several provisions of the Constitution have a bearing on the same subject, these should be read together so as to ensure that the full meaning and effect of their intent are affirmed.⁶⁷ Finally, the Constitutional Court has affirmed that a non-derogable provision of the 1995 Constitution confers absolute protection and should be enforced by all governmental and non-governmental organs as well as by individuals.⁶⁸

In the first constitutional petition subsequent to the promulgation of the 1995 Constitution, the Constitutional Court in *Tinyefuza v Attorney-General* referred to abiding by the values in the NODPSP, and held:⁶⁹

In applying or interpreting the Constitution or any other law, the courts and indeed all other persons must do so, so we are ordained, for the establishment and promotion of a just, free and democratic society. That ought to be our first canon of construction. It provides an immediate break or departure with past rules of constitutional construction.

Later, *Salvatori Abuki & Another v Attorney-General* similarly engaged with the application of the NODPSP in vindicating the constitutional rights of the petitioner, in addition to deciding challenges to the constitutionality of the Witchcraft Act.⁷⁰ The petitioner sought to vindicate, among others, the constitutional guarantee to equality and freedom from discrimination found in article 21(1), and the right to dignity in article 24. In the Constitutional Court, while declaring a banishment order to be an infringement of the right to dignity, Egonda Ntende J stated:⁷¹

I am prepared to take judicial notice of the fact that the majority of Ugandans live in rural Uganda working the land for their livelihood. The effect of a banishment order as in this case, would be to exclude such a person from shelter, food by denying him access to his land, and also means of sustenance, without provision of an alternative. The person so banished is rendered destitute on leaving the prison gates.

Most significant was the Constitutional Court's casting of justiciable human rights within the frame of the NODPSP. The judge stated:⁷²

I take this view guided by the National Objectives and Directive Principles of State which we are enjoined to apply in interpreting this Constitution in part thereof ... An exclusion order under section 7 ... seems to me to be set in the opposite direction from assuring access of the person banished to any shelter, food, security, clean and safe water, and healthy services.

67 *Twinobusingye Severino v Attorney-General* Constitutional Petition 47 of 2011 (Constitutional Court).

68 *Attorney-General v Salvatori Abuki* Constitutional Appeal 1 of 1998 (Supreme Court), also reported in 2000 KaLR 413.

69 *Tinyefuza* (n 62 above), judgment of Egonda Ntende J (unreported) 12-13.

70 Constitutional Case 2 of 1997.

71 Egonda Ntende J in *Abuki* (n 68 above) 41.

72 Egonda Ntende J in *Abuki* (n 68 above) 43-44.

Both *Tinyefuza* and *Salvatori Abuki* have been lauded for demonstrating the Court's willingness to read the NODPSP into the Bill of Rights, which suggested a willingness to perceive the rights enumerated in the NODPSP as justiciable.⁷³ These decisions indicate that the courts can vindicate rights located in the NODPSP, provided that they are willing to generously interpret entrenched rights in a manner which allows for the NODPSP to be read into the Bill of Rights.

However, none of the constitutional cases decided subsequent to *Salvatori Abuki* followed this approach to interpreting the NODPSP.⁷⁴ Indeed, in *Centre for Health, Human Rights and Development (CEHURD) v Attorney-General*, the petitioners invoked, without success, the argument that the NODPSP were binding upon the executive and justiciable.⁷⁵ The petition arose from the grievances of relatives of two women who had died in hospital during the course of childbirth. The petitioners alleged that the government's failure to provide the basic minimum maternal health package amounted to an infringement of the constitutional right to access health services and of the right to life. The Constitutional Court dismissed the petition on a preliminary point of law without evaluating any of the petitioners' arguments. As it stands, the *CEHURD* case showcases the shortcomings of relying on the NODPSP to enhance the enjoyment of socio-economic rights and, additionally, the *CEHURD* case waters down the potential of indirect vindication of socio-economic rights.⁷⁶

On the other hand, the courts must be lauded for not quashing the hopes of adjudicating socio-economic claims, given the fact that the Constitutional Court has marginally acknowledged their justiciability. For instance, although the *CEHURD* bench dismissed the petition at a preliminary stage of the trial and found that there were no questions that merited constitutional interpretation, the Court did not go as far as to declare that the right to health could not be justiciable. Indeed, the Court stated that the petitioners could claim redress from the High Court on the basis of article 50 of the 1995 Constitution.⁷⁷

In the aftermath of *CEHURD*, claims for the right to health have already been filed before the High Court. One of these cases has come to conclusion. In *The Centre for Health, Human Rights and Development*

73 Oloka-Onyango (n 3 above) 38-39; Mbazira (n 18 above) 11-14.

74 Eg, in *Ssemwogerere & Olum v Attorney-General* Constitutional Appeal 3 of 1999, the Supreme Court found that the Constitutional Court would have jurisdiction to determine matters concerning the internal workings of parliament in deciding whether an Act of parliament had been properly passed to become law. Also see *Kanyehamba* (n 3 above) 1 3.

75 *CEHURD & Others v The Attorney-General* Constitutional Petition 16 of 2011 (unreported). In October 2015, the Supreme Court, sitting as the Constitutional Appeal Court in *CEHURD v Attorney-General* Constitutional Appeal 1 of 2013, ordered that the Constitutional Court hear the petition on its merits. The hearing of the petition had not started at the time of writing.

76 Oloka-Onyango (n 23 above) 10-12; Oloka-Onyango (2007) (n 35 above) 47-49.

77 Page 16 of Constitutional Court ruling (on file with author).

& *Others v Nakaseke District Local Administration*,⁷⁸ the High Court declared that the constitutional right to protection of women on account of their unique status and maternal functions in society was violated where a woman died in the course of childbirth due to the medical attendants' failure to provide emergency obstetric care in a local government hospital. Even then, the High Court's finding was framed within the context of fundamental rights explicitly included in the main text of the 1995 Constitution, and it did not rely on the right to health set out in the NODPSP. Therefore, it still remains to be seen how the courts will deal with the matter of interpreting a right ensconced in the NODPSP. At the same time, arguments for direct claims based on the NODPSP remain to be tested.

However, the High Court's approach may be explicable. Given that the right to health was not explicitly entrenched as a justiciable right in the 1995 Constitution, the High Court may have found it difficult to adopt an approach based on the NODPSP, given that the Constitutional Court had not offered any interpretive guidance. When the Court's actions are viewed as pertaining to socio-economic rights claims within the NODPSP, and not necessarily to the entire Bill of Rights, it is possible to argue that, to date, the Constitutional Court and Supreme Court have not fully grasped the powers vested in them by the 1995 Constitution on account of their attitude towards the adjudication of socio-economic rights.

6 Conclusion

This article set out to explore the extent to which the human right to water is embodied in Uganda's constitutional framework and executive policy in order to surface the implications of such recognition for citizens' enjoyment of water as a right. It concludes that there is no explicit reference to a human right to water in the main part of the 1995 Constitution. At most, there is a non-justiciable right to water, emerging from the NODPSP, set out in the Preamble to the Constitution. However, considering that the 1995 Constitution implicitly allows an international law understanding of the right to be taken into account in interpreting the Bill of Rights, there appears to be ample space, which courts may utilise, to interpret the text of several rights within the Bill of Rights as implicating a human right to water.

The article has shown that, although the courts have not had the opportunity of hearing a claim related to the human right to water, the outcomes of adjudicating other rights claims illustrate some common trends. The Constitutional and Supreme Courts are willing to apply a generous interpretive approach to the provisions of the 1995 Constitution. Furthermore, these Courts are willing to apply

78 Civil Suit 111 of 2012 13 (judgment on file with author).

international law in the interpretation of the 1995 Constitution, which goes a long way towards introducing international human rights standards into the domestic setting.

Of concern, though, is the pattern which seems to emerge from the study of the Constitutional and Supreme Court cases relating to rights-based challenges: The Courts appear unwilling to determine claims arising from socio-economic directives of state policy. Since the Courts appear open to giving the 1995 Constitution a generous interpretation, and have vigorously enforced rights explicitly enumerated in the Bill of Rights, it would seem that the underlying problem with socio-economic rights claims is with the manner in which they have been articulated as non-justiciable within the NODPSP. It is, therefore, contended that the Courts' jurisprudence so far does not support claims for a human right to water, and that this weakness may be attributed to the manner in which the right to water has been classified as a NODPSP, yet executive interpretations of the NODPSP continue to fall short in facilitating the full realisation of the right. This is of concern. Given the fact that courts are likely to adjudicate claims on the basis of precedent, it seems that the underlying problem of a vague constitutional right to water may endure and will, accordingly, remain an impediment to the full realisation of the right.

A South African reflection on the nature of human rights

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Summary

This article argues that continued structural inequality in South Africa should give us pause to reflect on the efficacy of the country's rights discourse. It is not so much concerned with the ineffective application of rights (particularly socio-economic rights) as with the actual nature of the rights. My argument is pursued as follows: The notion of 'right' as we have it today is rooted in the same paradigm that fosters commodification; this lends rights an inherent indeterminacy and they are deployed not only to challenge hegemonic interests, but to defend them as well. This indeterminacy is also tied to the fact that rights are really preferences that cultivate particular types of subjectivity. Such recognition of the nature of rights will generate, I believe, a more sober view of its potential to correct society's iniquities.

Key words: *rights; South Africa; indeterminacy; autonomy; subjectivity*

1 Introduction

South Africa has been held up as the first state that is the virtual product of post-World War II's 'Age of Rights'. The country 'represents the first deliberate and calculated effort in history to craft a human rights state – a polity that is primarily animated by human rights norms'.¹ As such, the human rights discourse has been

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1 M Mutua *Human rights: A political and cultural critique* (2002) 126.

employed as the predominant means by which South Africa seeks to transform the iniquities of the past.

However, while South Africans have now been afforded a wide range of civil liberties, the broadly-stated aims in the country's Constitution relating to social redress remain out of reach. Individual rights (freedom of expression, the right to a fair trial, and so on) abound but structural inequality persists. Significantly, even the provision of generic socio-economic rights in the Constitution seems to have had little impact on this inequality. For, while these individual and socio-economic rights are theoretically available to all, they are possessed in an asymmetrical social, political and economic order – an order, it must be emphasised, that has been, and continues to be, profoundly shaped by the systemic racism of colonialism and apartheid, and its attendant racialised poverty and dispossession.² And so, access to and the exercise of rights in South Africa are strongly inflected by race and class stratification and may paradoxically lend weight to this stratification. As Brown has indicated, the exercise of these rights can indeed augment the power of those who hold power in society.³

This abstraction of rights from these social realities gives the human rights discourse in South Africa a peculiar hollowness: It projects the image of a country with a 'vigorous human rights culture', but this very vigour obscures, to use a Marxist phrase, fundamental social contradictions. As Vally succinctly notes:⁴

Institutions such as the South African Human Rights Commission, the Commission for Gender Equality, the Public Protector and others, for all the good work some of them do, often disguise the vicious nature of the society we live in. The discourse of rights, championed as the mainstay of our public institutions and the Constitution has often served to promote a fiction. Acting as if certain rights exist for all in an equal way inhibits people's ability to recognise when they are in fact, illusory, and why society does not act to protect these rights. A single mother in Soweto compared to a suburban corporate executive cannot be said to have the same power of political persuasion or opportunity. These are real distinctions that give some people advantages and privileges over others. The fiction that promotes the view that real social differences between human beings shall not affect their standing as citizens, allows relations of domination and conflict to remain intact.

I would like to explore this tension between human rights and social redress in South Africa by examining the notion of a 'right'. I argue that the indeterminacy of human rights – the fact that, after all is said

2 See, eg, S Vally 'From people's education to neoliberalism in South Africa' (2007) 111 *Review of African political economy* 39. See also S Terreblanche *Lost in transformation* (2012) 1-5.

3 W Brown 'Suffering rights as paradoxes' (2000) 7 *Constellations* 232. For a nuanced discussion of how the exercise of these rights is profoundly shaped by very local contexts, see also T Madlingozi 'Post-apartheid social movements and legal mobilisation' in M Langford et al (eds) *Socio-economic rights in South Africa: Symbol or substance?* (2013) 92 ff.

4 Vally (n 2 above) 40.

and done, we construe as a right whatever we want to construe as a right – means that, elementally, the human rights discourse relies on the same logic that sustains the types of activity that may reinforce conditions of structural inequality. This is not the same thing as saying that such discourse does not play a role in ameliorating such inequality. It does, and indeed is quite critical to monitoring the injustices produced by prevailing arrangements.⁵ Nor is my argument interested in the *motives* of human rights campaigners (and so I do not question these motives nor deprecate their efforts). Rather, my interest is in the formative ideas that went into the construction of the ‘right’ as we now have it, and in the *effects* this construction has produced. In my view such an examination can help shed some light on why human rights discourse, for all its ameliorative capacity, has not *innately* challenged structural inequality in South Africa in the way many would have hoped.

2 On the logic of autonomy

According to Asad, human rights proceed on the assumption that the human being has certain inalienable rights by virtue of being human.⁶ In other words, an essence is ascribed to the human being which invests him and her with particular rights, irrespective of social obligations. A human being’s civil status – as citizen of the state – is distinct from his or her status as a human being – the status which has invested him and her with these inalienable rights. For Asad, this explains why the devastating social effects that followed the Asian economic crisis in the mid-1990s – a crisis explicitly precipitated by neoliberal policies – was not classed as a ‘human rights’ violation. Nothing of the human being’s essence was said to be violated if he or she suffered as a consequence of (in this case) market manipulation from beyond their own state. His or her suffering as a result of the crisis – in other words, as a citizen of a state – is to be distinguished from his or her suffering as a human being: ‘Human rights are only concerned with the individual in the latter capacity, with his or her *natural* being and not civil status.’⁷

Such a distinction between human being as human being and human being as citizen is, of course, untenable. In reality, and especially in the modern state, these are intertwined. Asad’s critique of this artificial division is useful for understanding why the deleterious consequences of South Africa’s Growth, Employment and Redistribution (GEAR) policy was not seen as a violation of human

5 For the necessity and value of legal strategies, even among ‘counter-hegemonic’ social movements, see Mandligozi (n 3 above). Brown has also observed that while rights serve as a mitigation, not a resolution of subordinating powers, ‘[i]f violence is upon you, almost any means of reducing it is of value’. Brown (n 3 above) 232.

6 T Asad *Formations of the secular* (2003).

7 Asad (n 6 above) 129 (my emphasis).

rights. Despite exacerbating inequality and unemployment, increasing the cost of living for the poor, creating food insecurity and impeding access to housing, water and electricity,⁸ GEAR was a state policy applied to the country's citizens in their capacity as citizens. And so the fact that its *effects* (not intent, of course) violated the provisions contained in the Bill of Rights (which enshrines equality and access to employment and services) does not formally register as a transgression of human rights. The suffering that resulted from this policy is only recorded after the fact and follows indirectly from a person's status as a citizen. It is only then (if at all) that individual cases of suffering can be registered as human rights violations.

Some distinctions need to be introduced here. The Bill of Rights provides for formal equality before the law (section 9(1))⁹ – a comparatively straightforward matter, but the very next point states that '[e]quality includes the full and equal enjoyment of all rights and freedoms' (section 9(2)). However, if there are structural barriers to employment, or if there are obstacles to accessing essential services – all rights in the Bill of Rights – can such equality be said to have been optimally achieved? The equality spoken about here goes beyond the formal one stated in the first and speaks to a qualitative measure of living, namely, similar access to resources. But since access to such resources in South Africa – a country with one of the world's more acute Gini co-efficients¹⁰ – varies wildly, such equality can hardly be realised. Indeed, as Vally intimates above, social disparity can hinder access to more formal rights as well. GEAR, then, has produced results that are inconsistent with the Bill of Rights.

However, a failure of economic policy is not conventionally seen as a human rights violation. It is seen as a failure of state policy that was applied to *citizens* which then may adversely affect them as *humans*. And it is only in relation to the latter that the human rights regimen comes into the picture. This time lag has an important consequence: Human rights cannot formally indict state *policy*. It cannot, in this example, pronounce, in any legally-enforceable way, on the broader issue of rising inequality and unemployment. It certainly recognises such systemic challenges, and is critical of them,¹¹ but its technical remit is restricted to investigating the human consequences that,

8 A Mngxitama & A Eveleth 'The widening gap between rich and poor' *Social Watch* (2003) <http://www.socialwatch.org/node/10861> (accessed 5 April 2016).

9 Bill of Rights, Department of Justice, South Africa <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng-02.pdf> (accessed 5 April 2016).

10 Eg, see G Keeton 'Inequality in South Africa' 3 November 2014 <http://www.ngopulse.org/article/inequality-south-africa> (accessed 5 April 2016).

11 The Commission admits as much: 'SA has laid important foundations for human rights in our Constitution; through international UN obligations such as CEDAW, progressive policies and laws, institutions supporting democracy such as the Constitutional Court, the South African Human Rights Commission and the Public Protector. Yet these advances have been undermined by macro-economic choices.' P Govender 'South Africa's democracy and human rights: progress and challenges' 3 October 2012 <http://www.sahrc.org.za/home/index.php?ipkArticleID=136> (accessed 8 September 2015).

among other things, follow from the implementation of state policy, not the policy itself.¹² Echoing Asad, it may be said that its focus is on the suffering and impairment to the dignity of the human being as human being, not as citizen. In a sense, it is left picking up the pieces after the damage to *citizenry* already has been done.

So, while human rights advocates, such as South African Human Rights Commission's Deputy-Chairperson Pregs Govender,¹³ may correctly rail against the broader macro-economic framework,¹³ the human rights regimen is designed, via the time lag, to work within the structure that sustains this framework. Of course, it is a countervailing force and performs a crucial ameliorative function, but it responds from within the same structure.

The implications of working within such structural limitations have been discussed by Bond in relation to the right to water in South Africa. Reflecting on a protracted dispute between rights activists and the City of Johannesburg surrounding the provision of water in the early 2000s, Bond asks:¹⁴

[B]y invoking the right to water and attempting to define it in the context of neo-liberal municipal management, does a generic commitment to rights trump the market? Or instead, does rights talk work *within neo-liberalism*?

In taking the matter to the courts, water rights advocates argue that across South Africa,¹⁵

the self-interest of powerful municipal constituents – large businesses, farms and rich ratepayers – was to keep water prices relatively low, which in turn required limiting provision in low-income neighbourhoods.

Rights advocates further accused the City of, among other things, (i) making water unaffordable after the provision of very small free basic supply (equivalent to roughly two flushes a day); (ii) disconnecting water to people requiring more than the free basic supply but too poor to pay for it; (iii) offering 50 free litres per *household* per day rather than the Reconstruction and Development Programme recommendation of 50 litres per *person* per day; and (iv) providing low quality sanitation and water (for example, shallow sewage systems).¹⁶

In court, rights advocates met with gradually diminishing success. In April 2008, a High Court ruled that the 'prepayment water system in Phiri township' was 'unconstitutional and unlawful', and ordered the City to provide each applicant and other residents with a 'free

12 See SAHRC website 'About the SAHRC', <http://www.sahrc.org.za/home/index.php?ipkContentID=122&ipkMenuID=1> (accessed 8 September 2015).

13 Govender (n 11 above).

14 P Bond 'Water rights, commons and advocacy narratives' (2013) 29 *South African Journal on Human Rights* 126.

15 Bond (n 14 above) 133.

16 As above.

basic water supply of 50 litres per person per day and the option of a metered supply installed at the cost of the City of Johannesburg'.¹⁷ However, this judgment was overturned by the Supreme Court in 2009, which ruled that, although prepaid metres were 'unlawful', they could be 'legalised' by the City. In addition, it reduced the available consumption for individuals from 50 litres to 42, an order which Bond finds to be 'whimsical'.¹⁸ Finally, when the matter was taken to the Constitutional Court, it confirmed a policy which granted individuals 25 litres per day, as well as finding that the use of prepaid meters was 'reasonable and lawful'.¹⁹

For Bond, the frustrating unfolding of this story should teach us the limitations of 'consumption-based rights demands'. The rights narrative is still trapped in the paradigm of commodification. Water is still demanded as 'an individualised consumption norm' in rights talk (a rights talk that is, in addition, shaped by the legalism of the courts), rather than a communally-shared resource. As such, 'the right to water' campaign tends to unwittingly reinforce corporatist models of water management. Bakker, as quoted by Bond, has pointedly outlined the general problems of 'rights talk' in relation to water:

The adoption of human rights discourse by private companies indicates its limitations as an anti-privatisation strategy. Human rights are individualistic, anthropocentric, state-centric, and compatible with the private sector provision of water supply and, as such, a limited strategy for those seeking to refute water privatisation. Moreover, 'rights talk' offers us an unimaginative language for thinking about new community economies, not least because the pursuit of a campaign to establish water as a human right risks reinforcing the public/private binary upon which this confrontation is predicated, occluding possibilities for collective action beyond corporatist models of service provision.²⁰

What Bakker and Bond are saying is that, at a profound level, 'rights' advocacy and commodification work within the same structure. This does not negate a real difference or opposition between them, but it does illuminate why human rights are limited from a paradigmatic standpoint. Human rights discourse has to respond from within the same paradigm that is responsible for the commodification of the water supply, and so it has to frame its demands in terms of the limits set by that paradigm. But why does human rights discourse not look beyond this paradigm to present its criticism of the state of affairs? I think it is incapable of doing this because, fundamentally, it shares the same view concerning the *self* as the forces that drive commodification. To understand this more fully,

17 Bond (n 14 above) 134.

18 Bond (n 14 above) 134-135.

19 Bond 135; see *Mazibuko & Others v City of Johannesburg & Others* 2009 3 BCLR 239 (CC).

20 Bond (n 14 above) 138.

we need to again turn to Asad and, in particular, his reflection on the genealogy of natural rights, the precursor to human rights.

For Asad, natural rights – rights believed to be intrinsic to a human being in a ‘state of nature’ – are closely connected to the concept of active rights – rights that are believed to inhere in a human being irrespective of social relationships. An active right is distinguished from a passive right – one that entailed the reciprocal duties and obligations of a social network. The idea of *liberty* is critical to the notion of an active right. The idea means that the human being is to be defined as a *sovereign* individual and not as an individual defined in terms of his or her social relationship. As an autonomous individual, he or she has inalienable rights, that is, human rights. But as an autonomous individual, he or she is also at liberty to pursue their self-interest. Human rights and the capitalist spirit are the two, admittedly opposing, faces of natural rights. But both emerge from, and are inscribed in, its logic of autonomy and inalienability.

To state the argument from a different angle: The notion of self-ownership – of the sovereign self – is critical to human rights. But it is equally critical to the pursuit of self-interest. At one level, they are in opposition to one another, and human rights perform a crucial ameliorative function in curbing the negative effects that arise from the pursuit of self-interest. But at a deeper level, human rights discourse partakes in the same paradigmatic view of the self that fosters, for example, a predatory capitalism. And so its response to the effects of such capitalism, while capable of being very critical, cannot overturn the paradigm itself: If pursued, it would negate the reason for its own being.

The paradigmatic affiliation of human rights with capitalism sheds light, I think, on another major characteristic of human rights, namely, its indeterminacy. Essentially, the question that arises is: Who makes up these rights? The content and scope associated with these rights, of course, have changed over time. They initially were confined to civil liberties: They now extend to social, economic and environmental rights. The first declarations – the forerunners to today’s human rights – excluded non-whites and women: This has now been expanded. So, rights are in an incremental but continuous process of change. And so, how do we know which rights are inalienable? The question was already posed during the emergence of natural rights, and the answer, as Tuck points out, is as follows:²¹

Anything which it was reasonable to want, could now be construed as an inalienable right, the recovery of which was entirely justifiable: It was unlikely that any rational man would renounce his rights to such reasonable gratifications.

So rights could essentially be anything we want it to be. This underlying sensibility was imported into human rights and lends it a

²¹ As quoted in Asad (n 6 above) 133-134.

profound indeterminacy – it can be used to challenge hegemonic interests but it can also be employed to promote such interests.²² It is to this theme that I now turn.

3 State, indeterminacy and preference

The earlier question still remains: Who decides what gets constituted as a right? In other words, on what authority are autonomous decisions – ‘rights are whatever we want them to be’ – crafted into a legally-binding form? The answer, in short, is through the state.

It is the state that through its law enforces human rights. Even when human rights are passed by transnational bodies, they need to be ratified by the state. And even if the state does ratify international human rights treaties, it does not necessarily enforce their provisions.²³

It is through the constitutional basis of the state that human rights discourse acquires its inalienable authority in practice. As Nicol points out, human rights are accorded a ‘fundamentality’ that transcends the ‘ordinary’ laws of parliament.²⁴ Human rights are construed as such because they are seen as something owed to a human being by virtue of them being human. But – and here Nicol makes a very crucial point – what one believes is owed to a human being is not an ideologically-neutral construction, but it is an ideologically-driven one. It is informed, he says, *by one’s vision of the good life*. And so, if, for example, business rights are seen as being integral to that ‘good life’ then they, too, are accorded fundamentality. He writes:²⁵

I would argue, therefore, that what makes a right a human right is actually constitutionalisation, that is, the decision to make something supra-legislative, to elevate it to the constitutional plane and to that extent to disable the legislature. It is precisely because business rights are conceived as basic rights owed to human beings that these rights are accorded a fundamental status.

We may, says Nicol, *label* something as a human right or *label* something as competition law, but if a decision is made to fundamentalise a business right, then that right – the rights pertaining to competition law, for example – becomes a human right as it

22 See Mutua (n 1 above) 126.

23 E Posner ‘The case against human rights’ *The Guardian* 4 December 2014 <http://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> (accessed 6 April 2016).

24 D Nicol ‘Business rights as human rights’ in T Campbell et al (eds) *The legal protection of human rights: Sceptical essays* (2011) 229-243. I differ from Nicol in that I give less prominence to the influence of supranational bodies. While such bodies certainly have tremendous leverage, particularly over weaker states, this leverage still has to be mediated through the legal structure of a particular state.

25 Nicol (n 24 above) 233.

'presupposes that that right is an essential element of human existence'.²⁶

And while human rights 'proper', in the popular imagination, may be granted greater legitimacy than neoliberal-inspired economic rights, from the judicial perspective it makes no substantive difference what their origins are. As supranational rights, they need to be applied and upheld regardless of their popular legitimacy. In court, they are all seen as fundamental and constitutional and not bound by 'ordinary' law.

This notion of fundamentality, I believe, is central to understanding why human rights are so indeterminate. This indeterminacy lies not in the outcome of a human right, but in the way they are constructed. They fundamentally proceed from the belief that human rights are whatever we want them to be, making them amenable to vested economic interests as well.

There is a reason for such interests constitute business rights as human rights and this, Nicol says, is related to the type of society that the hegemonic elites seek to create. If human rights are seen as the rights we are owed by virtue of being human, and if these hegemonic forces feel we are owed business rights, then the values to which such forces aspire are those of market liberalism. In the current neoliberal European construct, says Nicol, 'democracy was not intended to be the highest value'. Nicol concludes:²⁷

At base a 'human right' is a right which is considered of the first importance, because it constitutes an essential element of the way life should be lived. However, judgments regarding the way in which life should be lived are not arrived at by some universalist alchemy. They are made by those who enjoy ideological hegemony in a given era, and for the past thirty years it is neoliberals who have enjoyed this hegemony.

A South African example of constituting a business right as a human right can be seen in the response of the Consumer Goods Council (CGSA) to a call on major retailers in this country not to stock Israeli products in the wake of Israel's 2014 assault on the Gaza Strip. The CGSA – which represents these retailers – declared that not stocking Israeli products would violate the 'right to free and fair trade'. A CGSA statement on 7 August 2014 reads:²⁸

The conflict in the Middle East has resulted in some of our customers and certain retail members, including Shoprite, Massmart, SPAR, Woolworths and Pick-n-Pay, being approached, sometimes in an aggressive and confrontational way, to remove products sourced from Israeli manufacturers from their shelves. *This infringes on their rights to free and fair trade as enshrined in the country's Constitution.* South Africa is a fully constituted democracy that respects law and order. There are channels

26 As above.

27 Nicol (n 24 above) 243.

28 Consumer Goods, Council of South Africa 'Conflict in the Middle East – Statement from the CGSA' <https://www.cgcsa.co.za/resources/press-office/press-releases/statement-from-cgcsa> (accessed 7 August 2014) (my emphasis).

provided by our respective members for complaints and grievances to be lodged if a consumer is dissatisfied with a particular product. This is also contained in the Consumer Protection Act. Our position, as an industry, is that we recognise the right of consumers to exercise freedom of choice with regard to the products that they purchase. In line with this we believe that the industry's role is to ensure that the products sold in our member's stores, are marked with legislated descriptive information that includes the country of origin. This enables consumers to make informed buying decisions that are aligned to the personal perspectives that they might hold.

Apart from the fact that it effectively claims a 'human right' to trade in Israeli products, what is remarkable about this statement is the way it abstracts, the way it separates, the 'right to free trade' from a volatile and unequal conflict where a great number of civilian deaths have clearly been caused by one party; where the chief United Nations (UN) human rights commissioner stated that Israeli military actions in the Strip may amount to war crimes;²⁹ where the internationally illegal dispossession and settlement of Palestinian land by the Israeli government lies at the heart of the conflict. In other words, it depoliticises this right to free trade, creating an illusory moral equivalence between the two parties and then leaving consumers, in a liberal individualist manner, with a 'choice' to buy or not to buy – the whole notion of a 'right to choose' only arises because the 'right to free trade' is depoliticised. Market capitalism extends its ideology by its pretence to be apolitical and non-ideological.

There is nothing, then, *innate* in human rights that challenge the economic *status quo*. This is, of course, not saying that human rights discourse does not challenge inequality or acts of injustice. It indeed does and is crucial, as I have pointed out before, in its ameliorative function. But I am simply pointing out that, since they can also be used to protect what many would see as a problematic *status quo*, they are not *innately* driven to question such. Rather, they are innately indeterminate.

But why are rights innately indeterminate? Why can they also be used to protect the interests of a hegemonic class? As Kennedy points out, the answer lies in the fact that, for all their objective veneer, rights are really preferences. Kennedy's analysis of this notion, I believe, deepens our understanding of fundamentality and indeterminacy associated with rights. In particular, he shows us how this indeterminacy works in the actual unfolding of the law.

Kennedy argues that rights discourse assumes a fundamental distinction between factual, empirical discourse and one based on value judgments and preferences. However, rights are seen to contain elements of both: They are preferences, but preferences that are justified in a supposedly rational manner. Like values, they proclaim

29 N Pillay 'UN: Israel assault in Gaza may be a war crime' *Aljazeera* 23 July 2014 <http://www.aljazeera.com/news/2014/07/un-israel-assault-gaza-may-be-war-crim-e-201472394058635836.html> (accessed 11 August 2014).

what 'ought' to be; but like a fact it is a value that 'is' evident to all after rational discussion. Rights, then, mediate between the domains of values and facts. And once a right is acknowledged, the same rational process will guide its application. In Kennedy's terminology, it is a 'factoid'.³⁰ Consequently, according to Kennedy, rights can be said to possess two qualities. First, as a 'rational' preference, it can claim to be universal. Second, as a 'factoid', it finds instantiation in social and legal rules in a fairly objective and determinate manner.³¹

So rights are in the first instance 'outside' the legal framework. It is constitutional law that enacts rights within the law and then applies rights as rules within that framework. (Here we are reminded, of course, of Nicol's notion of fundamentality.) When rights are outside the framework, arguments from rights mediate between value judgments (preferences of groups) and 'facts' (what is already within the law). When rights are already enshrined within the law, such arguments mediate between legal argument (the duty to show interpretive fidelity) and legislative argument (the values of a political community).³²

Kennedy points out two interesting corollaries associated with this outsider/insider character of constitutional law. When the law incorporates outside preferences into the law as is, it is in reality casting the preferences of a group as the preferences of the whole polity. But the reason these preferences can be incorporated in an almost seamless manner is because they are cast as *rights* and so viewed as rationally grounded (as a 'universal'). Those who reject such rights are not merely selfish, but *wrong*. And so – and this is the other corollary – rights talk becomes a discourse: 'a way of talking about what to do that includes a vocabulary and a whole set of presuppositions about reality'.³³ It projects itself, like the internal discourse of legal reasoning, as a discourse of reason and necessity, not mere preference.

In other words, it projects itself as a view of reality, as a theology. But just as one can have faith in such a theology, one can *lose* faith in the rational basis of rights and in the legal reasoning that follows from the acceptance of this basis. The result is cynicism. Kennedy writes:³⁴

Cynicism means using rights talk (or legal reasoning) as no more than a way to formulate demands. They may be 'righteous' demands, in the sense that one believes strongly that they 'ought' to be granted, but the cynic has no belief that the specific language of rights adds something to the language of morality or utility.

30 D Kennedy 'The critique of rights in Critical Legal Studies' in W Brown & J Halley (eds) *Left legalism/left critique* (2002) 184.

31 Kennedy (n 30 above) 184-185.

32 Kennedy 185-188.

33 Kennedy 190.

34 As above.

Consequently, one starts experiencing legal argument as mere 'rhetoric'. It is crucial to emphasise here that Kennedy does not mean that such argument is 'wrong' or 'meaningless'. Rather, one experiences it not as an instantiation of objective judicial reasoning, but as an outcome that follows from how one manipulates the material at one's disposal. The following statement by Kennedy is rather telling in this regard:³⁵

Loss of faith is a loss, an absence: 'Once I believed that the materials and the procedure produced the outcome, but now I experience the procedure as something I *do to* the materials to produce the outcome I want. Sometimes it works and sometimes it doesn't, meaning that sometimes I get the outcome I want and sometimes I don't.' Loss of faith is one possible resolution of the tension or cognitive dissonance represented by bad faith. One abandons the strategy of denial of the ideological, or subjective, or political, or just random element in legal reasoning. One lets go of the convention that outcomes are the consequences of 'mere' observance of the duty of interpretive fidelity.

The fact that material and procedures – legal rules – can be manipulated means that legal reasoning is indeterminate: Different sides can use such reasoning to arrive at opposing positions. And by extension, rights arguments, which are contained in legal rules, can be employed by individuals and groups with radically different suasions. Again, I must emphasise that Kennedy sees nothing wrong in all this *per se*. But he wants us to get away from the notion – indeed the theological belief – that judicial reasoning is somehow an impersonal exercise that leads to its own conclusions. Rules and rights do not spring from faith in the blind force of judicial reasoning; they are informed, as just stated, by ideological, subjective, political or plain random considerations.

Such considerations come to the fore when the court needs to balance one right (for example, an owner's property rights) against another (in this case, a tenant's rights). This balancing does not take place purely in the realm of the positivist law, but involves policy considerations as well. As stated by Kennedy:³⁶

According to the critique, what determines the balance is not a chain of reasoning from a right or even from two rights, but a *third* procedure, one that in fact involves considering open-textured arguments from morality, social welfare, expectations, and institutional competence and administrability.

In turn, the resolution adopted is naturally determined by ideology. To a large extent it is the subjective and political commitments of the judge that have the final say, not the detached deployment of rights arguments.³⁷

35 Kennedy (n 30 above) 191.

36 Kennedy 196.

37 Kennedy 198.

I think Kennedy's point is implicitly admitted even by those who would champion the transformative potential of liberal constitutionalism. For example, Michelman makes a considered defence of such constitutionalism in the South African context in light of what he calls 'social liberalism'. Such liberalism, inspired by figures such as John Rawls, distinguishes itself from classic liberalism in not seeing the right to property as a basic right in itself, but as a right that serves the more fundamental ones of freedom, security, privacy, equality, legality and, above all, dignity. When the right to property is seen in this way, then the court is not duty bound to uphold the formal protection of property irrespective of the social consequences involved, but indeed can evaluate individual claims in light of such consequences and the values (dignity and its correlates) that they may impinge upon.³⁸

However, Michelman, himself, tempers his social liberal outlook in a way that echoes the indeterminacy noted by Kennedy. Towards the end of his essay, he asks of his approach:³⁹

How much of a dent, though, does all of that really make on South Africa's post-apartheid legacy of poverty and dispossession? Dispossession, say, of the land and everything that it means in regard to not just to wealth but to power, status, and dignity? And not just of the land as land or natural resource but the land as capital input to housing? [...] To questions such as those, I think social liberals must choose between two lines of response. The first would be that we don't know until we really try, and we have not yet really tried. Maybe, with wisdom concertedly applied to issues of time, terms, trade, and taxation, there is a workable way to acquire land for redistribution that liberal equality and dignity can accept. That is a line that social liberals should not easily give up. *The other response-line would be that, alas, we cannot get there from here by a liberal/postliberal constitutionalist path.*

In other words, there appears little in the social liberal approach that *compels* the transformation of a problematic *status quo*. Choices are available, but we cannot be sure whether these choices will lead to socially-desirable outcomes (or, given the reasonable assumption that not all judges will be socially liberal, that they will be chosen at all). Sibanda, in his critique of Michelman, echoes this sentiment when he notes that 'transformative constitutionalism becomes susceptible to the charge that it promises more than it can actually deliver where the requisite shared transformative consciousness is not in fact in place'.⁴⁰

Similarly, O'Connell argues that human rights are capable of challenging the pernicious effects of neoliberalism. Human rights activists, he suggests, should recognise that neoliberal globalisation is not value-neutral but based on hegemonic interests. As such, a

38 F Michelman 'Liberal constitutionalism, property rights and the assault on poverty' (2011) 3 *Stellenbosch Law Review* 706.

39 Michelman (n 38 above) 722-723.

40 S Sibanda 'Not quite a rejoinder: Some thoughts and reflections on Michelman's "Liberal constitutionalism, property rights and the assault on poverty"' (2013) 2 *Stellenbosch Law Review* 332.

commitment to human rights would entail a commitment to fighting such globalisation and embracing alternatives such as subaltern globalisation.⁴¹ And there is no doubt that his project, as well as Michelman's social liberalism, may have considerable ameliorative effects in situations of social injustice.⁴² As such they are important strategies and endeavours. But they do not address the structural issue at play: What is the relationship between the undoubted liberal origins of human rights and neoliberalism – that is, the fact that they are both rooted in the notion of the autonomous self, as noted earlier in this essay? Michelman is careful to distinguish social liberalism (one more conducive to social justice) from classic liberalism (one that is amenable to neoliberalism). But surely this is a difference of degree, not of kind? Choosing to enact social justice instead of protecting a vested interest is still cast as a *liberal* value. O'Connell takes neoliberalism to task for its normative view of the individual as atomistic and self-serving. He contrasts this with the human rights view where this individual is urged to act towards others in the spirit of brotherhood and where he or she finds fulfilment through duties to their community.⁴³ But what of the conception of the autonomous 'individual' itself? If the individual autonomously makes decisions – and human rights discourse fundamentally accepts this – what would *compel* him or her not to act in an 'atomistic, self-serving' way?

A similar problem besets Davis and Klare's argument for transformative constitutionalism in South Africa.⁴⁴ For Davis and Klare, the background rules (norms and values) that inform any legal procedure need to be put into the foreground and made a conscious aspect in cultivating the transformative constitution. They argue that formalist approaches to the law in any case are informed by such background rules – there is nothing intrinsic in the text of the law itself that leads to determinate outcomes. The law itself is indeterminate and is made determinate by the norms and values of those who use the law. While their legal realism effectively shows up the formalist fallacy of a supposedly objective law, it begs the question of the nature of these norms and values themselves – in our case, the nature of rights – norms and values that the authors appear to take for granted. Why, for example, by their own admission, does the court show more of its transformative tendencies when it comes to 'softer' rights, such as freedom of expression and sexual orientation, but is more recalcitrant when it comes to the harder right of economic redress?⁴⁵ Why does an anti-formalist approach appear to sit easier in

41 P O'Connell 'On reconciling irreconcilables: Neo-liberal globalisation and human rights' (2007) 3 *Human Rights Law Review* 483.

42 Michelman (n 38 above) 706-723.

43 O'Connell (n 41 above) 496-498.

44 D Davis & K Klare 'Transformative constitutionalism and the common and customary law' (2010) 26 *South African Journal on Human Rights* 403.

45 Davis & Klare (n 44 above) 414 480.

one realm than the other? And while, as both of them remind us,⁴⁶ the South African Constitution is more receptive to social rights than a purely liberal, individualist one, why is such social consciousness (*ubuntu*) so difficult to translate into economic practice? Such questions beg a deeper exploration of the notions of rights, autonomy, freedom and dignity that typically accompany the judgments in these spheres.

So, despite the welcome emphasis on background rules, it is quite disappointing that Davis and Klare do not feel the need to pursue the metaphysical basis of such notions. Norms and values cannot be divorced from reflection on this basis. I cannot agree with them when they say that their thesis concerning legal indeterminacy is a 'modest' one that needs to be kept separate from a metaphysical one 'about the inherent qualities of language, reason and texts'.⁴⁷ Since both formalists (implicitly) and anti-formalists (explicitly) are shaped by their norms and values, both are ultimately informed by a vision of 'the good life' in formulating their judgments.⁴⁸ A vision of the good life necessarily entails specific conceptions of reason and language. After all, what is good can obviously be seen in a variety of ways. When background rules come to the forefront, so do metaphysical claims. We cannot thus ignore the question regarding the underlying world view of rights discourse.

This brings us to a final theme. What kind of citizen does the deployment of rights discourse in South Africa seek to construct? If my argument is correct, and rights are at the end of the day ultimately preferences based on an implicit metaphysic, what type of subjectivity – whether intentionally or not – does the state produce? What, in other words, are the effects of portraying rights discourse as the solution to the country's ills?

4 Rights and the creation of post-1994 South African subjectivity

The answer to these questions is necessarily partial, since the state's multiple interventions in the lives of the citizenry occur at different levels, and sometimes contradictory ones at that. The legal domain of rights is one such crucial – perhaps the most crucial – intervention in this regard, but I certainly do not wish to imply that this is the be-all and end-all of the state's interaction with its citizenry. Indeed, the South African government has shown some remarkable sensitivity in dealing with diverse constituencies, and has resisted pressure to

46 Davis & Klare 413.

47 Davis & Klare 437.

48 Davis & Klare 408.

automatically impose liberal democratic sensibilities.⁴⁹ But still, these sensibilities, via rights, play a critical role in cultivating a particular type of subjectivity characteristic of the post-1994 citizen.

One of the more obvious outcomes of these sensibilities was to let the citizen invest fully in the notion of rights themselves. Access to rights was now almost crafted as the panacea to a citizen's woes. As long as one had access to one's rights, one's material needs would be facilitated. And so, a preponderant emphasis is placed on rights rather than the needs themselves. This becomes problematic, as Pieterse argues, when, despite access to such rights, material needs remain unfulfilled.

Reflecting on why the socio-economic rights in the Constitution have not been translated tangibly into gains on the ground, Pieterse argues that the Constitutional Court has focused on the 'reasonableness' of enforcing these rights, rather than looking at the content aimed at by those rights.⁵⁰ The Court, consequently, ends up focusing on procedure rather than directly addressing the need – 'sandwiches, tablets and tents' – itself.⁵¹ Material needs are rendered 'extraneous to the inquiry into constitutional compliance with socio-economic obligations'.⁵²

Pieterse then raises the important question of whether such abstraction (abstracting the law from the direct need) is not 'inevitable'. Following Gabel, he argues that rights discourse creates the illusion that gaining a right is equivalent to achieving the need that gave birth to that right in the first place.⁵³ There is a difference between the 'meaning of verbal concepts and the qualitative or lived milieu out of which they arise'.⁵⁴ In other words, needs are assuaged by the granting of rights – but this granting is in reality a verbal assurance, not a fulfilment of the need.

This disjuncture between word and need is rather amenable to the *status quo*. And so when, for example, housing and medicine (a need) are demanded as a right (called act 1), the state may concede that right without necessarily fulfilling that need. If it is taken to court for

49 So, eg, government has resisted pressure by women's rights activists to enact the proposed Muslim Marriages Bill in its current form due do the Muslim community's internal debate about the implications of its provisions. See M Harrington-Johnson 'Muslim marriages and divorce' (2015) *De Rebus* 9 <http://www.derebus.org.za/muslim-marriages-and-divorce/> (accessed 6 April 2016); T Tlali 'Muslim Marriages Bill - Submission dates for comments extended, media statement, Department of Justice and Constitutional Development' 18 March 2011 <http://www.gov.za/muslim-marriages-bill-submission-date-comments-extended> (accessed 6 April 2016).

50 M Pieterse 'Eating socio-economic rights: The usefulness of rights talk in alleviating social hardship revisited' (2007) 29 *Human Rights Quarterly* 796-822.

51 Pieterse (n 50 above) 822.

52 Pieterse 812.

53 It is crucial to note here that neither Pieterse nor Gabel is saying that rights are unimportant and they both recognise their substantial value.

54 Pieterse quoting Gabel (n 50 above) 816.

not fulfilling the need, it may indeed be compelled in this regard if the court finds that the state is in a 'reasonable' position to comply with its obligations (act 2). But, crucially, the court's adjudication is based on the presumption of reasonableness associated with applying the right, not addressing the direct need. And since in any case these needs may not be addressed even after a favourable verdict, such victories are empty in that they present the possibility of changing the *status quo* without actually doing this (act 3). This is more or less what occurred in the *Grootboom* and *Treatment Action Campaign* cases, as described by Pieterse.⁵⁵ Even though both parties had taken the state to task on the basis of rights (to adequate housing and healthcare, respectively) (act 1), and both had the court rule in their favour (on the basis of 'reasonableness') (act 2), there was limited and grudging state compliance with the order (and thus the maintenance of the *status quo*) (act 3). The perceived granting of 'hard rights' is instrumentalised as the simultaneous fulfilment of urgent needs. Pieterse writes:⁵⁶

Gabel's theory reveals an obvious fault line in the narrative that critics of the Constitutional Court's socio-economic rights jurisprudence all too easily overlook – the hollowness of the rights at the centre of the jurisprudence. For while myself and other commentators typically blame the empty victory in act 3 of the drama on the Constitutional Court's ingrained ideological sensibilities, its formalistic approach to adjudication and its remedial timidity, Gabel reminds us that the Court comes into play only in act 2, after the battle has, for all practical purposes, already been lost. Instead, Gabel directs our attention to the opening sentences of act 1 – more specifically, to the moment that member/citizen is misled to demand the right to have her need satisfied rather than to insist on the actual satisfaction of that need. When state/society eventually responds to this new demand, it does so in terms that, while ostensibly meeting the new demand, allow for the nonfulfilment of the original need. By requiring observers to shift their focus thus, Gabel's account reveals socioeconomic rights (at least in the manner they have been articulated in sections 26 and 27 of the South African Constitution) to be accomplices to, rather than casualties of, the judicial and political sidelining of the needs they represent.

It is such disjuncture between word and need that, to return to a point made in the introduction, helps foment the impression that South Africa has a vigorous human rights culture while beset by social contradictions that reflect problematically on its success.

Pieterse's crucial observation that the citizen is 'misled' to demand the right to have his or her need satisfied rather than the satisfaction of the need itself recalls Bond and Bakker's earlier point about operating within the hegemonic paradigm. One is never truly challenging that paradigm itself, but responding to it and acting in its

55 Pieterse (n 50 above) 808-809. For the *Grootboom* case, see *The Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC). For the *TAC* case, see *Minister of Health & Others v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC).

56 Pieterse (n 50 above) 818.

shadow. And this is the kind of subjectivity cultivated by the state: that the citizenry frames both their problems and the solutions to these problems in terms of the rights afforded by the state. The Bill of Rights becomes the framework by which to both raise questions pertaining to individual and society and through which one responds to these.

What is the effect of filtering society's agenda through the Bill of Rights? The effect, Neocosmos intimates, is to create a somewhat disembodied citizenry: a citizenry that via the law and new modes of statist discourse is increasingly removed from direct democratic participation.

Neocosmos argues that human rights discourse is built on a theoretical foundation that sees people only as individual victims and not as the 'collective subjects of their own liberation'. These victims can only find recourse in the law. And so it is only those who are schooled in this law – the government, the non-governmental organisations (NGOs), the multinational agencies – that can save the victim.⁵⁷

How does this happen? Neocosmos explains that in constructing indices that 'measure democracy' politics becomes technical and quantitative. Democracy, and politics as a whole, thus are reduced to a technical process that is taken away from popular control. 'Human rights lawyers', 'social entrepreneurs', 'governance professionals' and 'gender mainstreamers' 'staff an industry whose tentacles hold up the liberal global hydra of the new imperial 'democratising mission' on the continent. Rather than a transition from authoritarianism to democracy, what occurred on the African continent during the 1990s can more profitably be understood as a 'process of systematic de-politicisation, a process of political exclusion'.⁵⁸

He continues:⁵⁹

More specifically this reversal consists of a political process whereby those same people are to be convinced – through the deployment of national legal strategies- that they really are clearly victims of violence, that they therefore could not have undertaken anything significant, new or different after all, despite what they may or may not have thought, as it would have

57 M Neocosmos 'Transition, human rights and violence: Rethinking a liberal political relationship in the African neo-colony' (2011) 2 *Interface: A Journal For and About Social Movements* 362.

58 As above.

59 Neocosmos (n 57 above) 363. Vally has also shown how this, eg, occurred in the case of education. In the 1980s, '[p]eople's education was seen as a vehicle for conscientisation, promoting critical thinking and analysis and alternative governance structures in education'. However, '[l]iberal views on education gained cachet from the beginning of negotiations between the ANC and the apartheid regime in the early 1990s. The role of civil society organisations and even the language of people's education became increasingly marginal to the overall project of education change. The discourse and content shifted substantially from radical demands which focused on social engagement and democratising power relations, to one which emphasised performance, outcomes, cost effectiveness and economic competitiveness.' Vally (n 2 above) 42-44.

all happened anyway and that in any case their suffering is now (largely) over. Everyone should return to their allotted place in the social structure and vacate the field of politics, leaving it to those who know how to follow unquestioningly the rules of the game (of the state): the trustees of the excluded. In fact if historicist categories are preferred, this process could be described as a never ending 'transition' from the inventive politics of popular agency to the oppressive technicism of state and imperial power.

And so, in Neocosmos's view, NGOs and the state, employing the mechanism of a technicist law, are jointly responsible for solidifying the *status quo*. Once popular struggles and grievances are depoliticised by putting them through the judicial mill; '[e]veryone should return to their allocated place in the social structure and vacate the field of politics'.

But there is a deeper implication to this process of depoliticisation, and Neocosmos perceptively explores this angle. Having neutralised, via the law, the challenges to its hegemony, the state now dictates the playing fields, the terms of reference in which discussion around society takes place. And so a hegemonic analysis visualises the world through state categories such as 'governance, civil society, power, interests, democracy, law, reparations' to the extent that 'state thinking becomes constructed as natural and the immutability of place as an incontrovertible fact evident to all'. The state is also in the business of creating subjects who are taught to regard this state of affairs as natural and immutable so that the 'inevitable conclusion is that there can indeed be no alternative to the politics of the state'.⁶⁰

In support of his argument, Neocosmos cites the example of the Truth and Reconciliation Commission which transformed political agents – the agents in a mass popular uprising against apartheid – into victims of human rights abuses. In other words, popular political agency was closed down in favour of state politics – a state politics that does not see human rights discourse as a threat but indeed as a means of sustaining its power.

Human rights discourse is not so much concerned with the inclusion in the field of politics of the excluded as with legal redress. It is not so much concerned with encouraging militancy (or even less radically with enabling an 'active citizenship') as with producing the political passivity of victims: It privileges state solutions and, through prioritising the law, reduces all political thought to state subjectivity. In this manner, people become transformed from subjects of history to victims of power.⁶¹

For Neocosmos, then, the state creates the docile, depoliticised subject who – and this is an implication of Pieterse's analysis as well – is trained to think via specific categories. Human rights discourse is integral to constructing those categories and the state, through its law, embeds them into the broader social consciousness. Personally, I

60 Neocosmos (n 57 above) 364.

61 Neocosmos 365.

do not believe that any of this is a pre-determined strategy. And the state quite clearly has not *successfully* produced the docile subject – numerous ‘service delivery’ protests are testimony to this. But it has certainly produced, via its technicist structures, a subject with far less political agency. And the effect of the discourse has undoubtedly been to create a particular type of citizenry – a citizenry trained to both pose questions and answers through the Bill of Rights; a citizenry made to depend on state categories of thought. Echoing Foucault, we can say that human rights discourse plays a central role in post-1994 South African ‘governmentality’.

5 Conclusion

The article has pursued the following train of thought: Human rights discourse partakes of the same paradigm that supports commodification. This lends this discourse an indeterminate character and, as such, it can be used to both challenge and protect hegemonic interests. This indeterminacy is rooted in the fact that human rights are, when all is said and done, essentially preferences; preferences are underwritten by a way of seeing the world – a vision of the good life – and so in its statist articulation cultivates a particular type of subjectivity amongst the citizenry. In saying this, I join others mentioned in this article in challenging a number of popular suppositions: that human rights represent an innate challenge to social injustice; that they rest upon some sort of objective foundation; that they represent a natural aspiration rather than a particular view of the good and of subjectivity.

At the same time, I am not calling for an abandonment of human rights or human rights discourse. On the contrary, as I stated a number of times in the article, human rights perform a crucial ameliorative function and indeed are indispensable in the fight against social injustice. Rather, I want to highlight two things: first, that a more considered view of the paradigm underlying human rights and its associated limitations and indeterminacy should compel us to be much more suspicious about its potential to enact change. The question should not be: Why is structural inequality still an issue *despite* our human rights framework? It should be: What is it *within* this framework that encumbers us from achieving this equality? A human rights framework should not be considered the automatic panacea to the country’s woes. So, in step with others, this is a call to be more critical regarding that framework, not merely in terms of its application, but in terms of examining the nature of ‘right’ itself. And so it is a call to be more critical regarding the very fundamentals of that framework.

A more suspicious view of the liberal rights framework would also allow us, I think, to be open to what Brown and Sibanda have called other ways of imagining society.⁶² And this is the second thing I want to highlight. If the current discourse of human rights does not innately challenge structural inequality because it partakes in a paradigm of commodification, what are the alternative paradigms – alternative imaginations – available? In the case of water rights, Bond and Bakker have helpfully suggested a commons model, where water is shared and sustainably preserved by a system of communal ownership. Water is not a private right, but rather partakes in an *ubuntu* culture of sharing that Bond says, ‘cuts against the grain of individualised liberties and their potential co-optation within a green economy [corporate green] regime’.⁶³ The commons model, of course, can be applied to other areas as well. But whatever the area, a move to such a model would mean employing a very different concept of rights – one which is *not* based on constituting a right ‘as anything one would reasonably want’. Rather, it would mean a return to a more passive concept of rights, one where the individual is defined in terms of his or her social relationships.⁶⁴ But such a move, which involves rethinking the nature of right itself, would also imply an interrogation of the enlightenment view of the ‘self-owning individual’. And the critique of the sovereign individual, in turn, as Brown has pointed out, presupposes a critique of our own desires – of ‘what we really want’.⁶⁵ In other words, and to revert to the point made by Nicol earlier in this article, the question becomes: What is our vision of the good life? It is perhaps in such fundamental questions that the heart of the discussion around rights lies.⁶⁶

But transitional considerations are important. In the absence of consensus on a clear alternative, and given the hegemony of the rights based paradigm, I believe that a critical question would be: How do we mitigate the more pernicious effects of this paradigm? For if there is agreement around something (and this among leftists as well as classical conservatives), it is that the neoliberal model – whose rapacious individualism is somewhat unwittingly underpinned by the classical liberal notion of the sovereign individual – cannot and should not be sustained. In my view, a transitional step would be to give more purchase to rights schemes which are uncomfortable with the liberal individual model. There are various alternative rights schemes which appear to be more amenable to fostering communal values as well as tempering the individualist ethos – the sense of self-ownership

62 Brown (n 3 above) 231; Sibanda (n 40 above) 340.

63 Bond (n 14 above) 138.

64 To reinforce this point: We are, of course, not dismissing the notion of ‘right’ altogether, but rather calling for a different way in which we look at rights. Glendon makes a similar call to look at a different tradition of rights in the preface to *M Glendon Rights talk: The impoverishment of political discourse* (1991).

65 Brown (n 3 above) 240.

66 For a probing analysis of such metatheoretical questions, see D Goosen *Oor gemeenskap en plek* (2015).

– that lies at the heart of liberal human rights. The African Charter on Human and Peoples' Rights (African Charter) is an example in this regard.⁶⁷ According to Adjovi, the African Charter was flouted to address perceived gaps, from an African perspective, in other universal rights schemes. And so, the Charter (i) enshrined second generation rights (socio-economic rights), thereby recognising the collective rights of the community, and not just first generation individual rights; (ii) not only are such second generation rights recognised in the Charter, but they are juxtaposed with political and civil rights and thus the whole complex of rights is seen as indivisible and interdependent; (iii) the African Charter explicitly incorporates duties and not just rights; (iv) there is a specific emphasis on development, decolonisation and racial discrimination.⁶⁸

In forging the way ahead, there is a need to take such rights schemes more seriously⁶⁹ as transitional steps towards imagining a new politics. And such rights schemes, of course, cannot remain static, but will have to interrogate the notion of 'right' itself in order to ensure that communal rights, or even the notion of duty, are not unwittingly instrumentalised in the service of a neoliberal hegemony. As such, they have to radically relook at the notions of the self-owning human (and by extension liberty) and commodification (and by extension, property) that, at root, inform this hegemony. In the absence of such fundamental interrogation, such rights schemes will only inscribe rather than present a paradigmatic challenge to the status quo.

67 See African Charter on Human and Peoples' Rights <http://www.achpr.org/instruments/achpr/> (accessed 30 June 2014).

68 R Adjovi 'Africa: Understanding the African Charter on Human Peoples' Rights' *Think Africa Press* 5 November 2012 <http://allafrica.com/stories/201211061322.html> (accessed 31 March 2016).

69 Of course, the African Charter is recognised by the South African government, but has hardly the same purchase as the more liberal conception of rights embedded in the Constitution.

The importance and relevance of *amicus curiae* participation in litigating on the customary law of marriage

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Summary

*With the South African Constitution recognising customary law as part of South Africa's legal system, debates arose as to the application of the equality principle within custom, as many customary practices were seen as discriminatory. The Recognition of Customary Marriages Act 120 of 1998 was the first piece of legislation that was enacted to address gender inequality within customary law, specifically customary marriages. Future litigation on the topic was deemed to be straightforward, entailing the mere interpretation and application of applicable provisions. However, what has emerged from litigating on the customary law of marriage is how litigators, and especially the participating *amicus curiae*, diverge on the litigation strategy to use. The article explores the relevance and importance of *amicus curiae* participation within a constitutional framework and establishes whether such participation has contributed to ensuring that women living under customary law's claims to culture and equality are understood in the right context.*

Key words: *customary law; Recognition of Customary Marriages Act; amicus curiae participation; Constitutional Court*

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1 Introduction

Amicus curiae is a well-established concept in law. Translated literally from Latin, the term means ‘friend of the court’.¹ In its most basic form, and at a court’s discretion, the *amicus curiae* throughout legal history provided information on areas of law that the court regarded as complex and beyond its expertise.² From the outset it was clear that the *amicus curiae* was not a litigating party, but merely assisted a court. However, over the years, the role of *amicus curiae* evolved and courts gradually acknowledged that they could represent third party interests that were previously ignored under adversarial court systems.³ South Africa’s favourable constitutional climate, and the establishment of the Constitutional Court, played an important role in developing the nature and purpose of *amicus curiae* participation.⁴

Of equal importance has been the express constitutional recognition of customary law as part of the South African legal system.⁵ With this recognition, and with African women increasingly engaging in intra-cultural debates about the meanings and manifestations of particular customs and accepting the living nature of customary law, *amicus curiae* participation has become an important role player in litigating on customary matters.⁶

The focus of the article is to explore the importance and relevance of *amicus curiae* participation in customary matters, specifically customary marriage matters, to establish whether the different litigation strategies they employ are able to influence the court in the decisions it reaches.

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- 1 G Williams ‘The *amicus curiae* and intervention in the High Court of Australia: A comparative analysis’ (2000) 28 *Federal Law Review* 365 366.
 - 2 MK Lowman ‘The litigating *amicus curiae*: When does the party begin after the friends leave’ (1992) 41 *American University Law Review* 1243 1248.
 - 3 Lowman (n 2 above) 1249.
 - 4 The principle of participatory democracy is firmly entrenched in the Constitution of the Republic of South Africa, 1996. Sec 57(1)(b) of the Constitution recognises the importance of participation in the law-making process and states that the National Assembly may make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement. Secs 70(1)(b) and 116(1)(b) contain similar provisions in respect of the National Council of Provinces and the provincial legislatures. The Constitutional Court was the first to adopt specific rules that regulated *amicus curiae* participation and has set the benchmark for this participation, remaining the preferred court in which to lodge these applications. See Rule 10 of the Rules of the Constitutional Court promulgated under Government Notice R1675 in Government Gazette 25726 (31 October 2003).
 - 5 Sec 211 of the Constitution states: ‘(1) The institution, status and role of traditional leadership, according to customary law, are recognised subject to the Constitution. (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.’
 - 6 L Mbatha et al ‘Culture and religion’ in E Bonthuys & C Albertyn (eds) *Gender, law and justice* (2007) 158 168.

2 Understanding the unique nature of litigating customary law matters

The place of customary law in South Africa's new constitutional dispensation has been the subject of much debate. During the negotiations for the interim Constitution, one of the key debates was whether customary law was going to be expressly recognised as part of South African law.⁷ In this debate, a particularly complicated and controversial issue arose, namely, as to whether the right to participate in one's culture could be reconciled with the equality principle, a key feature of the new Constitution. The conflict was especially complex as customary law, like most legal systems, had a very strong patriarchal foundation.⁸

The Congress of Traditional Leaders of South Africa (CONTRALESAs) objected to the proposed equality provision, stating that in terms of their culture, they did not support equality for women.⁹ CONTRALESAs argued that customary law should not be subject to the Bill of Rights, a standpoint that was vehemently opposed by all women delegates at the negotiations and rural women's organisations.¹⁰ These women argued that all women should be protected by the Bill of Rights, with the equality guarantee included, as its exclusion would be detrimental to the most oppressed and marginalised group – rural women.¹¹ The outcome was that customary law was recognised as part of South African law subject to the Bill of Rights.¹²

Law reform and litigation had an important role to play in addressing the potential conflict between customary law and the Bill of Rights. Customary law was codified in the Black Administration Act 38 of 1927 (BLA), entrenching and extending the subordination of women under customary law.¹³ The official and written sources of customary law were 'tainted by their association with colonialism and

7 Customary law means the customs and practices observed among the indigenous African people of South Africa. See secs 8 and 31 of the interim Constitution of the Republic of South Africa, 1993 (interim Constitution); F Kaganas & C Murray 'The contest between culture and gender equality under South Africa's interim Constitution' (1994) 21 *Journal of Law and Society* 409; T Nhlapo 'African customary law in the interim Constitution' in S Liebenberg (ed) *The Constitution of South Africa from a gender perspective* (1995) 157; W Lehnert 'The role of the courts in the conflict between African customary law and human rights' (2005) 21 *South African Journal on Human Rights* 241.

8 TW Bennett 'The equality clause and customary law' (1994) 10 *South African Journal on Human Rights* 122 123; E Bonthuys 'Accommodating gender, race, culture and religion outside legal subjectivity' (2002) 18 *South African Journal on Human Rights* 41.

9 C Albertyn 'Women and the transition to democracy in South Africa' (1994) *Acta Juridica* 39 57.

10 Albertyn (n 9 above) 57; Kaganas & Murray (n 7 above) 411.

11 Albertyn (n 9 above) 59.

12 Sec 211 Constitution.

13 See eg sec 11(3)(b) of the BLA that relegated customary wives as minors for purposes of contractual capacity and standing.

apartheid, and much of the law had been allowed to drift into stagnant backwater'.¹⁴ This was intensified when the apartheid government transferred legislative powers to the independent states, renouncing its responsibility in reforming customary law.¹⁵ The independent legislatures that took over were controlled by conservative chiefs who had little interest in disturbing their power structures, which led to an encoded traditional and very much patriarchal version of customary law.¹⁶

The Recognition of Customary Marriages Act 120 of 1998 (RCMA) was one of the first steps taken to reform customary law. The main goal of the Act is to remedy gender and racial inequality entrenched in official customary law and the 'perceived injustices of the unwritten patriarchal system of customary law' in relation to customary marriages.¹⁷ With not many other legislative initiatives, reformists soon turned to the courts.¹⁸ However, to litigate on a customary matter means that the actual content of custom has to be established. There is strong support for the idea that only the law as it is lived by its people should be heeded.¹⁹ This is known as 'living' customary law, as opposed to the codified and outdated sources available to courts, mainly through the BLA, known as 'official' customary law. The problem with living customary law is that it is drawn from modern social practice which differs over time and place, which is in conflict with courts' need for legal certainty.²⁰

Litigating on matters pertaining to the customary law of marriage was seen to be easier as there was already a clear framework in place with ensuing litigation supposedly only revolving on the interpretation of specific provisions. However, what is emerging from litigating on the customary law of marriage is how litigators, and especially the *amicus curiae*, diverge on the litigation strategy to use.

Some have chosen to focus on a rights-based approach that relies on the rights to equality and dignity to prove that an infringement has occurred, as illustrated through the *Gumede v President of the Republic of South Africa* judgment with the Women's Legal Centre (WLC) as *amicus curiae*.²¹ Others have called for the application of rules of living customary law, provided this does not violate the Bill of

14 TW Bennett 'Re-introducing African customary law to the South African legal system' (2009) 57 *American Journal of Comparative Law* 1 3.

15 Bennett (n 14 above) 3.

16 Bennett 4.

17 J Bekker & G van Niekerk '*Gumede v President of the Republic of South Africa*: Harmonisation, or the creation of new marriage laws in South Africa' (2009) 24 *Southern African Public Law* 206 207.

18 Bennett (n 14 above) 4. Bennett refers to the planned reform of customary succession that, despite a South African Law Commission discussion paper, was not acted on; see in this regard South African Law Reform Commission *Customary Law of Succession Discussion Paper 93 Project 90* (2000).

19 Bennett (n 14 above) 2.

20 Bennett 9.

21 2009 (3) SA 152 (CC).

Rights and, where necessary, its development. This will be illustrated by the *Mayelane v Ngwenyama* judgment with the Commission for Gender Equality (CGE) and National Movement for Rural Women (NMRW) as *amici curiae* supporting this approach.²²

The intention of the article is to establish how the divergent litigation strategies of the *amici curiae* have contributed to ensuring that women living under customary law are able to utilise their constitutional rights, ensuring that claims of culture, gender and diversity are understood in the right context. In order to unpack the relevant judgments and ensuing strategies, it is important to understand the reasons why public interest organisations participate as *amici curiae* and the specific organisational intent in participating in these matters.

3 Intervening in the public interest

Public interest law has been described as a focus 'on the wider public interest rather than the more private interest of a particular individual'.²³ A public interest group may be defined broadly as a free-standing voluntary organisation typically established to further a particular cause or simply to provide the poor with access to justice.²⁴

There are many reasons why public interest groups decide to litigate. Collins identifies five general, often interrelated, reasons why public interest groups choose litigation as a means to an end.²⁵ First, groups may turn to the courts when they lack access to alternative venues, such as the executive. Second, there are certain unique benefits that can be ascribed to judicial decisions, such as its precedent-setting capacity, especially in relation to constitutional decisions.²⁶ Third, litigation may be a means of protecting gains won through other avenues, such as defending a specific piece of legislation.²⁷ Fourth, groups 'may seek out the judicial arena to counterbalance their opposition's participation'.²⁸ Lastly, organisations may use the court system when their goals predispose them to litigate.²⁹

Most public interest groups choose not to enter the legal arena and to concentrate their resources on engaging the executive and general

22 2013 (4) SA 415 (CC).

23 G Budlender 'On practising law' in H Corder (ed) *Essays on law and social practice in South Africa* (1988) 319 322.

24 LB Nielsen & CR Albiston 'The organization of public interest practice: 1975-2004' (2006) 84 *North Carolina Law Review* 1591.

25 PM Collins *Friends of the Supreme Court: Interest groups and judicial decision making* (2008) 24.

26 Collins (n 25 above) 24.

27 As above.

28 As above.

29 The Women's Legal Centre (WLC) may be seen as an example. See the organisational goals of the WLC, as discussed hereunder.

advocacy. When they do decide to enter the legal arena, it is often not as a direct party to the litigation and the method of participation differs.³⁰ They may set up a test case which usually rests on a constitutional issue. Here, organised interests would want to challenge legislation or policy, or an individual could approach an organisation with the intention of challenging legislation or policy.³¹ This method is not often used, as it is time-consuming and requires a great deal of resources.³² Public interest groups may also decide to sponsor a case brought by others. Here, an organisation will assist with costs and resources in exchange for using the case as a means of highlighting its own interests.³³ Again, this is very expensive and time-consuming, and gives a group less leeway to structure a case.³⁴

Another method of participation, as discussed above, is *amicus curiae* participation. This type of participation is less costly and, as *amicus*, it may be able to introduce a new or alternative legal position and introduce sociological evidence to a court.³⁵ Given the low costs and flexibility associated with this method of participation, it is the clear choice for public interest groups when they decide to litigate as a non-party.³⁶

Within the South African context, groups and organisations have been very receptive to utilising *amicus curiae* participation as a cost-effective and efficient method of representing the public interest. In almost all customary cases brought before the Constitutional Court, *amicus curiae* applications were filed, and a range of women's and public interest organisations were allowed to make submissions to the Court. As this article focuses on cases pertaining to the customary law on marriage, it is important to understand the organisational structure and intent of the CGE, NMRW and WLC.

3.1 Commission for Gender Equality

The CGE is a specific constitutional body established to promote respect for gender equality and to aid its protection and attainment.³⁷ It is an independent institution subject only to the Constitution and the law, and has the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.³⁸

30 Collins (n 25 above) 25.

31 As above.

32 As above.

33 Collins (n 25 above) 26.

34 As above.

35 Collins (n 25 above) 27.

36 As above.

37 Secs 181 & 187 Constitution.

38 Secs 181(2) & 187(2) Constitution. The mandate and further regulations pertaining to the CGE are set out in the Commission for Gender Equality Act 39 of 1996.

To CGE from its inception differed on whether its identity should be feminist, as opposed to implementing a general gender framework.³⁹ The CGE moved toward a more general framework and focused on poor rural women, hence its interest in customary law matters and its participation as *amicus curiae* in these cases.⁴⁰

3.2 National Movement of Rural Women

The NMRW is a national membership organisation that serves the interests of rural women.⁴¹ It was established to create a network where rural women could gather, discuss their problems and take action, and its main objective is the empowerment of rural women. The NMRW with its close connection to rural women has been ideally placed to represent the interests of women living under customary law.

3.3 Women's Legal Centre

The WLC is a non-profit, independently-funded law centre that seeks to achieve equality for South African women through litigation.⁴² Its litigation strategy is outcome-based, and a case will be taken on if it has the potential to benefit a substantial group of women in the overturning of discriminatory legislation, to create new jurisprudence or extend existing jurisprudence, and create the possibility of positive orders that would enforce women's human rights. Representing women in customary law matters falls squarely within their mandate.

Focusing on the *amicus curiae* participation of the above organisations in matters pertaining to the customary law of marriage, the question that should be asked is whether they have been able bring information to the court that has led to a decision conscious of the impact it might have on the relevant women's lives.

39 A Gouws 'The state of the national gender machinery: Structural problems and personal politics' in S Buhlungu et al (eds) *State of the nation: South Africa 2005-2006* (2006) 143 152.

40 The customary matters in which the CGE appeared as *amicus curiae* in the Constitutional Court include *Bhe & Others v Magistrate, Khayelitsha & Others*; *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*); *Shilubana & Others v Nwamitwa* 2009 (2) SA 66 (CC); *Mayelane* (n 22 above).

41 Information obtained from http://www.nmrw.org/?page_id=2 (accessed 14 August 2013).

42 Information obtained from <http://www.wlce.co.za/> (accessed 15 August 2013).

4 Women's interests and the customary law of marriage

4.1 *Gumede v President of the Republic of South Africa (WLC as amicus curiae)*

As stated, the most significant and systematic reform of customary law after the advent of democracy was the enactment of the RCMA.⁴³ The Act was the first comprehensive piece of legislation to address gender and racial inequality concerning customary marriages.⁴⁴ Since the implementation of the Act, one of the areas of concern was the different proprietary consequences of marriages provided for reliant on when a customary marriage came into existence.⁴⁵ All customary marriages concluded after the commencement of the Act (15 November 2000) would be a marriage in community of property and loss.⁴⁶ The proprietary regimes of all marriages concluded before the commencement of the Act would be governed by customary law.⁴⁷

Gumede argued that these provisions discriminated unfairly against her on the grounds of race and gender.⁴⁸ *Gumede* had been married in terms of customary law, well before the enactment of the RCMA. When she sought a divorce from her husband, she found that she was not entitled to any of the property that had accrued during the marriage, as the customary law, specifically the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law, determined that a husband, as head of the family, would be the sole owner of all family property.⁴⁹

The WLC applied to be admitted as *amicus curiae* since it had for several years dealt with the impact of customary law on the lives of women and children. For the WLC, it was important for the court to understand the disadvantaged position of women to whom the RCMA applied, as it was of the opinion that *Gumede* did not sufficiently highlight this vulnerability, since she focused mainly on the ensuing unfair discrimination.

The WLC focused on the group of women to whom the RCMA applied (mostly African women living in rural areas), and stressed that these women were marginalised and vulnerable and had been

43 Mbatha et al (n 6 above) 161.

44 Bekker & Van Niekerk (n 17 above) 206-207.

45 L Mbatha 'Reflection on the rights created by the Recognition of Customary Marriages Act' (2005) *Agenda* 42-43.

46 Sec 7(2) RCMA; *Gumede* (n 21 above) para 10.

47 Sec 7(1) RCMA.

48 *Gumede* (n 21 above) para 1.

49 Natal Code of Zulu Law published in Proc R151 of 1987, Government Gazette 10966; *Gumede* (n 21 above) para 11.

'historically and systematically subjected to discrimination on various and intersecting grounds'.⁵⁰

The WLC referred to several international and African regional human rights instruments, and indicated that the discrimination allowed by the RCMA was unfair.⁵¹ Its main contention is summarised in the following statement:⁵²

To say to women in pre-Act marriages, these being black, mainly rural women who will tend to be older, that all other people (whether married under civil law or new customary marriages) deserve the protection of the Constitution and the right to equality, but they do not, fundamentally violates their dignity.

The WLC argued that the court had to be mindful of the changing circumstances of migrant labour and urbanisation that had led to the disintegration of the extended family and subsequent extended support systems. These circumstances left women vulnerable to eviction and homelessness upon divorce.⁵³ This vulnerability was much worse for older women, who were further disadvantaged by apartheid due to restrictions on their education and freedom of movement.⁵⁴ The WLC focused on the remedy it thought the court should provide in order to protect as many women as possible and not necessarily only Gumedede. Its argument was that a workable remedy should consider women who found themselves in polygynous unions:⁵⁵

We were hoping the court would go further than it needed to and extend the remedy to women in polygynous marriages, or comment on their position obiter, which sets the scene for further law reform or litigation. This is because many women in South Africa are not in monogamous marriages. The law needs to develop in such a way as to ensure the equal treatment of women in polygynous marriages, and cases where there is both a civil and customary marriage, where there is a domestic partnership and a marriage (either customary or civil). In this regard, an expression that women are entitled to statutory remedies that are just and equitable would benefit many women.

The remedy suggested by the WLC required property acquired by the parties to be held in community of property until a second marriage was concluded. Property acquired after a second or subsequent marriage was to be divided in proportion to the respective

50 S Cowen & N Mangcu-Lockwood *Written submissions of the amicus curiae CCT 50/08* para 10.

51 Cowen & Mangcu-Lockwood (n 50 above) paras 21-35. They specifically relied on sec 18 of the African Charter on Human and Peoples' Rights (1981); sec 23 of the International Covenant on Civil and Political Rights (1966); sec 16 of the Convention on the Elimination of Discrimination Against Women (CEDAW) (1979); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003); and the SADC Protocol on Gender and Development (2008).

52 Cowen & Mangcu-Lockwood (n 51 above) para 19.

53 As above.

54 As above.

55 Interview J Williams, WLC (14 March 2013).

contributions (both monetary and non-monetary) of the spouses to the respective marriages, in a manner that was deemed just and equitable by a court, taking into account the factors referred to in section 7(7) of the RCMA.⁵⁶

The Court approached the matter as an equality matter in terms of section 9 of the Constitution and found that the relevant provisions discriminated on the grounds of gender as they discriminated between a husband and wife, as only wives were subjected to the unequal proprietary distribution, and between different classes of women, as only 'old' marriages were subjected to the proprietary consequences in terms of the Codes.⁵⁷

The Court hinted at the arguments of the WLC and the relevant context provided, stating that '[t]he marital property system renders women extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent'.⁵⁸ The Court ordered that all customary marriages be marriages in community of property and limited its retrospectivity to not affect marriages that had already been terminated.

The Court acknowledged the usefulness of the WLC's submissions with regard to the relevant international and regional instruments, and the vulnerability and position of the class of women affected by the RCMA. However, it found that its arguments in relation to pre-Act polygynous unions should not form part of its decision and that, at most, the judgment could draw the attention of the legislature to cure the possible *lacuna*.⁵⁹ The proprietary consequences of polygynous unions would be regulated by customary law until parliament intervened.⁶⁰

Despite the Court not adopting the WLC's suggested remedy, when reading the judgment it becomes clear that the contextual evidence presented by the WLC assisted the Court in acknowledging the vulnerability of women in customary marriages. The Court focused on the patriarchal nature of the relevant Natal codes and the need for those entrenched values to change within a constitutional

56 Cowen & Mangcu-Lockwood (n 51 above) para 54. Sec 7(7) of the RCMA states: 'When considering the application in terms of subsection 6 – (a) the court must – (i) in the case of a marriage which is in community of property or which is subject to the accrual system – (aa) terminate the matrimonial property system which is applicable to the marriage; and (bb) effect a division of the matrimonial property; (ii) ensure an equitable distribution of the property; and (iii) take into account all the relevant circumstances of the family groups which would be affected if the application is granted; (b) the court may – (i) allow further amendments to the terms of the contract; (ii) grant the order subject to any condition it may deem just; or (iii) refuse the application if in its opinion the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract.'

57 *Gumede* (n 21 above) para 34.

58 *Gumede* para 36.

59 *Gumede* para 55.

60 As above.

framework.⁶¹ It may be that the Court, in not adopting the WLC's proposed remedy, was cautious of overstepping its boundaries in changing a democratically-implemented piece of legislation which was highly regarded.⁶²

The Recognition Act was assented to and took effect well within our new constitutional dispensation. It represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country. Past courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary 'unions'.

Gumede set a precedent concerning the interpretation of the provisions of the RCMA in line with the constitutional right to equality, and with the Court's next decision it became clear that this interpretation had to happen within the applicable custom.⁶³

4.2 *Mayelane v Ngwenyama* (CGE, NMRW and WLC as amici curiae)

When the RCMA was drafted, a contentious issue was the recognition of polygynous marriages, since it has been viewed as a patriarchal institution with not much relevance in modern society.⁶⁴ Research indicated that many women were against its legal recognition. However, non-recognition was not really an option, as many women were in these marriages and continued to enter into them.⁶⁵

A compromise was reached with the drafting of the RCMA as it extended protection to women and children that found themselves in polygynous marriages.⁶⁶ The compromise was the serial division of estates that required a husband, who wanted to enter into a further customary marriage, to make an application to court to approve a written contract that regulated the future matrimonial property systems of the marriages.⁶⁷ However, many uncertainties remained, as the RCMA did not provide for the equal treatment of wives in

61 *Gumede* (n 21 above) para 17.

62 *Gumede* para 16 (footnotes omitted).

63 See *Mayelane* (n 22 above) para 77, where the Court referred to the *Gumede* judgment in stressing the equal status and capacity of spouses.

64 Mbatha et al (n 6 above) 178; F Kaganas & C Murray 'Law, women and the family: The question of polygyny in a new South Africa' (1991) *Acta Juridica* 116; PE Andrews 'Who's afraid of polygamy? Exploring the boundaries of family, equality and custom in South Africa' (2009) 11 *Utah Law Review* 351.

65 Mbatha et al (n 6 above) 178.

66 C Albertyn & L Mbatha 'Customary law reform in the new South Africa' in SJR Cummings et al (eds) *Gender, citizenship and governance: A global sourcebook* (2004) 51-54.

67 Sec 7(6) of the RCMA states: 'A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after the commencement of this Act must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.'

polygynous marriages.⁶⁸ This was especially relevant with regard to consent, as the Act required only the consent of the parties to the marriage, and it was uncertain whether the consent of existing wives was required for the conclusion of a subsequent marriage.⁶⁹ The *Mayelane* matter came to focus on this specific issue, namely, whether the consent of a first wife was necessary for the conclusion of a subsequent customary marriage and whether compliance with section 7(6) of the RCMA was a requirement for the validity of a subsequent customary marriage.⁷⁰

Mayelane had been married to her husband in 1984 in terms of customary law. Upon her husband's death in February 2009, she approached the Department of Home Affairs to register her marriage when she was informed that another wife, Ngwenyama, who had allegedly entered into a customary marriage with her husband in 2008, had also applied for the registration of a marriage with her husband.⁷¹ Both the wives disputed the validity of the other's marriage.

Mayelane applied to the High Court for an order to declare her customary marriage valid and that of Ngwenyama null and void, on the basis that she had not consented to the second marriage as required by Tsonga custom.⁷² The High Court granted both orders and determined the matter by interpreting and applying section 7(6) of the RCMA and not considering the consent issue.⁷³ The High Court interpreted the section to be peremptory in that, if a husband failed to obtain court approval of a document that would regulate the proprietary consequences of the marriages, a subsequent marriage would be void.⁷⁴ Ngwenyama appealed the decision.

The Supreme Court of Appeal (SCA) found that section 7(6) did not regulate the validity of a customary marriage but only its proprietary consequences.⁷⁵ The SCA confirmed the order of the High Court, but also overturned the invalidity in relation to Ngwenyama's marriage. Mayelane appealed the latter part of the SCA decision to the Constitutional Court.

68 Mbatha et al (n 6 above) 179.

69 As above. Sec 3 of the RCMA sets the requirements for a valid customary marriage and states: '(1) For a customary marriage entered into after the commencement of this Act to be valid – (a) the prospective spouses – (i) must be above the age of 18 years; and (ii) must both consent to be married to each other under customary law; and (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.'

70 The ensuing discussion of the *Mayelane* judgment is reliant on a detailed case note discussion: A Spies 'Relevance and importance of the *amicus curiae* participation in *Mayelane v Ngwenyama*' (2015) 1 *Stellenbosch Law Review* 156.

71 Facts as provided in the SCA judgment *MM v MN & Another* 2012 (4) SA 527 (SCA) paras 3-4.

72 *Mayelane* (n 22 above) para 4.

73 *Mayelane* paras 4-5.

74 *Mayelane* para 6.

75 As above.

For the Constitutional Court, unlike the High Court and SCA, who only judged the matter according to an interpretation of section 7(6), the consent issue was crucial in adjudicating the matter, and it issued directives requesting the parties to consider the implications.⁷⁶ It was only after all the parties had filed their submissions, and the Court had benefit of all the arguments, that it again issued a set of directives requesting the parties to submit affidavits that would set out consent to polygynous marriages according to Tsonga custom.⁷⁷ This hinted at the fact that the Court planned to ground its decision in the particular custom. The WLC and the CGE, together with the NMRW, applied to be admitted as *amici curiae* in the Constitutional Court.

The WLC focused on establishing equality between the different wives with regard to their lived realities and vulnerability as a group.⁷⁸ The WLC supported the SCA's decision and was critical of the Constitutional Court's decision to focus on consent.⁷⁹ Before the Court issued its second set of directives, the WLC argued that the issue of consent was an issue of custom, and that there was not sufficient information before the Court to establish or develop the applicable customary rules.⁸⁰

The WLC further argued that it was not only the existence of the consent requirement that had to be established under customary law, but also the 'contours of a consent requirement'.⁸¹ This would mean that the Court would have to view consent within the context that women do not have an equal bargaining position in relationships, as well as a range of other questions, such as what consent means; whether express consent is required or whether tacit consent would suffice; what the consent should relate to; whether consent to polygyny is enough or whether it must relate to a particular individual and her family; and whether consent should be given at the time of the subsequent marriage or whether it could be procured earlier.⁸² The WLC argued that even if the Constitutional Court were to remit the matter back to the High Court to establish custom, it would not yield great certainty for women and would be a very slow process in securing rights protection for all the women concerned.⁸³

For the WLC, one of the most important questions was what the consequences of a subsequent marriage would be if it was concluded without the necessary consent. Would the marriage be void from the

76 Directions of the Constitutional Court dated 1 August 2012, CCT 57/12.

77 As above.

78 Notice of motion to be admitted as *amicus curiae* of the WLC, affidavit deposed to by JL Williams, CCT 57/12 para 4.

79 Notice of motion (n 78 above) para 34.

80 S Cowen & N Mji *Written submissions of the WLC*, CCT 57/12 para 35.

81 As above.

82 Cowen & Mji (n 80 above) para 35.1.

83 Cowen & Mji para 38.

start or would it be a ground for nullification of the marriage and, subsequently, what patrimonial consequences would follow?⁸⁴

The WLC attempted to construct a remedy that would best protect all the parties in the relevant circumstances. They argued that the appropriate route would be to treat marriages without consent as voidable rather than void.⁸⁵ A second marriage would thus be voidable once knowledge of this marriage comes to light, and it would be voidable from the date of a court order.⁸⁶ They conceded that it might violate the rights of women in second marriages, but that at least it would not be invalid from the outset.⁸⁷ Furthermore, if (as in this case) the existence of a subsequent marriage only came to light when a husband died, the second marriage would continue to be valid, but that did not mean that the first wife was without recourse as the Master would have a discretion and the right to refer a relevant dispute to a magistrate or traditional leader.⁸⁸

After the Court issued its second set of directives and it was clear that it planned to ground its decision within the particular custom, the WLC filed an expert affidavit by an elder and advisor to traditional leaders.⁸⁹ Mr Mayimele stated that a first wife may be informed of a subsequent decision but that the husband makes the decision to marry again.⁹⁰

The CGE and NMRW believed that the questions to be answered revolved around the establishment of specific rules of living custom, allowing these to be applied and, if necessary, developed, to bring them in line with the Constitution. They argued that customary law should only be developed once a court had a clear understanding of the content of the custom it intended to develop and that the matter should, therefore, be remitted to the High Court to reconsider the relevant custom.⁹¹

In response to the Court's second directives, the CGE and NMRW filed a range of affidavits, after having consulted directly with members of the Tsonga community. These affidavits described the law and practices relating to polygyny in that culture.⁹² In contrast to the evidence provided by the WLC, all the affidavits confirmed that in

84 Cowen & Mji para 35.2.

85 Cowen & Mji para 51.

86 As above.

87 Cowen & Mji (n 80 above) para 52.

88 Cowen & Mji para 54. In this regard, they referred to sec 5 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

89 Affidavit of HH Mayimele filed on behalf of the WLC, CCT 57/12.

90 *MM v MN* (n 71 above) para 56.

91 T Ngcukaitobi & M Bishop *Written submissions of the CGE & NMRW*, CCT 57/12 para 10.2.

92 The affidavits included affidavits by MS Bungeni; M Rikhotso; MD Shiranda and KI Nkanyani. They also commissioned an expert, Dr M Mhlaba, to provide his opinion on the issues raised by the Court; see the filing sheet of the CGE over NMRW in response to the Court's directions dated 25 February 2013, CCT 57/12.

Tsonga custom, consent was a requirement for the conclusion of a subsequent marriage.⁹³

The Constitutional Court confirmed the SCA's decision that the RCMA did not prescribe any consent requirement for a valid second or subsequent customary marriage, and followed the NMRW's and CGE's arguments that it was necessary to determine the content of custom, which justified its call for further evidence in this regard.⁹⁴

The Court largely relied on the affidavits filed by the *amici curiae*, especially those of the CGE and NMRW, in establishing whether Tsonga custom prescribed consent.⁹⁵ The Court accepted, based on the evidence, that Tsonga custom required consent for a subsequent marriage, viewing the different opinions as nuance and accommodation rather than contradiction.⁹⁶

The Court proceeded to consider the relevant evidence within the constitutional framework of equality and dignity.⁹⁷ Unlike the WLC, who focused on equality between the different wives and their equal treatment, the Court focused on equality between husband and wife and found that the particular custom had to be developed in light of these principles to unequivocally require consent.⁹⁸

Ngwenyama's marriage was found to be null and void and, to protect parties in existing customary marriages, the requirement was to be prospective and made known to the public through the Houses of Traditional Leaders and the Minister of Home Affairs.⁹⁹

Through the *Mayelane* matter it became clear that the *amici curiae* employed different litigation strategies in participating as such in customary law matters. The first strategy (supported by the CGE and the NMRW in *Mayelane*), the custom-based approach, advocates that the Court should establish what the actual living custom is, should enquire as to whether that custom complies with constitutional norms and, if it does not, should develop the particular custom. Although the emphasis is on custom, it is custom operating within a constitutional framework. Here, a decision would not be applicable to

93 See the Court's summary of the affidavit evidence in *MM v MN* (n 71 above) paras 55-59.

94 *Mayelane* (n 22 above) paras 28-42; notice of motion to be admitted as *amici curiae* of the CGE & NMRW, CCT 57/12 para 35.12.

95 *Mayelane* (n 22 above) para 18.

96 *Mayelane* paras 54-61.

97 *Mayelane* paras 62-69.

98 *Mayelane* para 75.

99 *Mayelane* (n 22 above) para 89; Zondo J and Jafta J (with Mogoeng J and Nkabinde J concurring) in separate minority judgments criticised the majority, specifically in relation to the issuing of the second set of directives and the call for further evidence. Zondo J argued that the Court should not have called for additional evidence and that the matter could have been dealt with on the records from the High Court and SCA. He found that the Court, as appellate court, was not in a position to deal with contradictory evidence as clearly presented in the affidavits. For Zondo J, the evidence tendered by *Mayelane* and

everyone, but only those that practise a specific custom, allowing customary law to develop alongside the Constitution.

The second strategy (supported by the WLC in *Gumede* and in *Mayelane*), the rights-based approach, points to the evidentiary difficulty in establishing proof of living custom and argues that the Court should, considering the vulnerability of the parties, provide immediate relief and establish legal certainty pertaining to specific rights claims. This position acknowledges the importance of living custom, although it is not applied.

In adopting different strategies, the question should be asked whether the *amici* were successful in representing these women's lives and whether they contributed to ensuring that women living and married under customary law are able to utilise their constitutional rights.

5 Conclusion

The divergent strategies identified in the above decisions are interesting and possibly could be ascribed to the different organisational goals of the participating *amici curiae*. As discussed above, the CGE, with its mandate of focusing on rural women, and the NMRW, as a grassroots organisation, felt strongly about the protection and development of customary law to serve the women to whom it applies. On the other hand, the WLC, as a rights-based organisation, wants to benefit as many women as possible from a single decision and has tailored its arguments to focus on specific remedies that flow from a breach of the equality provision of the Constitution.¹⁰⁰

However, despite a difference in strategy, the participating *amici curiae* had the communal goal of bettering the position of women in society living under customary law. They were able to illustrate that the rights to culture and equality are not oppositional but rather interrelated, a complexity that courts need to understand without

99 the affidavit from her uncle pertaining to Tsonga custom was sufficient in establishing that consent was a requirement and that Ngwenyama had failed to prove that she had entered into a customary marriage with the deceased. According to him, there was no valid marriage between Ngwenyama and the deceased, irrespective of whether one would take into account the additional affidavits; see *Mayelane* (n 22 above) paras 90-131. Jafta J asserted that development was not needed as this was never argued by any of the parties and fell outside the scope of the case. For Jafta J, there were no compelling reasons, especially when not argued by the parties, why the Constitutional Court should sit as a court of first and last instance considering the development of customary law. In agreeing with Zondo J, Jafta J found that Ngwenyama had failed to prove that a customary marriage existed between her and the deceased and that Tsonga custom required consent which rendered development unnecessary; see *Mayelane* (n 22 above) paras 132-157.

100 For a discussion of the WLC's litigation strategy, see R Cowan 'The Women's Legal Centre during its first five years' (2005) *Acta Juridica* 273 280.

feeling that they have to make a choice between different competitive rights.¹⁰¹ The particular customary rule, as lived, needs to be understood, as well as the social context of the relevant women. This requires knowledge 'of the actual reality of people's lives, their place within the community and the power, resources and interests implicated by the dispute'.¹⁰² The *amici curiae* played a crucial role in providing this contextual evidence to the court, which enabled it to suggest legal solutions that address women's subordination through law. With the acknowledgment that the law has a limited ability to radically transform gender relations, the *amici curiae* participating in these matters illustrated that if women's experiences are placed before a court, they could assist in the redefinition of existing legal issues.¹⁰³ In this sense, the law should be viewed as an important site of struggle, despite its gendered disparity, as it could 'be harnessed in a positive way to improve women's lives', as illustrated by the decisions.¹⁰⁴ Generally, rights claims give women an important sense of collective identity, actively shape public discourse and are a source of empowerment.¹⁰⁵ The public nature of rights assertion is especially significant because of the often private nature of discrimination against women, especially in a customary setting.¹⁰⁶

The importance of *amicus curiae* participation, not only within a South African context, is the way in which it fosters democratic ideals within judicial decision making:¹⁰⁷

Judges are required to subject public and private power to the demand for dialogic justification; to participate in a transformative debate about the relationship between the individual and collective. It is their duty to resist normative closure, to renounce attempts to make the current boundary between the collective and the individual appear natural and necessary; to challenge the assumption that 'the people' have a fixed identity, or that a broad social consensus is 'out there' waiting to be discovered. It is their responsibility to facilitate democratic deliberation; to promote respect for the 'marginalised other'; to allow a multiplicity of voices to be heard. As participants in a culture of justification, judges are required to take responsibility for their own actions, to spell out the moral and political values upon which their decisions rest.

101 S Moller Okin 'Feminism and multiculturalism: Some tensions' (1998) 108 *Ethics* 661 666.

102 C Albertyn "'The stubborn persistence of patriarchy'? Gender equality and cultural diversity in South Africa' (2009) 2 *Constitutional Court Review* 165 184; see also A Claasens & S Mnisi 'Rural women redefining land rights in the context of living customary law' (2009) 25 *South African Journal on Human Rights* 491 492.

103 K van Marle & E Bonthuys 'Feminist theories and concepts' in Bonthuys & Albertyn (n 6 above) 15 46.

104 C Albertyn 'Feminism and the law' in C Roederer & D Moelendorf (eds) *Jurisprudence* (2004) 291 295.

105 S Roach *Law and social change* (2000) 172.

106 As above.

107 H Botha 'Judicial dissent and democratic deliberation' (2000) 15 *South African Public Law* 321 322.

Amicus curiae participation assists in this process as it provides the opportunity for persons that may be affected by a judgment to participate, and so adds legitimacy to the judicial process and reassures the public of the courts' receptiveness to the norm of democratic inclusion.¹⁰⁸ However, *amicus curiae* participation does much more in terms of the democratic process, as it provides real democratic benefits to vulnerable groups.¹⁰⁹ In this sense, *amicus curiae* participation provides an important channel of communication with the judiciary, as an *amicus* is in the position to represent a vulnerable group's interests, allowing for a multiplicity of voices to be heard.¹¹⁰

The *amici curiae* that participated in the above matters played an especially important role, considering South Africa's history and the need for claims of culture, gender and diversity to be understood in the right context.¹¹¹ The *amici curiae* (despite their differences in strategy) were able to represent the voices of a specific vulnerable and marginalised group and ensured that these women's voices were heard before the court, strengthening South Africa's commitment to participatory democracy.

In future matters pertaining to customary law, and the customary law of marriage, *amici curiae* have a definite role to play in placing evidence of lived custom before the court to ensure its development within the constitutional framework of equality. Ultimately, *amicus curiae* participation fosters democratic ideals by allowing interest groups the option of influencing the way in which legal decisions are made by representing the voices of those not before court.¹¹²

108 OS Simmons 'Picking friends from the crowd: *Amicus* participation as political symbolism' (2009) 42 *Connecticut Law Review* 187 198.

109 Simmons (n 108 above) 199.

110 As above.

111 Albertyn (n 102 above) 196.

112 R Garcia 'A democratic theory of *amicus* advocacy' (2008) 35 *Florida State University Law Review* 315.

Recent developments

The King can do no wrong: The impact of *The Law Society of Swaziland v Simelane NO & Others* on constitutionalism

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Summary

*In mid-2014, the High Court of Swaziland issued a controversial judgment in which it dismissed an application challenging the powers of the King to appoint judges. This was the case of *The Law Society of Swaziland v Simelane NO & Others*, which has far-reaching consequences for constitutionalism and the rule of law in Swaziland. The main finding of the Court was that the lawsuit was frivolous because the applicants knew that the King enjoyed immunity from all legal suits for everything under the sun which he does or omits to do. In finding that the King's actions could be challenged as the King was considered to be unerring, the Court further relied on an archaic customary idiom, umlomo longacali manga (the mouth that does not lie). The net effect of this is that any exercise of public power by the King, or anyone acting on behalf of the King, cannot be challenged as unconstitutional. This article traces the origins of the*

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judicial problems currently afflicting Swaziland, and demonstrates that, to a large extent, the judiciary has been suffering from inside, rather than external forces, before making recommendations on how to remedy this unfortunate situation.

Key words: *Swazi King; constitutionalism; rule of law; immunity; judicial independence*

1 Introduction

On 1 August 2014, the High Court of Swaziland delivered judgment in the case of *The Law Society of Swaziland v Simelane NO & Others*¹ (*Simelane* judgment), dealing with the powers of the King to appoint judges and members of the Judicial Service Commission (JSC). The case was delivered almost 10 years after the Swaziland Constitution, which ended over 33 years of rule by royal decree, was adopted. This case is significant for constitutionalism in the context of Swaziland in three respects. First, the matter marked the first time in a post-constitutional Swaziland that a challenge was brought before the courts in relation to the appointment of judges, and the powers of the King in that regard. Second, the case added to the growing jurisprudence emanating from Swaziland courts on the immutable powers of the King and *iNgwenyama*. Third, this also marked the first time the customary protection offered to the *iNgwenyama* under the traditional idiom *umlomo longacali manga*² was judicially endorsed and incorporated into the constitutional jurisprudence of Swaziland.³ It also marked the first time the idiom was equated to immunity and applied to the King in his executive capacity. Needless to say, the judgment will have far-reaching consequences for the rule of law, access to courts, the limitation of governmental power and the principle of legality. The article, therefore, analyses the factors that influenced the reasoning of the Court in the *Simelane* judgment, as well as the impact thereof on constitutionalism in Swaziland in respect of the aforementioned key factors.

1 [2014] SZHC 179 (*Simelane* judgment).

2 See Constitutional Review Commission Final Report on the Submissions and Progress Report on the Project for the Recording and Codification of Swazi Law and Custom (undated) 135. The Commission stated: 'Pronouncements by the King become Swazi law when they are made known to the nation, especially at *Esibayeni* or Royal Cattle Byre. The King is referred to as *umlomo longacali manga* ("the mouth that never lies").'

3 See the High Commission of Swaziland 'History' <http://www.swazihighcom.co.za> (accessed 14 April 2015), where the traditional idiom is defined as a philosophical reference to 'the mouth that tells no lie'. The Zulu have a similar idiom, *umlom ongathethi manga*. Nzimande asserts that this reference emanates from the fact that all public announcements by the Zulu King were previously decided by the King-in-Council, hence his utterances could not be faulted because they emanated from the people. See T Nzimande *The legacy of Prince Mangosuthu Buthelezi: In the struggle for liberation in South Africa* (2011) 159.

2 Swaziland's constitutionalism in context: Very young and very fragile

It is impossible to fully comprehend the impact of the recent judgment on constitutionalism in Swaziland without a proper appreciation of key developments, both political and legal, in the past four decades. Like most African states, Swaziland operated under traditional leadership with a King and chiefs who served under the King. When Britain took over the administration of the country, they superimposed a Western system of governance on the country which saw the King subordinate to the Queen of England and his status reduced to that of 'paramount chief'. For Swaziland, the British assumed the role of protector, labelling the country a British protectorate between the years 1903 and 1968. The period between 1963 and 1967 allowed for limited self-rule,⁴ during which political power was contested by various political formations, including a royal political party called the *Imbokodvo* National Movement (INM); the Ngwane National Liberatory Congress (NNLC); the Swaziland Progressive Party (SPP); the Swaziland Democratic Party (SDP); the Swaziland Independent Front (SIF); and the United Swaziland Association (USA), among others.⁵ As was common at the time amongst all decolonisation processes in Africa, when Swaziland gained independence from the British in 1968, it inherited a constitution crafted and handed down by the British, based on a Western model of governance.⁶

Barely five years after independence, the reality of the unsuitability of this British Constitution was already setting in. In the 1972 parliamentary elections the NNLC won three seats, making it the official opposition, much to the ire of the King whose INM party still commanded a majority.⁷ To quell the growing popularity of the NNLC,⁸ the government of Swaziland decided to deport one NNLC candidate, Thomas Bhekindlela Ngwenya, to Barberton in the Mpumalanga province of South Africa, claiming that he was not a Swazi national.⁹ In 1973, the then King, Sobhuza II, unilaterally abrogated the independence Constitution and replaced it with a royal decree in April 1973,¹⁰ which became the supreme law of the land.¹¹

4 South African History Online 'Swaziland' <http://www.sahistory.org.za/places/Swaziland> (accessed 14 April 2015). See also JE Jessup *An encyclopaedic dictionary of conflict and conflict resolution, 1945-1996* (1998) 706.

5 JSM Matsebula *A history of Swaziland* (1988) 236-241.

6 Constitution of Swaziland Act 50 of 1968.

7 M Unwin & RE Grant *Swaziland* (2012) 60.

8 Institute for Security Studies 'Swaziland – History and politics' <http://www.issafrica.org/af/profiles/Swaziland/Politics.html> (accessed 15 April 2015).

9 Ngwenya, as parliamentary candidate of the NNLC, defeated the INM candidate. After Ngwenya had satisfied a court that he had indeed been born within Swaziland, the hearing of citizenship cases was transferred from the courts to a hastily-created tribunal, and he was again deported. After the tribunal was itself declared illegal, the Independence Constitution was suspended and parliament

This decree was enacted at the same time King Sobhuza II dissolved parliament,¹² and this saw the country operate without a parliament from 1973 to 1978.¹³ King Sobhuza II died in 1982 and was succeeded by his son, King Mswati III, who ascended to the throne on 25 April 1986 after a short period of regency.

The year after his enthronement, King Mswati III reaffirmed the unhealthy political and constitutional set-up introduced by his father in 1973. Through an amendment to the King's Proclamation, the new King decreed as follows:¹⁴

I hereby reaffirm that in terms of Swazi law and custom, the King holds the supreme power in the Kingdom of Swaziland and as such all executive, legislative and judicial powers vest in the King who may from time to time by decree delegate certain powers and functions as he may deem fit.

Interestingly, the pronouncement of the Court in the *Simelane* judgment is similar to both the above decree and the

handed all power over to the King. See L Vail *The creation of tribalism in Southern Africa* (1989) 308. See also the following sources: <http://publishing.cdlib.org/ucpressebooks/view?docId=ft158004rs;chunk.id=d0e7943;doc.view=print> (accessed 15 April 2015); the cases of *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister* 1970-76 SLR (HC) 88 119 and *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer* 1970-76 SLR 123 (HC).

- 10 CM Fombad 'The Swaziland Constitution of 2005: Can absolutism be reconciled with modern constitutionalism?' (2007) 23 *South African Journal on Human Rights* 95.
- 11 See the King's Proclamation to the Nation of 12 April 1973.
- 12 King's Proclamation (n 11 above), which provides: 'TO ALL MY SUBJECTS – CITIZENS OF SWAZILAND. 1 WHEREAS the House of Assembly and the Senate have passed the resolutions which have just been read to us. 2 AND WHEREAS I have given grave consideration to the extremely serious situation which has now arisen in our country and have come to the following conclusions: (a) that the Constitution has indeed failed to provide the machinery for good government and for the maintenance of peace and order; (b) that the Constitution is indeed the cause of growing unrest, insecurity, dissatisfaction with the state of affairs in our country and an impediment to free and progressive development in all spheres of life; ... 3 NOW THEREFORE I, Sobhuza II, King of Swaziland, hereby declare that, in collaboration with my Cabinet Ministers and supported by the whole nation, I have assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power is vested in myself and shall, for the meantime, be exercised in collaboration with a Council constituted by my Cabinet Ministers. I further declare that, to ensure the continued maintenance of peace, order and good government, my armed forces in conjunction with the Swaziland Royal Police have been posted to all strategic places and have taken charge of all government places and all public services. I further declare that I, in collaboration with my Cabinet Ministers, hereby decree that: A The Constitution of the Kingdom of Swaziland which commenced on the 6th September, 1968, is hereby repealed; B All laws with the exception of the Constitution hereby repealed, shall continue to operate with full force and effect and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this and ensuing decrees.'
- 13 There was a return to a parliamentary system in 1978 through the Establishment of the Parliament of Swaziland Order 23 of 1978, but the King still retained all judicial, executive and legislative powers. The order made provision for the exercise of executive and legislative powers, where the King, advised by a cabinet of Ministers, enjoyed executive powers.
- 14 See the King's Proclamation (Amendment Decree) 1 of 1987.

recommendations of Prince Mangaliso Dlamini's Constitutional Review Committee,¹⁵ which averred:¹⁶

Pronouncements by the King become Swazi law when they are made known to the nation, especially at Esibayeni or Royal Cattle Byre. The King is referred to as *umlomo longacali manga* ('the mouth that never lies'). That is before any pronouncement or proclamation, the King will have consulted and will have been advised.

However, it is our argument that this arrangement is inconsistent with the tenets of constitutionalism and the rule of law, two key components which underlie the notion of democratic governance that Swaziland professes to espouse. It is further antithetical to customary law itself, as will be seen below.

The years 1973 to 2005 were characterised by endless royal excesses, as any law or conduct that was inconsistent with King's Proclamation was rendered null and void.¹⁷ During this era, the immunity of the King was largely accepted, as there was no constitution in place. Further, this immunity drew its strength from the 1973 King's Proclamation, which already had been judicially endorsed as having established a *grundnorm*.¹⁸

When the current Constitution was adopted in 2005, there was hope that a new constitutional era had dawned and that there would be a shift from the rule by law and a return to the rule of law.¹⁹ There were further hopes that royal excesses would now be subject to judicial determination and fundamental rights finally would be respected and protected. It is of great concern that almost a decade after the adoption of the current Constitution, constitutional litigation is still not as vibrant as anticipated. This in part may be attributed to a lack of a culture of strategic litigation or public interest litigation on the part of Swaziland civil society, a rigid curriculum in the academy

15 Appointed by the King in terms of Decree 2 of 1996.

16 Report of the Constitutional Review Committee (2001) 135.

17 See para 14(1) of the King's Proclamation to the Nation of 12 April 1973 (Amendment Decree 1 of 1982).

18 See *Sithole NO & Others v The Prime Minister of the Kingdom of Swaziland & Others* [2008] SZSC 22, <http://www.swazilii.org/sz/judgment/supreme-court/2008/22> (accessed 14 April 2015). In this case, the Supreme Court confirmed a decision of the High Court that political parties and organised labour organisations had no legal capacity to challenge the constitutional validity of the constitution-making process (being Civil Case 2792/2006, <http://www.swazilii.org/sz/judgment/high-court/2007/196>, a judgment handed down by Banda CJ sitting with SB Maphalala and MD Mamba JJ). The Court came to the conclusion that the appellants had no *locus standi* to challenge the Constitution as at the time of its drafting, the 1973 King's Proclamation was operative as a *grundnorm* in Swaziland. This is the same Proclamation that introduced a ban on political parties, which ban subsists up to today.

19 This is despite an assertion in the Preamble to the effect that the Swaziland Constitution was adopted because it was necessary to protect and promote the fundamental rights and freedoms of everyone in the country, through a constitution which binds the legislature, the executive, the judiciary and the other organs and agencies of the Swaziland government. See the Preamble of the Swaziland Constitution of 2005.

that does not allow its products to think innovatively,²⁰ as well as a growing sense of apathy and disillusionment with the entire legal and political system in Swaziland.²¹ It can also be attributed to the lack of a Swazi-centric constitutional jurisprudence,²² or even the perceived lack of independence of the judiciary and its reluctance to enforce and protect the fundamental rights and basic freedoms in chapter III of the Constitution.

3 Essence of the legal challenge

The challenge to the King's appointment of Simelane as a judge came in the face of an ongoing judicial crisis which arose from what largely was perceived as interference in the work of the judiciary by both the executive and the head of the judiciary. It is quite interesting to note that the challenge was spearheaded by the Law Society of Swaziland (LSS), which historically had been characterised by a lackadaisical attitude. Perhaps this latent litigious inclination may be attributed to the judicial crisis, which will be discussed below. It is worth mentioning, though, that a similar challenge by the LSS before the adoption of the current Constitution had also been unsuccessful. In 2003, the LSS challenged the appointment of three judges. The matter was filed in the High Court as *Law Society of Swaziland v Swaziland Government & Five Others*,²³ in which the LSS called upon the government to show cause why the appointment of Justices Nkambule and Shabangu as judges of the High Court and the appointment of Judge Annandale as the Acting Chief Justice could not be declared void. The applications were never finalised because there were no judges to rule on them, with government having frustrated the appointment of an outside judge or judges.²⁴

20 The fact that Swaziland's only university which offers legal training, the University of Swaziland, only began offering human rights as a module a few years ago, coupled with the long-standing dominance of common law thinking, could explain the lack of capacity and innovation amongst Swaziland legal practitioners to launch constitutional challenges against seemingly unconstitutional actions of public officials, including the King and the JSC.

21 The judicial crisis, discussed below, which gripped the country in 2010/2011, helped cement negative perceptions amongst the public, in general, and the legal fraternity, in particular, about the state of judicial independence and the effectiveness of the judiciary in Swaziland.

22 While South African jurisprudence from the pre-1994 era found easy application in Swaziland's legal studies and litigation, the landscape has shifted dramatically after both countries adopted constitutions which differ markedly in respect of the nature and form of rights protected, and the extent to which certain public functions are regulated.

23 Case 743/2003.

24 TR Maseko 'The drafting of the Swaziland Constitution, 2005' (2008) 8 *African Human Rights Law Journal* 331.

Section 159 of the Constitution establishes the JSC and vests it with the power, *inter alia*, to advise the King in the exercise of his power to appoint judges of the High Court of Swaziland.²⁵ The LSS applied to the Court for a declaration that the appointment of Justice Mpendulo Simelane as a judge of the High Court of Swaziland be declared unconstitutional, invalid and of no force and effect and be set aside. The grounds upon which such relief was sought were the following: (i) that Simelane does not meet the criteria prescribed in section 154(1)(b)(i) of the Constitution;²⁶ and (ii) that the process of his appointment did not comply with section 173(4) of the Constitution.²⁷

The LSS argued that section 154(1)(b) of the Constitution was peremptory in that it prescribes that a person shall not be appointed as a judge of the High Court unless, *inter alia*, he has been a legal practitioner, barrister or advocate of not less than ten years' practice in Swaziland or any part of the Commonwealth or the Republic of Ireland. They further argued that Simelane had not satisfied that requirement.

The Court dismissed the application by the LSS on the basis that, in terms of section 153(1) of the Swaziland Constitution,²⁸ the appointment of the Chief Justice and the other justices of the superior courts was the exclusive preserve and prerogative of His Majesty the King, on the advice of the JSC.²⁹

25 Sec 160(1)(a) provides: 'Subject to any other powers or general functions conferred on a service commission in terms of this Constitution, the Judicial Service Commission shall, among other things, perform the following functions: (a) advise the King in the exercise of the power to appoint persons to hold or act in any office specified in this Constitution which includes power to exercise disciplinary control over those persons and to remove those persons from office.'

26 The provision stipulates that a person shall not be appointed as a justice of a superior court unless that person is a person of high moral character and integrity and in the case of an appointment to (b) the High Court, (i) that person is or has been a legal practitioner, barrister or advocate of not less than ten years' practice in Swaziland or any part of the Commonwealth or the Republic of Ireland.

27 Sec 173(4) of the Swaziland Constitution states: 'In making the recommendations to the King for the appointment of a member of a service commission, the line Minister shall proceed in a competitive, transparent and open manner on the basis of suitable qualifications, competence and relevant experience and the Minister shall endeavour to recommend a person who can effectively discharge the responsibilities of that office.'

28 Act 1 of 2005.

29 Even though the provision makes reference to the King receiving advice from the JSC, he is not constitutionally bound to follow such advice. Sec 65(4) states that '[w]here the King is required by this Constitution to exercise any function after consultation with any person or authority, the King may or may not exercise that function following that consultation'. See Fombad (n 10 above) 105.

4 Constitutionalism in the context of a plural legal system

As highlighted above, the decision of the Court would be difficult to comprehend without a proper appreciation of constitutionalism and the role played by the monarchy in constitutional development. The monarch's involvement in politics and legal development goes back to pre-colonial times, and was nurtured by the colonial master all the way through to independence. Today, the state of Swaziland officially claims to operate a dual legal system with Roman-Dutch common law (with a hint of English law) on the one side, and Swazi customary law on the other.³⁰ However, in reality, there are more than one customary law systems in Swaziland,³¹ even though they are officially disavowed. In essence, Swaziland does not necessarily embrace a legal dualist tradition, but a pluralist one.³² Kyed defines legal pluralism as the plurality of normative orders and institutions that enforce order within a political organisation.³³ This fits squarely into the Swaziland landscape because, apart from the Swazi (as an ethnic group), there are other races and ethnic groups living in and holding citizenship of Swaziland. For instance, there are a considerable number of citizens of Shangaan³⁴ and Zulu ethnicity.³⁵

Carefully analysed, Swaziland has always been saddled with a perpetual judicial crisis, save that it was often overshadowed by much more visible crises, including political, economic and social crises. The judicial powers given to the King through the 1973 King's Proclamation and confirmed in later decrees seem to have been the source of much of the judicial quagmire Swaziland has found itself in over the years.

In 2011, the then Chief Justice, Michael Ramodibedi, issued a directive preventing litigation in which the King or the *iNgwenyama* were cited.³⁶ This followed a High Court decision in the case of *Maseko v Commission of Police & Another (Maseko judgment)*,³⁷ which had found in favour of the applicant, Aaron Maseko, who was suing the King's office for the return of his cattle which had been unlawfully confiscated. Justice Masuku, who delivered the judgment, was later

30 K Starmer & TA Christou *Human rights manual and sourcebook for Africa* (2005) 886.

31 A Dube 'Does SADC provide a remedy for environmental rights violations in weak legal regimes? A case study of iron ore mining in Swaziland' (2013) 3 *SADC Law Journal* 259-278.

32 See HM Kyed 'Legal pluralism and international development interventions' (2011) 63 *Journal of Legal Pluralism and Unofficial Law* 1.

33 As above.

34 F Ndhlovu *The politics of language and nation building in Zimbabwe* (2009) 57.

35 UNESCO 'SiSwati' <http://www.salanguages.com/unesco/siswati.htm> (accessed 16 April 2015). See also UNISA 'Zulu' http://www.ulwazi.org/index.php5?title=Zulu_language (accessed 16 April 2015).

36 Practice Directive 4 of 16 July 2011.

37 [2011] SZHC 66 (*Maseko judgment*).

charged by the Chief Justice for insulting the King. Justice Masuku wrote in his judgment that the King had recently appealed to Swazis to obey the law and that it was inconceivable to imagine that His Majesty could speak with a forked tongue, saying one thing and authorising his officers to do the opposite.³⁸ In a disciplinary hearing in which the Chief Justice acted as complainant, witness, prosecutor and judge, Justice Masuku was found guilty and dismissed from the bench. The *Maseko* judgment was appealed to the Supreme Court,³⁹ where the Chief Justice also was on the bench and reversed the High Court decision delivered earlier by Justice Masuku. His main reason was that to apply Roman-Dutch common law to the matter would have been insensitive and wrong, since the case 'cried out for Swazi law and custom'. His issuance of Practice Directive 4 was, therefore, meant to give effect to his own appeal judgment in the *Maseko* case.

Pursuant to the above events, all lawyers in Swaziland embarked on a four-month boycott of all courts in protest against the Chief Justice's conduct. The legal fraternity partnered with broader civil society to deliver petitions in parliament and to the Ministry of Justice, calling for the impeachment of the Chief Justice and the dropping of charges against Justice Masuku. These processes yielded no results.

The actions of the Chief Justice negatively impacted on judicial independence, and set the tone for what the behaviour of judges ought to be in matters related to the King and the *iNgunyama*. It is worth noting that, as early as 2010, the Chief Justice, speaking *ex curia*, had pronounced himself a *Makulu Baas*,⁴⁰ in response to media enquiries about his behaviour, whilst he was still acting Chief Justice.⁴¹ He was speaking at the opening of the High Court where he slammed the media and judges for their role in what he perceived as meddling in the functions of his office.

When the King appointed an unqualified candidate as a judge, much against the constitutional stipulation, the LSS saw this as an affront to judicial independence and a violation of the Constitution. The challenge was, therefore, brought within the context of an already-antagonised judiciary, one which saw the LSS as a rabble-rouser that needed to be dealt with. It was also brought about in a climate where the bench would proceed with caution, having learnt its lesson in the Justice Masuku case about what the consequences are of questioning the powers of the King.

38 *Maseko* judgment (n 37 above) para 42.

39 *Commissioner of Police & Another v Maseko* [2011] SZSC 15.

40 Address by the Acting Chief Justice, Justice MM Ramodibedi, on the occasion of the opening of the High Court of Swaziland on 18 January 2010.

41 W Dlamini 'I'm *Makhulu Baas*' *Times of Swaziland* 19 January 2010, <http://www.times.co.sz/News/12481.html> (accessed 24 February 2016).

5 Immunity of the King: History, context and impact

In dismissing the LSS application, the Court did not delve into whether both the JSC, in advising the King, and the King himself, in appointing Simelane, were exercising public power. It totally avoided this question. Instead, the Court went on the defensive and outlined reasons why it should not inquire into the constitutionality of the actions of the King. In this regard, it relied on three things. The first was the section 11 immunity of the King provided for under the Swaziland Constitution. The second was, at least up until the judgment, only found in customary law, namely, the traditional idiom *umlomo longacali manga*. The third was the failure of the LSS to join the JSC as a party to the proceedings.

Section 11 of the Swaziland Constitution provides:

The King and *iNgwenyama* shall be immune from –

- (a) suit or legal process in any case in respect of all things done or omitted to be done by him; and
- (b) being summoned to appear as a witness in any civil or criminal proceeding.

In the Court's understanding, *umlomo longacali manga* grants the *iNgwenyama* immunity in much the same manner as section 11 does. It prevents any individual or tribunal from inquiring into the actions of the King and *iNgwenyama*. This is a dangerous approach, because if the drafters of the Constitution had intended *umlomo longacali manga* to be part of the constitutional text, they would have inserted it in the text. What compounds the problem is that the Court took the literal meaning of the idiom, without inquiring into its origin, its various meanings and whether it is indeed applicable in a constitutional setting and in the exercise of public powers.

The Court's approach is also selective in the sense that *umlomo longacali manga* is not the only customary value that is central to governance. There are other customary values which work as checks and balances to stem excess power. The idea of a dictatorial king has no place in customary law, hence the equally-hallowed value in the Swazi context of *inkhosi yinkhosi ngebantfu*. This literally translates into 'a king is a king through the people', and it makes the legitimacy of a king's rule conditional upon his humane treatment of people under his rule. In his coronation speech on 26 April 1986, King Mswati III reaffirmed this when he said that '[a] king is king by his people'.⁴² It is a form of checks and balances on royal political power, and it means that the legitimacy of a king's rule flows from the people.

There is also no way the Court could selectively employ the idiom *umlomo longacali manga* without addressing itself to the age-old value of *ubuntu*, which underlies the checks and balances discussed above.

42 See JSM Matsebula *A history of Swaziland* (1988) 325.

The legitimacy of a king only subsists as long as he is able to treat his people in accordance with *ubuntu*. In essence, the philosophy of *ubuntu* advocates that everyone must be given his due on account of common humanity. Motshekga indicates that *ubuntu* can be traced back to the teachings of the African sage, Khem (popularly known as Thoth-Hermes). He further asserts that *ubuntu* transcends race, class and gender.⁴³ Ntuli echoes Motshekga's sentiment. He attempts to unpack *ubuntu* by analysing the root of the word *ubuntu*, and tries to ascertain its meaning. He asserts that the root of the word, *ntu*, is derived from the vital force, a godhead. *Ubuntu* flows from such godhead and refers to the search for the godhead within us.⁴⁴

Thus, the King is not excused or exempted from the value of *ubuntu*; he is equally bound by it. The Court's decision to carve out *umlomo longacali manga* from the ancient tree of customary wisdom, whilst conveniently leaving out the values of *ubuntu* and *inkhosi yinkhosi ngebantfu*, is very mischievous.

As can be gleaned from the earlier discussions, the idea of absolute immunity preceded colonisation, and traces its roots from customary rules in place before Western ideas permeated Swaziland's legal landscape. What colonisation did was to entrench this notion as well, since the British also favoured a system that perceived the King as infallible.⁴⁵ This notion that 'the King can do no wrong' and can, therefore, not be subjected to the justice system is what paved the way for colonial legislation such as the State Liability Act in South Africa and the Government Liabilities Act in Swaziland,⁴⁶ in terms of which state assets were protected from attachment and execution. These pieces of legislation, developed by the colonial governments, were inspired by the idea of the inviolability of the King (crown) and all crown assets. Murungu echoes the above sentiment and posits that immunity follows in the first place from the divine right of kings, which basically means that one could not put an infallible ruler on trial since, if one did, the verdict must always go in his favour. The King was deemed infallible and could not do any wrong in his own state or be sued in his own courts.⁴⁷ Akande and Shah share similar

43 African National Congress 'Speech by Honourable Mathole Motshekga during the National Assembly second reading debate on Legal Practice Bill' 12 November 2013, <http://www.anc.org.za/caucus/show.php?ID=3238> (accessed 15 April 2015).

44 P Ntuli 'Personhood: An African perspective' in T Nhlapo *African culture, human rights and modern constitutions* (2013) xiii.

45 See the case of *Nyathi v MEC for Health Gauteng* CCT 19/07; [2008] ZACC 8. In this case, Madala J, in finding sec 3 of the State Liability Act unconstitutional, traced the origins of the Act to the notion that the King can do no wrong. He held in para 18 that the Act was 'a relic of a legal regime which was pre-constitutional and placed the state above the law: a state that operated from the premise that "the King can do no wrong". That state of affairs ensured that the state and, by parity of reasoning, its officials could not be held accountable for their actions.'

46 Act 2 of 1967.

47 C Murungu 'Immunity of state officials and prosecution of international crimes' in C Murungu & J Biegan (eds) *Prosecuting international crimes in Africa* (2011) 37.

sentiments, as they argue that such immunity reflects remnants of the majestic dignity that once attached to kings and princes as well as remnants of the idea of the incarnation of the state in its ruler.⁴⁸

Whilst the trend in most jurisdictions today favours an approach which provides limits to the King's executive powers, Swaziland is holding fast to the idea of a king whose acts and omissions are beyond judicial scrutiny. This breeds confusion, especially given the seemingly democratic aspirations of the Swaziland Constitution. The current legal confusion in the Swaziland system stems from the conflation of the terms 'King' and *iNgwenyama*.⁴⁹ The text of the section 11 immunity does not make a distinction between the King and *iNgwenyama*. A clear distinction between the two offices is critical, since these two offices have very distinct, yet sometimes overlapping, functions. It would seem that this was a deliberate act on the part of the drafters of the Constitution, as the aim was to maintain the *status quo* and ensure the inviolability of the King.⁵⁰

The office of the King is an executive one.⁵¹ Understood in this sense, the King is the head of the executive arm of government. He thus exercises public power. In fact, in the process of judicial appointment, both the King and the JSC exercise public power, which legally ought to be subject to judicial review in the interests of sound constitutionalism, a limited government and the rule of law.⁵² As Burns posits, both are organs of state and both exercise powers or perform functions in terms of the Constitution.⁵³ Woolman defines a public power as the performance of a function pursuant to some statutory authority, or the performance of a task in furtherance of some government function.⁵⁴ The JSC's recommendation and the King's final ratification of such endorsement are performed pursuant to the authorising provision, section 160 of the Constitution, and this is done in furtherance of the governmental function of ensuring a properly-constituted and functioning and legitimate judiciary. To oust judicial inquiry over executive acts through constitutional enactments

48 D Akande & S Shah 'Immunities of state officials, international crimes and foreign domestic courts' (2011) 21 *European Journal of International Law* 824.

49 Dube (n 31 above) 259-278.

50 Part of the jurisdictions studied by the Swaziland government personnel as part of the drafting process was that of Morocco, which placed a premium on the inviolability of the King. It is obvious that Swaziland's sec 11 was inspired by Morocco's immunity provision.

51 See sec 64(1) of the Swaziland Constitution, which provides that '[t]he executive authority of Swaziland vests in the King as head of state and shall be exercised in accordance with the provisions of this Constitution'.

52 The need to subject the exercise of public power by public officials to judicial review in order to test its compliance with the values of the rule of law and the principle of legality was articulated in *Police and Prisons Civil Rights Union & 75 Others v Minister of Correctional Services & 5 Others* Case 603/05 ECJ, para 46.

53 Y Burns *Administrative law* (2013) 136.

54 S Woolman 'Application' in M Chaskalson *et al Constitutional law of South Africa* Revision Service 5 (1999) 62.

such as Swaziland's section 11 does not advance but impedes the rule of law.

There has also been judicial endorsement of this understanding of what public power is, which judicial reasoning would support the assertion that the exercise of the powers of the JSC and the King actually is an incident of public power. In *Van Zyl v New National Party*,⁵⁵ the exercise of public power was found to be synonymous with the ability to act in a manner that affects or concerns the public. It cannot be disputed that the appointment of judges affects and concerns the public, who have an interest in a fully-functional, independent and impartial judiciary.

The office of the *iNgwenyama* is a customary one.⁵⁶ In the Swaziland context, both the office of the King and the *iNgwenyama* are occupied by the same person. When acting as an *iNgwenyama*, the King performs customary functions, such as being a leader of various regiments, commissioning and overseeing various traditional ceremonies, as well as sitting and adjudicating over disputes brought under customary law dispute resolution mechanisms.⁵⁷ Ideally, the thin line between these two distinct offices must be navigated carefully, to avoid an encroachment on executive functions. In other words, when the King exercises public power, he ought to disengage from his customary capacity under which he is permitted to act as he deems fit, as the 'infallible mouth'.

The appointment of judges falls squarely within the office of the King, as executive head of state, and not that of the *iNgwenyama*, which is a customary office. The main reason behind this argument is that judicial appointment ought to be carried out in the context of proper safeguards, to ensure judicial independence and public confidence in the bench. Customary law, unfortunately, has not developed these safeguards for the appointment of judges to serve in the superior courts. The dangers of assessing judicial appointments through the lens of customary law are thus manifold.

As indicated above, the Court in the *Simelane* judgment avoided dealing with the question of whether the exercise of the powers of both the JSC and the King were public powers, and the impact of the section 11 immunity on the exercise of such powers. It simply acknowledged that ordinarily it would have been disinclined to entertain the matter, but was forced to do so in the current instance because of its national importance. However, despite acknowledging the public interest in the matter, the Court failed to proceed to treat the matter as such, and instead sought to find a shortcut to dismissing the application. What better way to do this than to invoke the section 11 immunity of the King and *iNgwenyama*? In paragraph 11, the

55 2003 (10) BCLR 1167 (CC) para 75.

56 Sec 228(1) of the Swaziland Constitution, ch XIV.

57 *iNgwenyama* in SiSwati is the appellation given to a lion, and signifies power and majesty, the king of the jungle.

Court simply concluded that due to this immunity, the application was frivolous from its inception and was bound to fail. It is quite disconcerting, on at least two grounds, that a judge would label an attempt to obtain judicial interpretation of the extent and scope of the immunity of the King in relation to the exercise of public power as frivolous. First, it carries the real risk of discouraging constitutional litigation, and demonstrates a lack of appreciation on the part of the judiciary on their role in a society that perceives itself to be open and democratic. Second, the Court does not venture to explain how it arrived at this finding, leaving anyone who wishes to test whether public power was exercised in conformity with the Constitution without a remedy. Such a state is not tenable in the pursuit of a society based on the rule of law.

6 Was the LSS application a frivolous one or merely a weak case?

In paragraph 11 of the judgment, the Court labelled the application as frivolous from the moment it was launched and, because of that reason, the Court felt it was bound to fail. According to the Court, the frivolity of the action flowed from the fact that it was a direct challenge to the powers of the King in his appointment of judges when the litigants knew full well that the King enjoyed immunity from all legal processes.

Frivolous litigation refers to the practice of starting or carrying on lawsuits that, due to their lack of legal merit, have little to no chance of success. Such lawsuits are brought without justification and have no merit.⁵⁸ The intention of the litigants in instituting frivolous lawsuits is merely to harass,⁵⁹ delay or embarrass the opposing party.

A frivolous lawsuit should be distinguished from a weak case, since the latter does have legal grounds, albeit weak, whilst the former does not necessarily have a basis.⁶⁰ These are lawsuits which are frivolous, improper and instituted without sufficient ground, to serve solely as an annoyance to the defendant.⁶¹ Courts are empowered by the common law to stop such frivolous and vexatious proceedings as they amount to an abuse of the court process.⁶²

58 *Fisheries Development Corporation of SA Ltd v Jorgensen & Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd & Others* 1979 (3) SA 1331 (W).

59 MP Southwood *The compulsory acquisition of rights: By expropriation, way of necessity, prescription, labour tenancy and restitution* (2000) 263.

60 See *Bisset & Others v Boland Bank Ltd & Others* 1991 (4) SA 603 (D & CLD) 608E-H, where Booysen J stated that courts have inherent power to strike out such claims. See also *Western Assurance Co v Colderwell's Trustees* 1918 AD 266 271.

61 *Cohen v Cohen & Another* 2003 (1) SA 103 (CPD) para 14.

62 *Corderoy v Union Government* 1918 AD 512 517.

Whilst an action which is obviously unsustainable is vexatious, this must appear as a certainty, and not merely on a preponderance of probability.⁶³ Hence, the court in *ABSA Bank Ltd v Dlamini*⁶⁴ stated that, whilst a vexatious or frivolous action amounts to an abuse of the court process, determining what constitutes a frivolous action must be done on a case-by-case basis. There cannot be an all-encompassing understanding of the concept of abuse of the court process.⁶⁵

When looking closely at the LSS application, it does not appear as a certainty that the applicants knew from the beginning that theirs was a lost case. First, because of the reliance by the Court on *umlomo longacali manga*, an amorphous traditional idiom that had never before been used in constitutional litigation to bar proceedings, there was nothing to indicate to the litigants that their case was without merit. Second, because the nature of the application was a constitutional one, aimed at testing the constitutionality of the King's actions in the exercise of executive powers, it is our argument that the LSS *bona fide* aimed at testing the scope and reach of the immunity provisions in the exercise of public power. It was not aimed at harassing or annoying the respondent. Third, section 2(2) read together with section 64(2) places a right and a duty upon the King to uphold and defend the Constitution. It is our argument that the LSS application was aimed at giving the King an opportunity to defend and uphold the Constitution as mandated by sections 2(2) and 64(1). Only once the appointment of Simelane as judge was declared unconstitutional would the King be able to uphold the Constitution by appointing a qualified candidate. Unless Simelane's appointment was nullified, the King could not correct this as by then he was *functus officio*.⁶⁶ This is because there is no provision in the constitutional text that empowers the King to reverse his decisions once made. Hence, the argument that he would be *functus officio*, and another body, in this instance the High Court, which is vested with constitutional jurisdiction, would be the only one with the power to reverse the decision. This accords with the rule of law, in that individuals should be entitled to rely on governmental decisions, and should be able to plan their lives around such decisions. They should further be insulated, at least to some degree, from the injustice that would result from a sudden change of mind on the part of the King.⁶⁷

In the fourth place, it is our contention that the judges erred in deciding that the action was frivolous simply because of the section 11 immunity of the King. This is because the King does not act alone in appointing judges, but is advised by the JSC. Where the JSC gives the King advice which leads to an appointment which is

63 *Ravden v Beeten* 1935 CPD 296; *Burmharm v Fakheer* 1938 NP 63.

64 [2007] ZAGPHC 241; 2008 (2) SA 262 (J).

65 As above.

66 C Hoexter *Administrative law in South Africa* (2012) 277.

67 As above.

unconstitutional, both these actions need to be tested by the judiciary in line with the notion of *trias politica*. In any case, the JSC does not enjoy any immunity under the Constitution. Further, where the King acts *ultra vires*, as he did, that has implications for good governance and a judicial pronouncement on the extent of his immunity in relation to his *ultra vires* acts becomes imperative. The question before the Court, therefore, should have been whether the King's immunity extended to his exercise of public power even in cases where he flagrantly violates the Constitution by appointing an unqualified candidate as a judge. This is a fundamental question in constitutionalism, and the LSS cannot be faulted for wanting a competent authority, the Swaziland High Court, to pronounce on it. The case of the LSS was weak, but not entirely unfounded.

7 The order of costs: A very effective scarecrow?

Constitutional challenges like this are brought to test the constitutionality of the appointment process, which is an incident of exercise of public power and also instituted in the public interest. Despite the desirability of such challenges, and their instrumental role in ensuring a sound democratic state based on a limited government, respect for fundamental rights and the rule of law, there seems to be a tendency on the part of the Swazi bench to treat these challenges with contempt.

For instance, in punishing the LSS with an order of costs the Court stated:⁶⁸

For the reasons set out above and the *manner the applicant has dealt with a matter it brought in haste* to this Court, it is the considered view of this Court that this application be and is hereby *dismissed with an order for costs against the applicant on the punitive scale* which costs the Court orders that *they be paid by the members of the executive council of the applicant jointly and severally the one paying the other to be absolved* and these are to include certified costs of counsel.

It is worth noting that this punitive approach is not limited to the current case. There has been a growing trend in the Swaziland justice sector, particularly in cases of constitutional litigation,⁶⁹ where courts award punitive costs. This trend definitely has adverse effects on the administration of justice as it has the potential to cause would-be

68 My emphasis.

69 See in this regard the case of *Maria Temtini Dlamini & Others v Chairman of the Elections and Boundaries Committee & Others* High Court Case 1415/2013. In *Sithole NO & Others v The Prime Minister of Swaziland & Others* [2007] SZHC 190, the Court made an order of costs against the applicant, albeit not at the punitive scale. However, in *Sithole NO & Others v The Prime Minister and Others* [2008] SZSC 22 (n 18 above) para 76, the Court ordered each party to pay its own costs, after counsel for the appellants had argued that the matters raised were of much moment to them and their members, were of interest to the public, and were complex and fraught with legal difficulty.

litigants to be reluctant to challenge what they perceive to be unconstitutional decisions by state officials, such as the King and bodies exercising public power, such as the JSC.

8 Recommendations and conclusion

The foregoing clearly indicates that Swaziland's judiciary has endured years of interference. Such interference has come from both the executive arm of government as well as from within the judiciary itself. The actions of the Chief Justice, which led to prolonged boycotts of courts by legal practitioners, continue to have a negative impact on the legitimacy of the judiciary. Needless to say, it affects the rule of law and, by necessary extension, constitutionalism. The *Simelane* judgment further compounded the situation by importing a misplaced customary concept into Swaziland's constitutional jurisprudence. However, all is not lost. Swaziland can still redeem itself and restore the public's confidence in the legal system. The following are proffered as possible solutions.

Swaziland should embark on a constitutional review exercise with a view to amending the Constitution to limit the powers of the King as an executive state official. Lessons could be drawn from jurisdictions such as Lesotho, whose Constitution provides for a constitutional monarch, unlike the Swaziland Constitution which creates an absolute monarch. The new constitutional framework should bestow executive powers upon the Prime Minister, and not the King. Only a very limited scope of executive functions should, if necessary, be bestowed upon the King, provided that such constitutional amendment clearly states that those executive powers may not be exercised by the *iNgwenyama*, whose office is a customary one.

The process of constitutional amendment should also be aimed at removing the section 11 immunity, which currently prevents the King's actions as a state official from being scrutinised by a court. This would not be an easy task, as it is clear that Swaziland still wants to hold on to the archaic concept that the King can do no wrong. The best way to achieve this would clearly be to separate the two offices, that of the King from that of the *iNgwenyama*. The *iNgwenyama's* immunities should be regulated by customary law, because that is where the office belongs. Only the King should have power to exercise executive functions, and not the *iNgwenyama*, and these functions should be strictly limited, with the bulk of executive business being performed by the Prime Minister. Any immunity that is granted to the King should be accompanied by a clause that stipulates that such immunity does not extend to the performance of executive functions by the King. It is submitted that this would likely reduce the rising impunity on the part of the King, whose actions cannot be questioned under the current constitutional arrangement.

Swaziland's courts should desist from the selective incorporation of customary idioms into constitutional jurisprudence, as this tends to

cloud the real legal issues and permits judges to create new laws out of nothing. In the event that the courts refer to customary idioms, such idioms should be permeated by the values and principles of constitutionalism and the rule of law.

Swaziland should acknowledge the existence of other customary law systems in the territory and should shift away from its current obsession with what it calls Swazi law and custom. The recognition of Swaziland as a plural legal society rather than a dual one should be coupled with judicial reform aimed at raising awareness of this reality amongst judges and legal scholars.

Swaziland should also desist from the practice of constituting the bench through acting judges who have never served as judges before, or have never had to deal with constitutional litigation. Of the three judges that heard this matter, only one was drawn from the Industrial Court. The other two are practising attorneys who have never acted as judges before. They were in essence *ad hoc* judges with no judicial experience.

There should also be an improvement in the manner in which members of the JSC are appointed. Currently, it is the prerogative of the King to appoint members onto the JSC. Even though political parties are banned in Swaziland, the process can be made to be more participatory by involving the legislature in the appointment procedure. This is because there are currently members of parliament who are card-carrying members of these banned political parties, even if they were elected on individual merit and not on the basis of their membership of their parties. Getting the legislature involved in both the process of appointing the JSC and that of appointing judges would limit the possibility of recommending unqualified candidates as judges, as happened in the Simelane appointment.

Legal formalism and the new Constitution: An analysis of the recent Zimbabwe Supreme Court decision in *Nyamande & Another v Zuva Petroleum*

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Summary

This is an analysis of the recent decision by the Supreme Court of Appeal in the case of Nyamande v Zuva Petroleum. The article critiques the formalistic and conservative approach used by the Supreme Court in reaching its decision, as the Court failed to consider the important role now played by the Constitution of the Republic of Zimbabwe. This is because Zimbabwe passed a new Constitution in 2013. The article briefly discusses the facts of the case, the reasoning and ruling by the Supreme Court and, in some detail, the failure by the Court to consider a number of fundamental human rights and freedoms which are embodied in the Zimbabwean Constitution. The article also outlines some important rights and principles that the Supreme Court ought to have considered but failed to do. It additionally briefly considers the legislative framework governing labour relations in Zimbabwe, particularly the Labour Act of Zimbabwe, with the aim of interrogating the correctness of the decision in light of the constitutional and legislative framework governing labour relations in Zimbabwe. Although the legislature has subsequently rectified the matter, it is still important to reflect on the mistakes made by the Supreme Court in order to prevent it from erring in the same manner in the future. It is important to note that there has to be some level of change regarding the manner in which judges interpret the law, particularly in light of the new Constitution. If the Constitution is to be worth anything more than the

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piece of paper it is written on, the judiciary ought to ensure that in all cases they adjudicate on the Constitution is considered. The Constitution should permeate all law, including statutory and common law.

Key words: *constitution; dismissal; labour; justice; fairness*

1 Introduction

Today it is a well-known fact that companies have a significant impact on communities and individuals. This impact sometimes may be negative and sometimes positive. Indeed, in some instances, companies exercise significant power over individuals, even having the ability to control their well-being.¹ For this and many other well-documented reasons,² there must be some checks and balances to ensure that workers access social justice and democracy in the workplace.³ The recent decision by the Supreme Court of Zimbabwe in the case of *Nyamande & Another v Zuva Petroleum (Nyamande case)*⁴ leaves a lot to be desired. Not only did the Supreme Court leave the majority of employees at the mercy of the employer, but it also destroyed the protection that workers enjoyed for decades under Zimbabwe's constitutional and labour framework.⁵

The article seeks to analyse the recent decision by the Supreme Court of Appeal in the *Nyamande* case. It critiques the formalistic and conservative approach used by the Supreme Court in reaching its decision, as the Court failed to consider the important role now played by the Constitution of the Republic of Zimbabwe. This is mainly because Zimbabwe passed a new Constitution in 2013.⁶ As point of departure, the case note will briefly discuss the facts of the case and the reasoning and ruling by the Supreme Court. The second part of the article discusses, in some detail, the failure by the Supreme Court to consider a number of fundamental human rights and

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- 1 M Gwanyanya 'The South African Companies Act and the realisation of corporate human rights responsibilities' (2015) 18 *Potchefstroom Electronic Law Journal* 3102.
 - 2 For a discussion on the reasons why it has become necessary to regulate companies on human rights violations, see A Ramasastry 'Corporate complicity: From Nuremberg to Rangoon – An examination of forced labour cases and their impact on the liability of multinational corporations' (2002) *Berkeley Journal of International Law* 91; as J Ruggie 'Business and human rights: The evolving international agenda' (2007) *American Journal of International Law* 819; B Stephens 'Amorality of profit: Transnational corporations and human Rights' (2002) *Berkeley Journal of International Law* 45; B Stephens 'Corporate liability: Enforcing human rights through domestic litigation' (2000-2001) *Hastings International and Comparative Law Review* 401.
 - 3 Zimbabwean Labour Act [Chapter 28:01] as amended by Act 17 of 2002 section 2 A.
 - 4 *Nyamande & Another v Zuva Petroleum (Pvt) Ltd* SC 14/2015.
 - 5 A Magaisa 'Dark day for the Zimbabwean worker as Supreme Court goes neo-liberal' 18 July 2015 <http://alexmagaisa.com/dark-day-for-the-zimbabwean-worker-as-supreme-court-goes-neo-liberal/> (accessed 20 July 2015).
 - 6 The Constitution of the Republic of Zimbabwe Amendment Act 2013.

freedoms now contained in the Constitution.⁷ The article will outline all the possible rights and principles that the Supreme Court ought to have considered but failed to do. It will also briefly consider the legislative framework governing labour relations in Zimbabwe, particularly the Labour Act of Zimbabwe.⁸ The aim is to interrogate the correctness of the decision in light of the constitutional and legislative framework governing labour relations in Zimbabwe. Most importantly, the article will interrogate the relationship between employer and employee and demonstrate that, contrary to what the Supreme Court said in its judgment, this relationship is neither equal nor fair. Inherent in this relationship is the unique, unequal bargaining positions of the two parties. This is why we generally have laws to protect this relationship.⁹ To simply view this relationship as any other contractual relationship is, at the very least, unfair and results in injustice.

In the third and final part of the article I discuss the implications of this decision and provide a few recommendations as to how this situation in which workers in Zimbabwe find themselves can be rectified. I then conclude by arguing that the Supreme Court had failed to act in a manner consistent with the Constitution. In order to avoid a similar situation in the future, the judiciary needs to be constantly conscious of the fact that Zimbabwe now operates in a constitutional dispensation. If the Constitution is to be worth anything more than the piece of paper it is written on, the judiciary ought to ensure that in all cases they adjudicate on, the Constitution is considered. The Constitution should permeate all law, including statutory and common law.¹⁰

2 The case

2.1 Facts

The facts of the case are as follows. Don Nyamande and Kingstone Donga (the appellants) were employed by British Petroleum Shell (BP Shell) as supply and logistics manager and finance manager respectively. BP Shell sold its services as a going concern to Zuva Petroleum (the respondent).¹¹ An agreement of sale of business was concluded between BP Shell and Zuva Petroleum. A transfer of

7 As above.

8 Zimbabwean Labour Act [Chapter 28:01] as amended by Act 17 of 2002.

9 Magaisa (n 5 above).

10 See sec 2 of the Constitution which provides that it is the supreme law of Zimbabwe and conduct or law that is inconsistent with it is invalid.

11 'Going concern' here meant that Zuva Petroleum would simply step into the shoes of BP Shell, and no conditions of the employees would be altered.

undertaking was done in terms of section 16 of the Labour Act.¹² The appellants were transferred to the new undertaking without derogation from the terms and conditions of employment that they enjoyed while employed by BP Shell. Some time in November 2011, the respondent offered its employees, who included the appellants, a voluntary retrenchment package which was declined by some employees.¹³ In December 2011, the respondent served each of its employees, including the appellants, with a compulsory notice of intention to retrench.¹⁴

The appellants and the respondent could not agree on the retrenchment terms. Having failed to agree on the terms of retrenchment, the parties referred the dispute to the Retrenchment Board of Zimbabwe.¹⁵ In May 2012, the Ministry of Labour and Social Services directed the parties to carry out further retrenchment negotiations for another 21 days. In the middle of May 2012, and before the expiry of the 21 days, the respondent wrote letters to the appellants, terminating their contracts of employment on notice, as was provided for in the contracts of employment signed by both parties, with effect from 1 June 2012.¹⁶

The respondent paid the appellants in cash in lieu of notice and thus terminated the employment relationship. The appellants approached a labour officer, contending that their employment contracts had been unlawfully terminated. The labour officer failed to resolve the matter and referred it to compulsory arbitration. The arbitrator concluded that the termination of the contracts of employment was unlawful because the appellants had not been dismissed in terms of a code of conduct. The respondent appealed to the Labour Court. The Labour Court allowed the appeal. In its judgment, the Labour Court essentially held:¹⁷

The submission that section 12B [of the Act] came to do away with the possibility of terminating a contract of employment on notice is a misunderstanding of the law as it stands. In any event, the provisions of section 12(4) of the Act are clear and allow no ambiguity as also the provisions of section 12B. None of the sections have the effect of doing away with the termination of a contract of employment on notice.

12 See sec 16 of the Act (n 6 above). It provides that whenever any undertaking in which any persons are employed 'is alienated or transferred in any way whatsoever, the employment of such persons shall, unless otherwise lawfully terminated, be deemed to be transferred to the transferee of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer, and the continuity of employment of such employees shall be deemed not to have been interrupted'.

13 *Nyamande* case para 2.

14 As above.

15 *Nyamande* case para 3.

16 As above.

17 *Petroleum v Nyamande & Another* (2014) 195 LC/H.

The Labour Court concluded that neither section 12B¹⁸ nor section 12(4)¹⁹ of the Act abolished the employer's right to terminate employment on notice. The appellants were not satisfied with the judgment of the Labour Court and appealed to the Supreme Court on the following grounds:²⁰

- (1) The Labour Court erred and seriously misdirected itself on a question of law by upholding the termination of the appellants' contracts of employment on notice and failing to find such termination to be unfair dismissal.
- (2) The Labour Court erred and seriously misdirected itself on a question of law in failing to realise as it should have done that section 12(4) of the Act does not provide for the termination of a contract of employment on notice and that any such purported termination is contrary to section 12B of the Act.
- (3) The Labour Court erred at law in allowing termination on notice as that amounts to allowing an employer to terminate employment for no justifiable and valid cause. The appellants sought the setting aside of the Labour Court's judgment and its substitution with that of the arbitrator.

As the Supreme Court correctly noted, the crux of the contention between the parties was the legal status of the employer's common law right to terminate an employment relationship on notice.²¹ In their argument, the parties agreed that both the employer and the employee previously had a common law right to terminate an employment relationship on notice. The point of departure was that the appellants, while acknowledging that the employer's right once existed, argued that it had since been abolished or, at the very least,

18 Sec 12B(1) of the Labour Act states that '[e]very employee has the right not to be unfairly dismissed'. Subsection (3) sets out the instances whereby an employee is said to have been unfairly dismissed. An employee is deemed to have been unfairly dismissed if 'the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee'; or 'if, on termination of an employment contract of fixed duration, the employee (i) had a legitimate expectation of being re-engaged; and (ii) another person was engaged instead of the employee'.

19 Sec 12(4) of the Labour Act provides as follows: 'Except where a longer period of notice has been provided for under a contract of employment or in any relevant enactment, and subject to subsections (5), (6) and (7), notice of termination of the contract of employment to be given by either party shall be (a) three months in the case of a contract without limit of time or a contract for a period of two years or more; (b) two months in the case of a contract for a period of one year or more but less than two years; (c) one month in the case of a contract for a period of six months or more but less than one year; (d) two weeks in the case of a contract for a period of three months or more but less than six months; (e) one day in the case of a contract for a period of less than three months or in the case of casual work or seasonal work.'

20 *Nyamande* case para 4.

21 *Nyamande* case para 6. I may add that it is my view that counsel for the appellants should have raised constitutional arguments in their papers, and not simply contended that the legal status of the common law right was abolished by the Labour Act.

that the right was now regulated by the Labour Act,²² which requires an employer to show good cause before dismissing an employee.²³

2.2 Decision of the Supreme Court

The Supreme Court upheld the decision of the Labour Court and held that the employer was within his contractual rights to terminate the employment contract on notice. It further held that nothing in the Labour Act abolished nor regulated the common law right of the employer²⁴ to terminate the contract upon giving notice to the employee. This, however, should not be the basis for precluding an employee who has been dismissed without good cause to challenge the lawfulness of his or her dismissal. In South Africa, for example, the notice of termination of employment does not affect the right of a dismissed employee to challenge the lawfulness or fairness of the dismissal in terms of the labour laws or any other law.²⁵

2.3 Reasoning of the Supreme Court

After applying the golden rule of statutory interpretation, the Supreme Court held that it could not find any words in section 12B of the Act that either expressly or by necessary implication abolished the employer's common law right to terminate an employment relationship by way of notice. It also reasoned that it was a well-established principle of statutory interpretation that a statute cannot effect an alteration of the common law without explicitly saying so. Furthermore, the Supreme Court relied on the *dictum* of Lord Halsbury in *Bank of England v Vagliano Brothers*²⁶ that there is a presumption, in the interpretation of statutes, that parliament does not intend a change in the common law and, if it does, it has to express its intention with irresistible clarity.²⁷ The Court went further to state that if by necessary implication such alteration in the common law was intended to be effected, the language of the statute in question must be irresistibly clear. Construing the statute by adding words which are not found in the legislation or words of the statute itself is to sin against one of the most familiar rules of construction.²⁸

Section 12B of the Labour Act deals with dismissals and the procedures to be followed in cases where an employment relationship is to be terminated by way of dismissal following misconduct

22 Again, counsel for the appellants in my view should have had an alternative argument that, in the event that the Labour Act does not regulate that right, then certainly the Constitution does. Perhaps this would have brought the attention of the Court to the constitutional provisions.

23 Sec 12B of the Labour Act.

24 The Supreme Court made the mistake of viewing the case as one involving a normal contract between parties.

25 Basic Conditions of Employment Act 11 of 2002.

26 (1891) AC 107 120.

27 *Bank of England* (n 26 above).

28 As above.

proceedings, while section 12(4) deals with the termination of a contract of employment on notice, and lays down the limitations as to the periods of notice. The Court reasoned that, on a proper reading, section 12B of the Labour Act deals with a method of termination of employment known as 'dismissal'. While dismissal is one method of terminating employment, it is not the only method of terminating an employment relationship. It is only one of several methods of terminating employment.²⁹

Therefore, section 12B, according to the Supreme Court, does not deal with the general concept of termination of employment. It concerns itself only with the termination of employment by way of dismissal. The Court further stated that section 12(4) of the Act was the only provision that deals with the concept of termination of employment on notice in terms of a contract of employment. Section 12(4) of the Labour Act provides:

Except where a longer period of notice has been provided for under a contract of employment or in any relevant enactment ... notice of termination of the contract of employment to be given by either party shall be -

- (a) three months in the case of a contract without limit of time or a contract for a period of two years or more;
- (b) two months in the case of a contract for a period of one year or more but less than two years;
- (c) one month in the case of a contract for a period of six months or more but less than one year ...

Based on the above section, the Court concluded that 'the wording of section 12(4) is so clear that it leaves very little room, if any, for misinterpretation'.³⁰ It further held that section 12(4) 'governs the time periods that apply when employment is being terminated on notice' and that 'the notice periods do not apply when an employee is dismissed. In instances of dismissal no notice is required'.³¹

3 A critique of the Supreme Court's decision

As stated above, the Supreme Court held that after applying the golden rule of statutory interpretation, it could not find any word or words in section 12B of the Labour Act that either expressly or by necessary implication abolished the employer's common law right to terminate an employment relationship by way of notice. It also reasoned that it was a well-established principle of statutory interpretation that a statute cannot effect an alteration of the common law without explicitly saying so. The major problem with

29 *Nyamande* case (n 4 above).

30 *Nyamande* case (n 4 above) para 17.

31 As above.

this reasoning is that it fails to take into account the Constitution of Zimbabwe, which expressly states that the Constitution is 'the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency'.³² Indeed, the Supreme Court should have gone beyond the arguments advanced by the parties to consider the applicability of the Constitution to the dispute.³³ It is submitted that if the Supreme Court wanted, as it stated, an expressly-stated alteration of the common law, then a simple glimpse at the founding provisions of the Constitution³⁴ would have provided it with such. If this did not satisfy the Court, perhaps another glimpse at the Constitution, particularly Chapter 4, which regulates the interpretation of the Constitution, would have provided it with such. In that sense, the Supreme Court should, at the very least, have considered to develop the common law as it is required to do so by the Constitution. Section 46 provides:³⁵

- (1) When interpreting this Chapter, a court, tribunal, forum or body -
 - (a) must give *full effect to the rights and freedoms* enshrined in this Chapter;
 - (b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;
 - (c) must take into account *international law* and all treaties and conventions to which Zimbabwe is a party;
 - (d) must have due regard to all the provisions of this Constitution, in particular the *principles and objectives* set out in Chapter 2; and
 - (e) *may consider relevant foreign law*; in addition to considering *all other relevant factors* that are to be taken into account in the interpretation of a Constitution.
- (2) When interpreting an enactment, and when developing the common law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.

However, the Supreme Court did not see it fit to take these sections into account. With respect, this approach was extremely conservative and formalistic in its outlook, and this is reflected in its decision. If this was not the case, then, at the very least, the Supreme Court ought to have interrogated section 12, and this would have led it to the inevitable conclusion that it is inconsistent with the Constitution, particularly section 65(1), which provides that '[e]very person has the right to fair and safe labour practices'.³⁶ From a constitutional law perspective, this is where doctrines of cure come in, for instance,

32 Sec 2 Constitution of Zimbabwe (n 6 above).

33 M Sayi 'Constitutional validity in *Zuva* case judgment' <http://www.chronicle.co.zw/constitutional-validity-in-zuva-case-judgment/> (accessed 23 July 2015).

34 Sec 3 Constitution of Zimbabwe.

35 My emphasis.

36 Sec 65(1), among other things, provides for the right to fair and safe labour practices.

reading in or severance, whichever would have been appropriate. The challenge seems to be the fact that the judges of the Supreme Court failed to come to terms with the transformative ethos of the new constitutional dispensation.

Added to this, the Supreme Court's reasoning and the use of Lord Halsbury's *dictum* in the *Bank of England* case³⁷ of the presumption against reading anything into a statute unless it is irresistibly clear, creates a number of problems in this particular case if it is to be accepted.

The problem with this reasoning is that if one is to accept it, then it renders the Labour Act useless in many instances, because what this means is that an employment contract is just an ordinary contract which should be governed by the common law rules of contract. The dictates of fairness, justice and equity would not apply as they are not explicitly mentioned in the Labour Act. Yet, one of the reasons why the Labour Act was enacted was to balance the relationship between employer and employee so that the relationship can be guided on the principles of fairness.³⁸

It is significant to note that the Labour Act is premised on the basis that the employer and employee relationship is inherently unequal and that the employee must in certain instances be protected against the enormous amount of power that employers usually possess.³⁹ As the Act provides in its Preamble, its purpose is 'to declare and define the fundamental rights of employees; to give effect to international obligations of the Republic of Zimbabwe as a member of the ILO ...'⁴⁰

One of these fundamental rights that employees have is not to be unfairly dismissed. Simply giving notice to an employee without any further checks and balances to protect the employee is grossly unfair, unjustifiable and, most importantly, unconstitutional. It is submitted that there must, at the very least, be some checks and balances to ensure that when the employer decides to terminate the relationship, it is done in a fair and just manner. Leaving employees at the mercy of employers may lead to serious injustices and may have dire consequences, some of which the Supreme Court may not have intended or even foreseen. As Magaisa notes,⁴¹ it can never be a fair labour practice to dismiss an employee at will. This is especially so under the new constitutional dispensation. There must be some procedurally-accepted way of doing so, and reasons must be provided.⁴²

Another fundamental error that the Supreme Court made was to interpret the termination of employment contracts by way of notice as

37 *Bank of England* (n 26 above).

38 Sec 2A Labour Act.

39 Magaisa (n 5 above).

40 Preamble Labour Act.

41 Magaisa (n 5 above).

42 As above.

being different from dismissals. As indicated above,⁴³ the Court stated that section 12(4) deals with the termination of a contract of employment on notice and sets out the limitations as to the periods of notice. It stated that a proper reading of section 12B of the Labour Act would reveal that it only deals with a method of termination of employment known as 'dismissal'. While dismissal is one method of terminating employment, it is not the only method of terminating an employment relationship. It is only one of several methods of terminating employment. The South African jurisprudence could in this instance have been of some guidance to the Supreme Court, particularly the Labour Relations Act, which provides that dismissal is applicable when an employer terminates a contract of employment with or without notice.⁴⁴ The Supreme Court here implies that the termination of employment by way of giving notice is not a dismissal but simply a termination of a contract or an agreement. The imperfections of this reasoning cannot be overemphasised. The termination of an employment contract by way of notice is a dismissal, and when an employer uses this form of contract termination, that also constitutes dismissal.⁴⁵ The Court seemed to suggest that giving notice to an employee that the contract will be terminated as per the contract is not dismissal and, therefore, will not fall under section 12(4) governing dismissals. This reasoning clearly is inaccurate, improper and misleading.

If this reasoning is to be accepted, section 12B, which regulates dismissals, may also have some problematic provisions. Section 12B lists situations which may be deemed to be unfair dismissals. One of those situations is 'if the *employee* terminated the contract of employment *with or without notice*⁴⁶ because the employer deliberately made continued employment intolerable for the employee'.⁴⁷ Clearly, therefore, if it is possible for an employee to terminate employment with notice and it may still be deemed to be unfair dismissal, then giving notice to terminate a contract indeed constitutes dismissal. Consequently, this would mean that section 12B applies to the termination of employment by way of notice and, thus, the common law position is indeed regulated by the Labour Act. It can no longer be enough simply to give notice in all circumstances. This section clearly shows that there may be instances where notice is indeed given and still this constitutes unfair dismissal.

The Labour Act also gives guidelines on retrenchment in section 12C. The section sets out the manner in which this should be done. However, the Supreme Court's decision also renders this section useless as surely no employer would opt to go through this long,

43 Sec 12B Labour Act.

44 Labour Relations Act 66 of 1995.

45 Magaisa (n 5 above).

46 My emphasis.

47 Sec 12B Labour Act.

expensive and exhaustive process if they can simply give notice. As Magaisa correctly argues, if the legislature did not intend these rules to be used, why, then, would they have gone to so much trouble of setting out rules against unfair dismissals and retrenchment procedures?⁴⁸ It is submitted that a correct reading and interpretation of these provisions in the Labour Act would have led the Supreme Court to conclude, at the very least, that the Labour Act regulates employer and employee relationships in instances where the parties decide to terminate the relationship by notice. Even if this is not done in the most explicit way, as the Supreme Court wanted, this alone should have been enough to look at the Labour Act in its entirety, its purposes as well as the spirit in which it was drafted. This would also have meant that issues of fairness, reasonableness and justice would come into play.

The Supreme Court's reasoning and ruling may lead to many unintended consequences, even if one were to excuse the reasoning of the Court based on the Labour Act, or assume that the Labour Act indeed does not regulate the termination of employment contracts, as was done by the Supreme Court. Can one come to the same conclusion if the constitutional dimension is brought into play? In my view, this would be a difficult argument. Below I outline some of the constitutional and human rights issues that the Supreme Court ignored completely. The aim here is to specifically highlight some sections which the Court could have considered before reaching its decision.

4 The Constitution

4.1 Supremacy of the Constitution

Section 1, arguably the most important provision of the Constitution of Zimbabwe, provides that it is 'the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency'. As stated above, the Supreme Court should have had due regard of the Constitution and its provisions. Section 2 further provides that 'the obligations imposed by the Constitution are binding on every person, natural or juristic, including the state and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them'. The Court's obligation to fulfil the Constitution is mandatory and, as the wording expressly provides, it must be done at every level. Surprisingly, the Supreme Court failed to fully appreciate the serious nature of this judgment and the potential implications it may have on the lives of ordinary citizens. The fact of the matter is that the judgment not only affects contracts of employment, but it also has serious implications for the livelihood of workers. As Magaisa put it,

48 Magaisa (n 5 above).

this concerns 'human lives and common standards of fairness, decency and social justice'.⁴⁹

4.2 Founding values and principles

In its founding values and principles, the Constitution notes that the nation is founded on respect for, amongst other things, fundamental human rights and freedoms; recognition of the inherent dignity and worth of each human being as well as the recognition of the equality of all human beings.⁵⁰ It is submitted that an employee who is constantly at the mercy of his or her employer may never fully appraise himself or herself with any of these rights contained in the founding provisions. This, however, does not mean that all employers are 'evil' and will violate employees' rights. Rather, the mere fact that there is that potential should never go unchallenged in any constitutional democracy. If the Zimbabwean Constitution is to survive any scrutiny it may face, judgments such as these should never see the light of day.

4.3 Work and labour relations

Section 24 of the Constitution speaks directly to the matter of worker and labour relations. It provides:⁵¹

The state and all institutions and agencies of government at every level must adopt *reasonable policies and measures*, within the limits of the resources available to them, to provide everyone with an opportunity to work in a freely chosen activity, in order to secure a decent living for themselves and their families.

This section clearly advocates some level of fairness by providing that reasonable policies must be put in place in order to give everyone an opportunity to work freely in order to secure a decent living. Surely the Supreme Court could have used this section to determine if it was reasonable to merely cancel an employment contract on notice and not to have any reasonable procedures to guard against abuse.⁵²

Section 65, which deals with labour rights, also provides that each person has the right to fair and safe labour practices and standards. The section lists a number of rights that employees have and, as mentioned earlier, it is now difficult to envisage how employees will fully realise some of these rights. How does one fully enjoy the right to engage in collective bargaining,⁵³ for example, if the only thing an employer has to do in order to dismiss an employee is to give three months' notice? The same applies to many other rights, such as the

49 As above.

50 Sec 3 Constitution of Zimbabwe.

51 My emphasis.

52 Magaisa (n 5 above) correctly notes that an employer must act reasonably when deciding to terminate a contract on notice as the failure to do so might be an unconstitutional exercise.

53 Sec 65(5)(a) Constitution of Zimbabwe.

right to form and join unions, and the right to organise.⁵⁴ All the employer has to do in order to remove any threat that an employee may pose to him or her is to give notice of intention to terminate the contract which, in turn, begs the question of why the legislature would have included all these rights in the Constitution if a simple notice may render them useless.

Further, section 44 of the Constitution imposes on everyone a duty to respect fundamental human rights and freedoms and explicitly provides for the binding nature of the Constitution.⁵⁵ The interpretation section quoted above also demands the need to interpret the law in a manner that is just, equitable and fair.

4.4 Principles guiding the judiciary

Section 165 provides that the judiciary in exercising judicial authority must be guided by the principles that justice must be done to all, irrespective of status, and that the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law. At the centre of this argument is the fact that the Supreme Court failed to safeguard the right to fair labour practices as contained in the Constitution. Section 44 of the Constitution provides for the duty to respect fundamental rights and freedoms of the state and every person, including juristic persons. Further, every institution of the state must respect, promote and fulfil the rights and freedoms set out in this chapter. Section 46(1) also provides that when interpreting this chapter, every court, tribunal and forum must give full effect to the rights and freedoms enshrined in the chapter. Therefore, the Supreme Court ought to have gone beyond the arguments raised by the parties and considered whether the Constitution found application in the dispute before it. Its failure to do so amounts to a failure to safeguard the rights and freedoms contained the Constitution, particularly the right to fair labour practices. The judgment has the potential of destabilising the workplace, which in turn leads to disintegration in the ability of the state to protect some of these human rights. Section 165(7) similarly provides that 'members of the judiciary must take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular must keep themselves abreast of developments in domestic and international law'. It is worth mentioning, however, that the Court did analyse precedents of no-fault dismissals in previous cases, such as *Chirasasa v Fidelity Life Assurance*,⁵⁶ and found that there was good cause to terminate on notice for no-fault basis.

54 Sec 65(2) Constitution of Zimbabwe.

55 Sec 44 Constitution of Zimbabwe.

56 *Luke Chirasasa & Others v Fidelity Life Assurance of Zimbabwe & Another* [2003] ZWSC 72.

5 Possible remedies to this defect

It must be acknowledged that Zimbabwean labour laws operated in favour of the employee rather than the employer. Legislation placed a number of obligations on employers. Workers had significant protection, so much so that employers complained that it was expensive to terminate workers' contracts.⁵⁷ If one also considers the economic crisis that the country faced, and continues to face, this needed to be addressed. Even in the event that the Supreme Court's decision is reversed, this issue will still have to be addressed. The significant protection employees enjoyed alone cannot be sufficient justification for the decision that was given. Two fundamental principles should always be borne in mind when considering cases of this nature. First, the principle of separation of powers, now embodied in the Constitution of Zimbabwe,⁵⁸ clearly articulates that it is not the duty of courts to make legislation. This duty is left to the legislature. What the Supreme Court did was to effectively change the law which had been in existence for a number of years.⁵⁹ If indeed the courts felt that the labour laws were too stringent and operated harshly against employers, there was little they could do about it in terms of the Constitution. Therefore, if this was an attempt to tilt the law in favour of employers, it was an unconstitutional exercise which should be considered invalid. Second, if the Constitution is to be given the respect and value that it is worth, it should indeed be the supreme law of the country. No amount of economic hardship faced by those operating within its parameters should justify any deviation from it. The argument that the Supreme Court was correct in its decision because of the economic and social challenges that employers faced when wanting to downsize or dismiss employees, and the argument raised by some that, because of economic challenges as well as competition from imports, it was necessary to allow employers to shed off labour and avoid liquidation,⁶⁰ are flawed.

Whatever the reasons for the decision of the Supreme Court were, one can only hope that the above argument or reasoning has no basis whatsoever. However, that still does not solve the problem most employees currently face as a result of this judgment. There are other avenues which I believe may be pursued in order to assist employees.

57 See M Ruziwa 'Unpacking Supreme Court ruling on job termination' *The Herald* online 22 July 2015 <http://www.herald.co.zw/unpacking-supreme-court-ruling-on-job-termination/> (accessed 25 July 2015).

58 Although not expressly, the Constitution of Zimbabwe recognised the principle of separation of powers by splitting the roles of government into three arms.

59 I argue that the Supreme Court changed the law that was in existence for years mainly because the Act sets out the procedures to be followed in the event of retrenchment. The decision of the Supreme Court would, however, mean that this would be futile because all that an employer would have to do is to give notice and the termination would be lawful.

60 Ruziwa (n 57 above).

First, the matter has been appealed to the Constitutional Court and one can only hope that the Constitutional Court will provide more greater and engage with the facts in more detail. Hopefully, the Constitutional Court will deal with the more fundamental issues of dignity and human rights at a deeper level. Since the matter has been taken on appeal, it brings some temporary relief to employees as this effectively means that the Supreme Court judgment is suspended.⁶¹ It is not clear, however, whether employers understand this legal position, as dismissals are reportedly still carried out.⁶²

However, section 11 of the Constitution provides that '[t]he state must take all practical measures to protect the fundamental rights and freedoms enshrined in Chapter 4 and to promote their full realisation and fulfilment'. It is submitted that the legislature can and should move swiftly to ensure that employees are protected by passing clear and unambiguous legislation that will bring finality to this matter.

A long-lasting solution is necessary to balance all the issues involved. There certainly is a need to foster a human rights-respecting culture in the workforce. The current situation in which employees find themselves fundamentally affects their dignity. The ability to earn a living is closely linked to the right to dignity. No employee should be at the mercy of an employer. As argued above, there must be some form of checks and balances. These may be negotiated or considered at various levels. Certain considerations have to be put in place, including, but not limited to, the reasonableness of the employer's decision to dismiss the employee; the length of time the employee has worked for the particular employer; and the fairness of the procedure.⁶³

6 Conclusion

It is acknowledged that judges follow rules and precedents to ensure certainty and continuity. Indeed, the law should not be easily tilted merely because one feels that the result of applying set precedents will be unfair. In the same manner, it must also be acknowledged that Zimbabwe now operates under a constitutional dispensation. The common law foundations and provisions that are simply based on the notion of continuing on, for the sake of maintaining order, stability and precedent, need to be removed from our law, as the Constitution

61 C Mahove 'ConCourt challenge suspends Supreme Court ruling' *Newsday* online 25 July 2015 <https://www.newsday.co.zw/2015/07/25/concourt-challenge-suspends-supreme-court-ruling/> (accessed 26 July 2015). Mahove correctly notes that an appeal to a higher court has the effect of suspending the decision appealed against.

62 It is beyond the scope of this article to discuss the legal understanding of the employers in this regard.

63 Magaisa (n 5 above).

so demands.⁶⁴ As Roederer, in the South African context, noted:⁶⁵

The result [of developing the common law in accordance with the Constitution] is not to undermine the foundations of law [or] to unsettle every rule, and to leave every existing right or entitlement in jeopardy. No doubt those which cannot be supported by the values of the new constitutional dispensation are in jeopardy of being condemned. They will need to be replaced with rules which are supported by those values. Those rules which can be, or are, supported by those values will find a foundation as secure as any set of rules can be ... They will find a foundation built on comprehensive sets of human rights drawn from the best international and comprehensive practices.

Simply put, the common law rules, which are not supported by the new constitutional dispensation, no longer have a place in our law. If there is any hope for Zimbabwe to defeat the biggest challenge to transformative constitutionalism, the legal culture and philosophy also have to change. The legal system (including judges, lawyers, academics, and so on) also has to come to terms with the transformative ethos of the new constitutional dispensation.

It is important to note that the matter was taken on appeal to the Constitutional Court and the appeal was dismissed on the grounds that the appellants had failed to establish that the appeal was urgent. Nothing in the Constitutional Court's judgment supports the notion that there was no legal basis for the challenge. Rather, the case was dismissed on the basis that it lacked urgency. Coupled with this, the legislator amended the Labour Act by introducing the Labour Amendment Act 7 of 2015,⁶⁶ which was promulgated in August 2015. The amendment was aimed at protecting employees from arbitrary dismissals which resulted from the *Nyamande* case. Section 12(4)(a) of the Act was amended to describe the circumstances under which a contract of employment may be terminated. It provides that a contract of employment may only be terminated in accordance with a prior agreement between the employer and employee, an employment code or through retrenchment as described in the Act. The amendment also responds to employers' arguments about the retrenchment provisions under the Act being too costly, by allowing the Retrenchment Board to make exemptions for an employer in the case of financial incapacity.⁶⁷

It would seem, therefore, that even if the case reaches the Constitutional Court on the normal roll, the result will be purely

64 CJ Roederer 'Post-matrix legal reasoning: Horizontality and the rule of values in the South African law' (2003) 19 *South African Journal on Human Rights* 57.

65 Roederer (n 64 above).

66 Labour Amendment Act 7 of 2015.

67 F Madzingira 'Employee rights in Zimbabwe: The contrasting approaches of the Constitutional Court and executive in response to *Nyamande and Another v Zuva Petroleum*' OxHRH Blog, 19 September 2015) <http://ohrh.law.ox.ac.uk/employee-rights-in-zimbabwe-the-contrasting-approaches-of-the-constitutional-court-and-executive-in-response-to-nyamande-and-another-v-zuva-petroleum> (accessed 23 May 2015.)

academic. One could indeed argue that it was in line with the principle of separation of powers to leave this matter to the legislature to make the necessary amendments to the Labour Act. It is submitted that this should not be the case, particularly in a constitutional democracy. At the very least, the Court ought to have declared the relative sections of the legislation invalid to the extent of its unconstitutionality, and then directed the legislator to rectify the defect by passing the necessary amendments to the legislation to the extent necessary.⁶⁸

68 An example of such an order can be found in South African jurisprudence which declared certain provisions of the Marriage Act invalid to the extent that it did not recognise same-sex marriages in *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC).

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Cristiano d'Orsi

Post-Doctoral Fellow

Isabeau de Meyer

Publication Manager: *African Human Rights Law Journal*;
Administrator: LLM/MPhil (Human Rights and Democratisation in Africa)

Alex Ekeke

Doctoral candidate

Charles Fombad

Professor of Law and Head of Constitutional Law Unit at the Institute for International and Comparative Law in Africa (ICLA)

Hanifa Mufaro Gutu

Project Assistant: Freedom of Expression and Access to Information

Michelo Hansungule

Professor of Human Rights Law; Academic Co-ordinator: LLM/MPhil (Multidisciplinary Human Rights)

Lizette Hermann

Manager: Pretoria University Law Press (PULP)

Christof Heyns

Professor of Human Rights Law; Director: Institute for International and Comparative Law in Africa (ICLA); United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

Thuto Moratuo Hlalele

Project Co-ordinator: Disability Rights Unit; Special Projects Co-ordinator: LLM/MPhil (Sexual and Reproductive Rights in Africa)

Nora Ho Tu Nam

Tutor; Doctoral candidate

Adetokunbo Johnson

Researcher: Gender Unit; Doctoral candidate

Eduardo Kapapelo

Academic Associate; Project Co-ordinator: Nelson Mandela World Human Rights Moot Court Competition

Magnus Killander

Associate Professor and Head of Research

Emily Laubscher

Assistant Financial Manager

Josua Loots

Researcher; Programme Manager: Business and Human Rights Unit

Eric Lwanga

Programme Co-ordinator: LLM/MPhil (Human Rights and Democratisation in Africa)

Tokollo Makgalemele

Research Assistant

Sydney Mdhlophe

Assistant: Pretoria University Law Press (PULP)

Harold Meintjes

Financial Manager

Innocentia Mgijima

Project Co-ordinator: Disability Rights Law Schools Project

Alina Miamingi

Co-ordinator: Children's Rights Project

Oteng Mogoeng

Research Assistant

Charles Ngwena

Professor of Sexual and Reproductive Health Rights; Disability Rights

Jehoshaphat Njau

Project Co-ordinator: Disability Rights Scholarship Programme

Bright Nkrumah

Research assistant

Michael Nyarko

Tutor; Doctoral candidate; Editor: AfricLaw.com

Damian Oakes

Co-ordinator: African Coalition for Corporate Accountability Project (ACCA)

Geoffrey Ogwaro

Project Manager: LGBTI Rights; Doctoral candidate

Adebayo Okeowo

Advocacy and *Alumni* Co-ordinator; Doctoral candidate

Chairman Okoloise

Tutor; Doctoral candidate

Juan Pablo Perez Leon Acevedo

Post-Doctoral Fellow

Sarita Pienaar-Erasmus

Assistant Financial Manager

Thandeka Rasetsoke

Administrative Assistant: International Development Law Unit

Ahmed Sayaad

Project Co-ordinator: African Human Rights Moot Court Competition

Ololade Shyllon

Project Manager: Freedom of Expression and Access to Information; Doctoral candidate

Olufemi Soyaju

Programme Co-ordinator: LLM (International Trade and Investment Law in Africa)

Norman Taku

Assistant Director

Carole Viljoen

Operations Manager

Frans Viljoen

Director

Extraordinary/Honorary professors

Jean Allain

Professor of Public International Law, Queen's University of Belfast, Northern Ireland

Cecile Aptel

Office of the High Commissioner for Human Rights, Geneva, Switzerland

Jakkie Cilliers

Director, Institute for Security Studies

Mustaqeem de Gama

Acting Director of International Trade and Economic Development, Department of Trade and Industry

Fernand de Varennes

Université de Moncton, Canada

John Dugard

Member, International Law Commission

Johann Kriegler

Retired Justice of the Constitutional Court of South Africa

Dan Kuwali

Lawyer in private practice, Malawi

Edward Kwakwa

Legal Counsel, World Intellectual Property Organisation, Geneva, Switzerland

Cephas Lumina

Independent Expert of the United Nations Human Rights Council

Richard Maiman

University of Southern Maine, USA

Thandabantu Nhlapo

University of Cape Town

David Padilla

Formerly Assistant Executive Secretary, Inter-American Commission on Human Rights

Mary Robinson

President, Mary Robinson Foundation – Climate Justice, Northern Ireland

Michael Stein

Harvard Law School, United States of America

Johann van der Westhuizen

Retired Justice of the Constitutional Court of South Africa

Extraordinary lecturers

Adem Abebe

Senior Research Fellow, Max Planck Institute, Germany

Oagile Dingake

Justice of the Botswana High Court

Solomon Ebobrah

Professor of Law, Niger Delta University, Nigeria

Nicole Fritz

Executive Director, Southern Africa Litigation Centre

Elizabeth Griffin

Consultant

Dr Enga Kameni

Manager, Legal Services, African Export-Import Bank, Egypt

Sarah Knuckey

Director, Project on Extrajudicial Executions, New York University School of Law, USA

Dr Zonke Majodina

Previously of the South African Human Rights Committee and the UN Human Rights Committee

Asha Ramgobin

Executive Director, Human Rights Development Initiative

Jure Vidmar

St John's College, University of Oxford, United Kingdom

Advisory board

André Boraine

Dean, Faculty of Law, University of Pretoria

Edouard Jacot Guillarmod

Consultant

Johann Kriegler

Retired Justice of the Constitutional Court of South Africa

Bess Nkabinde

Justice of the Constitutional Court of South Africa

David Padilla

Formerly Assistant Executive Secretary, Inter-American Commission on Human Rights

Sylvia Tamale

Makerere University, Kampala, Uganda

Johann van der Westhuizen

Retired Justice of the Constitutional Court of South Africa

Academic Programmes

- LLM/MPhil (Human Rights & Democratisation in Africa)
- LLM (International Trade & Investment Law in Africa)
- LLM/MPhil (Multidisciplinary Human Rights)
- LLM/MPhil (Sexual & Reproductive Rights in Africa)
- LLM (Dissertation) Human Rights
- Doctoral Programme (LLD)
- Programmes at the Faculty of Law
- Gill Jacot Guillarmod Scholarship
- Disability Rights Scholarship Programme
- Alumni Association: LLM (HRDA)

Projects

- Advanced Human Rights Courses (AHRC)
- African Moot Court
- Nelson Mandela World Human Rights Moot Court
- African Disability Rights Moot Court
- Extractive Industries (African Commission Working Group)
- Human Rights Clinics
- Human Rights Conferences
- Annual African Trade Moot

Research

- AIDS & Human Rights Research Unit
- Business and Human Rights Unit
- Disability Rights Unit
- Ending Mass Atrocities in Africa Conference
- FRAME
- Freedom of Expression & Access to Information
- Gender Unit
- Impact of the Charter/Protocol
- Implementation and Compliance Project
- International Development Unit (IDLU)
- International Law in Domestic Courts (ILDC)
- Unlawful Killings Unit
- Children's Rights Unit
- African Coalition for Corporate Accountability (ACCA)

Regular publications

- *AfricLaw.com*
- *African Human Rights Law Journal*
- *African Human Rights Law Reports (English and French)*
- *African Disability Rights Yearbook*

CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 December 2015

Compiled by: I de Meyer

Source: <http://www.au.int> (accessed 31 May 2016)

	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	10/06/14	30/09/05	28/06/12
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97	09/12/14	13/09/12	24/08/11
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70				
Chad	09/10/86	12/08/81	30/03/00	27/01/16		11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	
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		03/07/15	17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
South Sudan						13/04/15
Sudan	18/02/86	24/12/72	30/07/05			19/06/13
Swaziland	15/09/95	16/01/89	05/10/12		05/10/12	
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06*	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	21/10/05	24/01/12
Tunisia	16/03/83	17/11/89		21/08/07		
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
TOTAL NUMBER OF STATES	54	45	47	30	37	24

* Additional declaration under article 34(6)
Ratifications after 31 July 2015 are indicated in bold