



# AFRICAN HUMAN RIGHTS LAW JOURNAL

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## Editorial

This issue of the *African Human Rights Journal* appears at the end of year two of the Human and Peoples' Rights Decade in Africa (2017-2026) of the African Union (AU), which the AU declared in 2016. You would be forgiven for not having noticed. Africa's people could be forgiven if they question the extent to which African states and the African Commission on Human and Peoples' Rights (African Commission) have over this period acted as the protectors of their human rights.

As far as human rights are concerned, the rhetoric of AU member states has little to do with reality. When it declared the Human Rights Decade in June 2016, the AU Assembly pledged its 'unflinching determination to promote and protect human and peoples' rights in Africa and the need for the full implementation of human and peoples' rights instruments and decisions and recommendations made by the AU organs with a human rights mandate'.<sup>1</sup> More than that, the Assembly also called on the AU Commission 'to ensure the independence and integrity of AU organs with human rights mandate by shielding them from undue external influence'.<sup>2</sup> Regrettably, it turned out that it was not the threat of 'undue *external* influence' by donors and non-governmental organisations (NGOs) from outside Africa, but undue influence by the AU policy organs themselves (culminating in Decision 1015 by the AU Executive Council in June 2018) that undermined the independence and integrity of the African Commission.

Decision 1015 was adopted following a 'retreat' between the African Commission and the AU Permanent Representatives' Committee (PRC), at which a stand-off between the AU policy organs and the African Commission was the main agenda point. This deadlock arose because the Commission refused to cave in to mounting political pressure to withdraw the observer status it had granted to the non-governmental organisation (NGO) Coalition of African Lesbians (CAL) in 2015. In January 2018 the AU Executive Council reiterated its earlier directive to the Commission to withdraw

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1 Assembly/AU/Decl.1(XXVII)Rev 1 para 4.

2 Decision on the report on the joint retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR), EX.CL/Dec.1015(XXXIII).



CAL's observer status, and called for a joint retreat of the African Commission and the PRC to be convened to resolve the tension.

Far from 'resolving' the issue, Decision 1015 aimed to pull the carpet from under the African Charter on Human and Peoples' Rights (African Charter) system by not only providing a deadline for the withdrawal of CAL's observer status, but by further questioning key aspects of the Commission's functioning. Following the adoption by the Executive Council of Decision 1015, the Commission complied, and withdrew CAL's observer status. In the process the African Commission acted in ways that confuse. In its May 2018 decision, reported in the 44th Activity Report,<sup>3</sup> the Commission emphasised that it would deal with the request for withdrawal of observer status in a judicial manner, guided by due process, legality and the African Charter. Regrettably, its eventual response to Decision 1015 contradicts this promised approach, in that it based its withdrawal of accreditation on the Executive Council's decisions as such. This implies that it was political pressure, rather than legal persuasion, that informed the Commission's decision.

This outcome seriously undermines claims the African Commission can make to being independent and autonomous. The reason why African states in 1981 created the African Charter was to establish a system of *independent* oversight over the human rights enjoyed by the people of Africa. The African Commission as autonomous interpreter of the African Charter was placed at the core of this system. The principle of the rule of law – both at national and at AU level – requires that executives respect judiciaries' interpretative function. By insisting that its own interpretation of the Charter overrides that of the Commission, the Executive Council not only has undermined the Commission's autonomy, but also subverted the AU's internal rule of law.

There are many other aspects of Decision 1015 that give cause for concern. One such element is the 'request' to the African Commission to revise its criteria for NGO observer status in line with the guidelines for accreditation to the AU, 'taking into account African values and traditions'.<sup>4</sup> The criteria for AU observer status require that at least *two-thirds of the resources* of an NGO have to come from 'contributions from its members'.<sup>5</sup> As very few of the NGOs currently enjoying observer status with the African Commission would comply with this requirement, this 'request' seems to be aimed at diminishing the role of civil society in complementing the work of both states and

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3 In its 44th Activity Report, the African Commission notes its May 2018 decision that it 'has to abide by and apply due process in order to ensure legality, compliance with the African Charter and its juridical mandate. Accordingly, the Commission will forthwith institute a process for judicially determining the request to withdraw NGO observer status from CAL. The Commission will report its final determination on this matter in its next Activity Report' (para 43).

4 Para 8(iv) of Decision 1015.

5 Para 1(l)(7) of the Guidelines for Observer Status with the AU.

the African Commission. The invocation of the nebulous and contested concept of 'African values', as if it has one agreed-upon predetermined meaning, is also disconcerting, and seems to lie in wait to be used as subterfuge whenever political expediencies so dictate.

We add our voice to calls imploring our political leaders to respect the independence of the African Commission and other AU human rights mechanisms.

In this issue a wide variety of issues and institutions of relevance to Africa are covered.

Two contributions concern international courts in Africa. Against the background of the AU's stance on immunity, as reflected in article 46*Abis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Ani examines the implications of the AU's embrace of immunity for heads of state and government and senior government officials. Ani specifically interrogates the implications for the prosecution of leader figures if an AU-led hybrid court without any immunity provisions is to be established in South Sudan. In his analysis he further draws lessons from the case involving the former President of Chad, Hissène Habré. In examining the domestic impact of the decisions of the East African Court of Justice, Lando goes beyond mere compliance by the member states with the orders of Court, by analysing the influence of these decisions on the development, interpretation or application of law and policy, and the practices of state and non-state actors.

McQuoid-Mason's contribution is related to these two articles in its quest for access to justice. However, in his article McQuoid-Mason addresses the domestic arena, specifically countries where there is a dearth of lawyers. In order to ensure access to justice in such settings, he argues, legal aid legislation should be drafted to allow non-lawyers to assist persons in conflict with the law.

The next two contributions deal with two important children's rights issues. O'Hare, Bengo, Devajumar and Bengo (a team of authors comprising the disciplines of pediatrics, bioethics, public health and law) draw on the literature on the 'leakage' of revenue from low and middle-income countries to identify factors that may enhance children's survival. Mwambene traces positive developments in respect of the prohibition and eradication of child marriage in three Southern African countries (Zimbabwe, South Africa and Malawi). The progress made to a significant extent can be ascribed to a combination of political and legal initiatives. The African Union Campaign to End Child Marriage, launched in 2014, has been very influential within the political domain. Legal initiatives include the Southern African Development Community (SADC) Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage, adopted by the SADC Parliamentary Forum in 2014; and the Joint General Comment of the African Commission on Human and

Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child on Ending Child Marriage, adopted in 2017.

Four country-specific articles (three dealing with Nigeria, one with South Africa) touch on and contribute to contemporary debates on the continent. Badejogbin reviews Nigeria's death penalty jurisprudence with reference to a specific case (the 1998 Nigerian Supreme Court decision in *Onuoha Kalu v The State*). Akogwu relies on Isaiah Berlin's conception of liberty to argue for less state interference with the rights of sexual minorities in Nigeria. Adelakun analyses the law related to surrogacy in Nigeria, concluding that there is a gap regarding surrogacy in the laws of Nigeria, which may occasion abuse. Djoyou Kamga derives conclusions from the reliance by South African courts on the concept of ubuntu, thereby drawing the outlines of a South African ubuntu jurisprudence.

As on previous occasions, part of this issue of the *Journal* is devoted to a 'Special focus', in this instance themed 'Dignity takings and dignity restorations'. The focus is inspired by the 2014 book by Professor Bernadette Atuahene, *We want what's ours: Learning from South Africa's land restitution program*. Penelope Andrews provides an editorial to the 'Special focus' section. The 'Special focus' contains three articles, each focusing on an aspect of 'dignity restoration'.

In the *Journal's* 'Recent developments' section Killander and Nyarko sketch human rights developments in the African Union between January 2017 and September 2018. Their discussion includes a detailed contextual analysis of the 'backlash' resulting from the granting of observer status to CAL, referred to earlier. In an important conclusion to this discussion, the authors highlight that state parties to the African Charter should ensure that they 'fulfil the criteria for membership as set out in the founding treaties and other decisions of the AU' when nominating members to the African Commission and other AU human rights bodies. Windridge discusses the 2016 merits judgment by the African Court on Human and Peoples' Rights in *African Commission on Human and Peoples' Rights v Libya*. This case relates to the detention of Saif al-Islam Kadhafi (Kadhafi) the son of former Libyan leader Muammar Gaddafi. For the first time, the Court decided a case on its merits without the state having offered any arguments, making this the Court's first default merits decision.

Our sincere appreciation and thanks go to all who have been involved in making the *AHRLJ* the quality and well-regarded journal it has become since its establishment in 2001. For this particular issue, we extend our genuine gratitude to our anonymous reviewers who so generously gave of their time, expertise and insights: Romola Adeola; Horace Adjolohoun; Joseph Akech; Akinola Akintayo; Usang Assim; Gina Bekker; Ashwanee Budoo; Charles Fombad; Zita Hansungule; Larry Helfer; David Ikpo; Tinyade Kachika; Mariam Kamunyu; Kennedy Kariseb; Kristi Kenyon; Anton Kok; Anne Louw; Trésor Makunya; Thaddeus Metz; Godfrey Musila; Satang Nabaneh; Enyinna Nwauche; Michael Nyarko; Ciara O'Connell; Chairman Okoloise; Dejo Olowu;

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## Implications of the African Union's stance on immunity for leaders on conflict resolution in Africa: The case of South Sudan and lessons from the *Habré* case

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### Summary

After 2009 when the International Criminal Court issued an arrest warrant against President Omar Al Bashir of Sudan, the African Union began to promote an immunity principle for sitting leaders and senior government officials. The immunity principle was formalised in article 46Abis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. While the immunity principle raised an uproar among civil society groups, there has been limited scholarly engagement with its implications for conflict resolution and the need to deter would-be perpetrators of international crimes. Thus, the article examines the impact of the AU's immunity principle on conflict resolution efforts in Africa using South Sudan as a case study and drawing lessons from the case involving the former President of Chad, Hissène Habré. The article contends that even though an AU-led hybrid court without any immunity provisions is to be established in South Sudan, the AU's historical immunity stance will impede the hybrid court from trying the warring leaders who are the main actors responsible for the crimes in South Sudan. As such, the immunity principle provides opportunities for the warring leaders, who eventually will be leaders and senior government officials in line with the peace deal, to enjoy impunity for international crimes. If it is established the court most likely will focus on trying scapegoats of the warring factions in a tokenist effort at justice. The *Habré* case reveals that the trial of incumbent leaders is possible when incumbent leaders lose political power, but prosecution depends on additional variables such as a lack of international support. In the context

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*of the proclivity of some leaders on the continent to remain in power beyond their constitutional mandates, the AU's immunity stance further provides an incentive for the 'sit-tight-in office syndrome' to avoid future probes into international crimes. The article argues that the AU's strategic shift away from the immunity stance could prevent impunity and provide leaders with greater legitimacy.*

**Key words:** African Court; African Union; International Criminal Court; South Sudan; Hissène Habré; human rights; conflict resolution

## 1 Introduction

This article examines the positive stance of the African Union (AU) on immunity for leaders and senior government officials and its impact on conflict resolution and justice in Africa. The article uses South Sudan as a case study and explores lessons from the *Hissène Habré* case. It is premised on article 46*Abis* of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Amendment Protocol) that was adopted on 27 July 2014. The article stipulates that 'no charges shall be commenced or continued before the Court against any serving AU Head of State or Government or anybody acting or any entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office'.

The initial Protocol on the Statute of the African Court of Justice and Human Rights that was adopted in 2008<sup>1</sup> did not contain an immunity clause. The article observes that the immunity clause inserted into in the Amendment Protocol was developed in the context of the tense relationship between the AU and the International Criminal Court (ICC). The AU criticises the ICC for targeting Africans given that nine out of the 10 situations under investigation by the ICC are from Africa.<sup>2</sup> However, as discussed below, the central issue is the ICC's refusal to grant immunities to incumbent African heads of state and government and other senior officials.

The rift between the ICC and the AU – which initially was a supporter of the international court – originated when the ICC in 2009 issued an arrest warrant against a sitting head of state, President Omar Al Bashir of Sudan. Ironically, the AU has not raised objections against the cases involving the indictment of rebel leaders (four of the nine cases on Africa). These cases indeed were brought to the ICC at

1 The African Court of Justice and Human Rights was established to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union.

2 M Caldwell 'African Union criticises International Criminal Court at member states' meeting' All Africa 19 November 2015 <http://allafrica.com/stories/201511200495.html> (accessed 2 February 2016).

the behest of African governments, as in the case of the Democratic Republic of the Congo (DRC), Central African Republic (CAR), Uganda and Mali.<sup>3</sup>

Out of the five situations brought before the ICC by the United Nations (UN) Security Council (UNSC) and the ICC Chief Prosecutor, the AU mainly picked issue with the indictments against sitting leaders in Sudan and Kenya. Following the issuing of an arrest warrant against of Al Bashir of Sudan, the AU embarked on a fierce campaign for immunity for sitting leaders within the ICC framework. The AU contends that sitting heads of state and government should be immune from prosecution based on the need to uphold the sovereignty of states and to avoid jeopardising the legitimacy of governments and the stability of states.<sup>4</sup>

When the ICC initiated the cases against President Uhuru Kenyatta and Deputy-President William Samoei Ruto of Kenya, the condemnation of the ICC's apparent targeting of Africa grew louder. Without any formal investigation by the AU, it is clear that the regional body took it as a matter of principle to insist on immunity for incumbent leaders regardless of the situation. When the ICC withdrew the charges against President Kenyatta in December 2014 and terminated the case against Deputy-President Ruto in April 2016 the AU commended the ICC's decision. However, the situation has since escalated.

At the AU Summits in January and July 2016 the AU urged its Open-Ended Ministerial Committee on the ICC to develop a comprehensive strategy on a collective withdrawal from the ICC.<sup>5</sup> In January 2017 the AU adopted an ICC withdrawal strategy which encouraged AU member states to withdraw from the Rome Statute.<sup>6</sup> The AU Assembly also praised earlier attempts in 2016 by Burundi, South Africa and The Gambia to withdraw from the ICC.<sup>7</sup>

The AU's withdrawal strategy is yet to be revisited by the AU Assembly, but Burundi, serving as the interim Chair of the AU's Open-Ended Ministerial Committee on the ICC,<sup>8</sup> in January 2018 led a

3 ICC 'Situations under investigation' <https://www.icc-cpi.int/pages/situations.aspx> (accessed 19 August 2016).

4 Coalition for the International Criminal Court 'Report on the 12th Session of the Assembly of States Parties to the Rome Statute' (2013) 6 [http://www.iccnw.org/documents/asp12\\_report.pdf](http://www.iccnw.org/documents/asp12_report.pdf) (accessed 17 June 2016).

5 AU Assembly 'Decisions, declarations and resolution: Assembly of the Union Twenty-Sixth Ordinary Session' January 2016, Assembly/AU/Dec.588-604(XXVI), [https://au.int/sites/default/files/decisions/31274-assembly\\_au\\_dec\\_605-620\\_xxvii\\_e.pdf](https://au.int/sites/default/files/decisions/31274-assembly_au_dec_605-620_xxvii_e.pdf) (accessed 20 October 2018).

6 AU Assembly 'Decision on the International Criminal Court' January 2017 [https://au.int/sites/default/files/decisions/32520-sc19553\\_e\\_original\\_-\\_assembly\\_decision\\_s\\_621-641\\_-\\_xxviii.pdf](https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decision_s_621-641_-_xxviii.pdf) (accessed 12 October 2018).

7 After the electoral defeat of The Gambia's dictator Yahya Jammeh, the new government rolled back on the country's bid to withdraw from the ICC. South Africa's withdrawal bid was also deemed unconstitutional and nullified by the national judiciary.

8 The Committee was established to follow up on the AU's concerns about the ICC.



campaign against the ICC. The AU Assembly condemned the ICC decision to open investigations on the situation in Burundi based on the recommendation of the Ministerial Committee on the ICC. The AU Assembly claimed that the ICC's decision was 'prejudicial to the peace process under the auspices of the East African Community, and constitutes both a violation of the sovereignty of Burundi and is a move aimed at destabilising that country'.<sup>9</sup>

Since 2014, the AU had already moved to ensure that the African Court respects the immunity of sitting leaders and senior officials on the continent through the Amendment Protocol.<sup>10</sup> Although the Amendment Protocol has not yet entered into force, the immunity clause reflects the stance of the AU on matters of justice and accountability.

However, there has been a limited assessment of the ramifications of the AU's immunity principle on the efficiency of the African Court and the need for conflict resolution in Africa where the role of leaders in conflict situations is significant. Will the grant of immunity to sitting heads of state and senior government officials enable the continent to realise justice as well as advance conflict resolution on the continent?

Hence, the article explores the implications of the immunity stance on conflict resolution in Africa. The case of South Sudan is a useful case for engaging with the impact of the immunity clause on resolving conflicts and attaining justice in Africa. The *Habré* case further highlights some empirical lessons on the fate of justice and reconciliation in Africa.

Since December 2013 South Sudan has been embroiled in a civil war sparked by leadership tussles in the Southern Peoples' Liberation Movement (SPLM) party that led the region into independence in 2011 after a violent conflict with the Sudanese government in the north. The conflict pitted the SPLM in power led by President Salva Kiir with the SPLM in opposition led by the sacked Vice-President Riek Machar. Several elites have since broken away from the Kiir and Machar camps to form their own armed groups. Although the South Sudanese conflict has a complex dimension, reports on the conflict have consistently indicted the country's leaders as the commanders and beneficiaries of the war crimes and crimes against humanity. The article observes that the historical lack of accountability for war crimes and crimes against humanity in the region provides an ambient for the warring parties to persist with impunity in warfare.

Several peace talks have taken place and agreements reached, including the Agreement on the Resolution of the Conflict in the

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9 AU Assembly 'Decision on the International Criminal Court' January 2018, [https://au.int/sites/default/files/decisions/33908-assembly\\_decisions\\_665\\_-\\_689\\_e.pdf](https://au.int/sites/default/files/decisions/33908-assembly_decisions_665_-_689_e.pdf) (accessed 12 October 2018).

10 The AU decision of January 2018 also called for an 'advisory opinion from the International Court of Justice on the question of immunities of a Head of State and Government and other senior officials'.

Republic of South Sudan (ARCSS) on 25 August 2015, a deal reached under the coordination of the Intergovernmental Authority on Development (IGAD).<sup>11</sup> The ARCSS was violated in July 2016 following the outbreak of violence between the warring factions three months after the formation of a transitional government. Despite the signing of new agreements between June and October 2018, reports of violations persist and the leaders of the warring factions often depict themselves as unconcerned about the consequences of the violations of the peace agreements. Thus, any real effort at pursuing accountability and bringing an end to the violence in South Sudan has to engage with the role of the warring leaders who now take up leadership positions in the government.

There remains limited effort by IGAD mediators to highlight the accountability of the leaders for the human rights abuses in South Sudan. The Hybrid Court for South Sudan (HCSS) is meant to be operationalised by the AU in line with the ARCSS agreement, and there is no provision for immunity against prosecution. However, section 4 of this article argues that based on the current AU stance on immunity for sitting leaders, the continental body will face difficulties in prosecuting the leaders of the warring factions that will make up any new government in South Sudan after some stability has been attained.

As such, the game for warring leaders is to be co-opted into leadership through the peace process, and they are under no pressure to desist from human rights violations since they derive legitimacy and a seat at the negotiation table through violence.<sup>12</sup> As discussed further in section 4.1, the immunity clause for sitting heads of state and senior leaders also fails to address concerns across the African continent where a number of sitting heads of state prefer to 'sit tight' in office and are suspected of having committed gross human rights violations. The successful prosecution of former Chadian President Hissène Habré by an AU-mandated national court in Senegal created renewed momentum around the functioning and efficiency of criminal prosecution against a former head of state in Africa. However, the successful prosecution of Habré was possible because he no longer enjoyed political support and lacked international allies. In conflict settings that require deterrence measures to avoid impunity and state oppression, waiting for leaders in Africa to lose political power, which is encouraged by the AU immunity clause, does not bode well for

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11 While sub-regional bodies are independent bodies, they are also expected to align their policies to that of the AU in line with art 4(b) of the Protocol on relations between the AU and regional economic communities (RECs). The operations of the RECs fall within the 'principle of subsidiarity', which requires RECs/RMs to respond to challenges in their sub-region.

12 D Majak 'Taming the dominant gun class in South Sudan' <https://africacenter.org/spotlight/taming-the-dominant-gun-class-in-south-sudan/> (accessed 12 October 2018).

conflict resolution and justice on the continent, especially in the case of South Sudan.

The next section provides a contextual framework for engaging with the issues discussed in the article.

## 2 A constructivist framework for justice as a tool for conflict resolution

The theoretical framework of constructivism – which highlights the influence of prevailing ideas – provides a useful framework for understanding how normative values come about, including the idea of transitional justice and the AU stance on immunity for sitting leaders in Africa. The prominent feature of constructivism is its divergence from dominant theories – neo-realism and neo-liberalism. Constructivism holds that the significant influence in international relations is social consciousness or prevailing ideas in the system as opposed to material elements.<sup>13</sup>

In this regard the international system is founded on the inter-subjective ideas that are shared among people. This includes the institutionalised ideas that are expressed as practices and identities.<sup>14</sup> Wendt in his article illustrates the influence of ideas by arguing that '[500] British nuclear weapons are less threatening to the United States than five North Korean nuclear weapons'.<sup>15</sup> In this claim, the US perceives Britain as an ally while it views North Korea as an enemy capable of acting aggressively. If it were merely about material capability, the US would be threatened more by Britain than by North Korea. Hence, the concerns relating to security in the world order, for instance, do not merely involve a consideration of the resources, weapons and other material elements of other states as espoused by neo-realists. Rather, it concerns ideas that prevail in the international system based on the historical and behavioural relationships of states. This condition implies that if the ideas in international relations change, the relationships in the international relations also change.

Relations in the international order have over the years led to the formation and changes of ideas in the international system. For instance, the idea of sacrosanct and inviolable sovereignty have over the years shifted to sovereignty as responsibility,<sup>16</sup> as expressed in the Responsibility to Protect (R2P) doctrine, which was endorsed by the

13 R Jackson & G Sorensen 'Social constructivism' in R Jackson & G Sorensen (eds) *Introduction to international relations: Theories and approaches* (2006) 162.

14 JW Legro *Rethinking the world: Great power strategies and international order* (2005) 6.

15 A Wendt 'Anarchy is what states make of it: The social construction of power politics' (1992) 46 *International Organization* 391.

16 MK Cusimano *Beyond sovereignty: Issues for a global agenda* (2000).

2005 UN World Summit Outcome Document.<sup>17</sup> The next section engages with some ideas that have over the years been constructed in international relations, especially in terms of international justice.

## 2.1 International laws on justice

Parallel to the paradigm shift from the idea of sacrosanct sovereignty to sovereignty as responsibility, the notion of justice also has shifted from a national confine to the greater role of the international community in seeking justice, especially in conflict areas. This development is aptly captured by the 2004 UN Report of the High-Level Panel on Threats, Challenges and Change which surmises that any threat to a state and to human life *en masse* constitutes a threat to international security. One of the primary normative and institutional frameworks for international justice is international humanitarian law.

International humanitarian law serves as an international legal framework to limit the effect of armed conflict so as to mitigate suffering. It is founded on two international conventions, namely, the Hague Convention (1907) that restricts the means and methods of warfare, and the four Geneva Conventions (1949) that provide for the protection of certain categories of vulnerable persons: those wounded and sick in armed forces in the field; the wounded, sick and shipwrecked members of armed forces at sea; prisoners of war; and civilians not belonging to the armed forces, including non-nationals and refugees.<sup>18</sup> These international laws are applicable to all states and all actors in situations of armed conflict.<sup>19</sup>

Pursuant to this law and in recognition of the limitations of domestic courts, the UNSC established *ad hoc* international tribunals, such as those in the former Yugoslavia, Rwanda and Sierra Leone, to address the legal responsibilities of individuals in relation to war crimes, genocide and crimes against humanity. In 2002 the ICC was established by the Rome Statute as a permanent international court

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17 The R2P entails that the broader international community bears the responsibility to intervene in the internal affairs of member states when a particular state in question fails or is unwilling to protect civilians in line with chs VI and VII of the UN Charter. Thus, the classical inviolable right to sovereignty – an ‘exclusive and final jurisdiction over territory, as well as resources and populations that lie within the territory’ as endorsed by the 1648 Treaty of Westphalia – have become diluted with conditions which states need to fulfil to avoid external interference. UN ‘Overview of international humanitarian law’ (2016) <http://www.gsdrc.org/topic-guides/international-legal-frameworks-for-humanitarian-action/concepts/overview-of-international-humanitarian-law/> (accessed 20 June 2016).

18 International Justice Resource Centre ‘International humanitarian law’ (2016) <http://www.ijrcenter.org/international-humanitarian-law/> (accessed 20 June 2016).

19 Another pertinent law is international human rights law, which is founded on the Universal Declaration of Human Rights that was adopted by the UN on 10 December 1948. The Universal Declaration, together with other relevant international instruments, stipulates the basic civil, political, economic, social and cultural rights that all human beings should enjoy.

with a mandate to prosecute those responsible for international crimes.<sup>20</sup>

The UN also has advanced the notion of transitional justice, which serves as the 'the full set of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuse, in order to secure accountability, serve justice and achieve reconciliation'.<sup>21</sup> Transitional justice involves a range of judicial and non-judicial mechanisms including individual prosecutions, reparations, truth seeking and institutional reform. In attaining justice, international courts, such as the ICC and the African Court, are meant to complement national judicial institutions. They serve as last resorts to justice in light of the inability or unwillingness of domestic courts to prosecute cases genuinely, especially in states in crises and fragile states. Hybrid courts such as the anticipated Hybrid Court for South Sudan are meant to comprise both international and national judicial officials to ensure that the international community supports weak national judicial systems in pursuing justice. The South Sudan Hybrid Court is meant to be established by the AU with the cooperation of the government. These mechanisms serve to prevent impunity and to ensure the accountability of domestic elites that often operate within the confines and protection of the sovereignty of states.

Although transitional justice often takes place after some stability has been restored in conflict states, the idea of international justice is meant to deter would-be perpetrators of crimes. The idea also serves to nudge conflict parties to avoid human rights violations and pursue a timely conflict resolution, which entails addressing the causes of conflict to ensure lasting peace and security.

## 2.2 Construction of the immunity clause in Africa

The idea of common goals and values dominates policy and inter-state discourses of African intergovernmental organisations. While there are divergences in the values and priorities in Africa, the idea of pan-African unity, destiny and cooperation has remained a motivating factor for inter-African cooperation through continental and regional organisations.

It is within the constructivist idea of common identity and unity for a common cause that the AU, which is made up of African governments, advances the immunity clause for sitting leaders and senior government officials in Africa. While arguing against the ICC's alleged witch-hunt of African states, the AU cites the need for stability

20 The International Court of Justice was also established by ch XIV of the Charter of the United Nations to safeguard international law, especially that pertaining to states.

21 United Nations Secretary-General 'The rule of law and transitional justice in conflict and post-conflict societies' (2004) UN Doc S/2004/616 (23 August 2004), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2004/616](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616) (accessed 20 October 2018).

in African states, which could be jeopardised by the trial of sitting heads of state and senior officials.<sup>22</sup> By extension, the collective decision of AU leaders for immunity influences the behaviour of governments and leaders. AU member states such as South Africa, for instance, refused to hand President Omar Bashir over to the ICC when he visited the country for the 2015 AU Summit. Besides South Africa's particular national considerations, the decision was based on the collective decision and idea of immunity for sitting leaders as constructed by the AU. Reports also note that South Africa had signed a memorandum of understanding with the AU that it would not arrest Bashir. The initial withdrawal by The Gambia, South Africa and Burundi from the ICC in 2016 was undertaken in the knowledge that the AU would support such a move. Indeed, while agreeing to the AU's collective withdrawal strategy, the AU Assembly praised these countries even though South Africa and The Gambia have abolished their withdrawal decision. To avoid possible confusion on the continent, the AU included the immunity of sitting leaders in article 46*Abis* of the Amendment Protocol.

Although the Hybrid Court for South Sudan in writing does not provide for the immunity of government officials, South Sudanese officials are conscious of the AU's traditional stance on immunity. This stance includes the precedent set by the AU in terms of the rejection of trials against incumbent leaders and senior government officials. As such, the calculations of the warring parties of South Sudan rightfully may be influenced by the AU's immunity perspective, as discussed below.

### 3 Human rights violations in South Sudan

In order to understand the imperative for justice in South Sudan, it is important to understand the context of human rights violations in the country, and the responsibility of warring leaders, who eventually will make up the new government. South Sudan on 13 December 2013 plunged into civil war after three years of independence. The conflict pitted the Nuer and Dinka groups against one another as former Vice-President Riek Machar from Nuer faced off against his rival, President Salva Kiir from the Dinka tribe. Other warring factions have broken away from the government and opposition to form their own armed groups, and to canvass for inclusion in the peace process.<sup>23</sup> Despite numerous peace talks, the warring leaders have led large-scale military operations that have affected civilians. A report by the Human Rights Council in March 2016 indicated that thousands of people had been killed in South Sudan with over two million people displaced from

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22 AU Assembly (n 9).

23 'Why another power-sharing deal in South Sudan has collapsed' *PSC Report* 8 June 2018 <https://issafrica.org/pscreport/situation-analysis/why-another-power-sharing-deal-in-south-sudan-has-collapsed> (accessed 10 October 2018).

their homes.<sup>24</sup> The violence includes various attacks against the UN Mission in South Sudan (UNMISS) personnel and facilities as well as aid workers.

The humanitarian crisis led the AU Peace and Security Council (PSC) at its 411th meeting on 30 December 2013 to establish the Commission of Inquiry on South Sudan (Commission) 'to investigate the human rights violations and other abuses committed during the armed conflict in South Sudan and to make recommendations on the best ways and means to ensure accountability, reconciliation and healing among all South Sudanese communities'.<sup>25</sup> The report of the Commission revealed that the warring parties had murdered, tortured, raped and committed other sexual and gender-based crimes against civilians.<sup>26</sup> These include the crimes of conscripting children and looting and destroying civilian property.

A report by the UN Office of the High Commissioner for Human Rights (OHCHR) gave searing accounts of how civilians suspected of supporting the opposition were killed by being burnt alive, suffocated in containers, shot, hanged from trees or cut to pieces, and 'several women said they were raped when they left UN protected camps to search for food; others were abducted and held in sexual slavery as "wives" for soldiers in barracks'.<sup>27</sup> These reports, which are mainly overviews of the human rights violations, are clear indications of war crimes and crimes against humanity in violation of international humanitarian law.

### 3.1 Liability of domestic leaders

A study reveals that, when asked about the cause of the 2013 conflict,

the majority of the respondents cited a struggle over SPLM leadership (52%), an attempted *coup* (21%) and a clash between members of the army (17%) as the main causes of the conflict ... a clear majority identifies the main problems as being at the leadership level (67%).<sup>28</sup>

The findings of the AU Commission of Inquiry on South Sudan corroborates this conclusion by noting that the conflict centres upon the leadership figures of South Sudan, particularly within the SPLM.

24 Human Rights Council 'Thirty-first session: Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General' (2016) [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A-HRC-31-49\\_en.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A-HRC-31-49_en.doc) (accessed 20 June 2016).

25 African Union *Final Report of African Union Commission of Inquiry on South Sudan* (2015) 8.

26 The report insists that accountability is key to a durable solution to the South Sudanese security context. This contributed to the inclusion of the Hybrid Court for South Sudan (HCSS) within the ARCSS that was signed in August 2015.

27 OHCHR 'South Sudan: UN report contains "searing" account of killings, rapes and destruction' (2016) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17207> (accessed 1 September 2016).

28 DK Deng & R Willems *Expanding the reach of justice and accountability in South Sudan: Intersections of truth, justice and reconciliation in South Sudan* (2016) 6.

The Commission's report revealed that 'Riek [Machar] wanted to be the Chairman, Rebecca Nyandeng wanted to be the Chairperson, Pagan [Amum] wanted to be Chairman and Salva [Kiir] wanted to continue. That was the problem.'<sup>29</sup>

Prior to independence significant differences in the leadership, especially between President Kiir and his Vice-President, were overlooked for the sake of unity. The division led to the stripping of executive powers from Machar in May 2013 and his eventual dismissal on 23 July 2013 along with most of the Cabinet (with the exception of four Ministers) and the suspension of the SPLM Secretary-General, Pagan Amum, for alleged corruption.

Markedly, during the meeting of the SPLM's National Liberation Council in Juba in December 2013, fighting broke out between soldiers loyal to the President and those in support of Machar. The fighting soon spread to the general population in other regions. The report of UNMISS notes that South Sudan's military and National Security Service (NSS), including the opposition forces, 'operate in a space above the law and with virtual impunity'.<sup>30</sup> The victims of the power tussle are people in villages that have little or no say on who holds leadership positions in the SPLM.<sup>31</sup>

Kiir and Machar, the main rivals in the conflict, have a significant responsibility regarding the human rights violations. However, since most of the peace process entails them serving as top leaders in South Sudan, questions are raised as to how to hold them accountable. Beyond the Kiir and Machar divide, various other leaders have since broken away from Kiir and Machar's faction to form their own armed groups. Irrespective of their claims to forming armed movements, the creation of new movements partly occurred because their participation in the peace process and their chances of gaining senior leadership positions in a new government depend on the extent of the threat posed by their groups.

For instance, Lieutenant-General Thomas Cirillo Swaka, a former deputy chief of general staff for logistics, in February 2017 left the Kiir government to form the National Salvation Front (NAS). Lam Akol, a former Minister of Agriculture, also left the government to form the National Democratic Movement in 2016. There is also Peter Gatdet's South Sudan United Movement (SSUM) of 2016 which splintered from the Federal Democratic Party/South Sudan Army Forces (FDP/SSAF). The FDP/SSAF, currently led by Gabriel Changson, had also

29 AU (n 25) 24-26.

30 FIDH 'Addressing the human rights situation and the need for accountability for atrocities committed in South Sudan' <https://www.fidh.org/en/international-advocacy/united-nations/addressing-the-human-rights-situation-and-the-need-for-accountability> (accessed 30 August 2016).

31 MJ Kur 'Major African transitional justice mechanisms: Lessons for South Sudanese government and civil society' (2016) <https://paanluelwel.com/2016/07/08/major-african-transitional-justice-mechanisms-lessons-for-south-sudanese-government-and-civil-society/> (accessed 7 September 2016).



defected from Machar's group in mid-2015. The most recent armed group is that of Paul Malong who formed the South Sudan United Front (SSUF) on 9 April 2018. Malong was the former Chief of General Staff of the army who was sacked in May 2017 and placed under house arrest until November 2017.

Other examples include the South Sudan Federal Democratic Party (SSFDP) of 2015; the South Sudanese Patriotic Army (SSPA) of 2015; and the South Sudan National Movement for Change of 2017, among many others. Some of these groups formed the South Sudan Opposition Alliance (SSOA) to work together during the peace process, but the strength of the armed groups differs and reaching agreement within the alliance remains a major concern.

Due to the proliferation of armed groups, the recent Khartoum peace deal led to the creation of additional vice-presidential positions.<sup>32</sup> The initial deal of 2015 contained a First Vice-President position and a Vice-President position.<sup>33</sup> The current deal requires five vice-president positions including the First Vice-President and four other vice-president positions. This arrangement entails three additional vice-presidential positions to satisfy the interests of the warring leaders. The Council of Ministers has also increased from 30 as provided by the initial ARCSS to 35 in the new deal. The number of the members of the national legislative assembly has also increased from 400 to 550 in the new deal. The need for inclusivity is vital. However, violence secured those governing positions for the warring leaders. In line with the AU's stance on immunity, President Kiir and First Vice-President Machar and the other vice-presidents could be shielded from prosecution while in office. Other elites that make up the executive and the national assembly also could raise their role as senior leaders in the government.

Given that violence remains the ticket to sustained leadership positions, a genuine attempt at addressing the crisis requires addressing the lack of accountability in the country regardless of their positions in the current governing arrangement. Apart from the call by human rights activists for accountability, South Sudanese also have been vocal in requesting justice for the crimes in the region, as discussed in the next section.

### 3.2 Quest for justice in South Sudan

Several research findings observe that the indiscriminate violence in South Sudan is the result of a culture of impunity and lack of accountability in the region.<sup>34</sup> For over 40 years of civil war in the

32 Revitalised ARCSS 28 August 2018, <https://www.dropbox.com/s/tss2y6pelt3snlx/ARCSS%202018%20Initialled.pdf?dl=0> (accessed 28 October 2018).

33 Agreement on the Resolution of the Conflict in the Republic of South Sudan (ARCSS) 2015, <https://drive.google.com/file/d/0B5FAwdVtt-gCelBQZVAXbjhUc1FmSHo3VnNaT09Ldm1GNEhz/view> (accessed 28 October 2018).

34 AU (n 25).

region, South Sudan has not witnessed a history of comprehensive justice and accountability for war crimes and crimes against humanity.<sup>35</sup> Although much of the conflict faced by South Sudan before 2011 was between the SPLM army (SPLM/A) and the Khartoum government in the north, there has been a significant internal communal and leadership conflict in South Sudan that did not receive adequate attention due to the predominant description of the conflict as something happening between the north and south of the Sudan.<sup>36</sup>

The Comprehensive Peace Agreement (CPA) that ended the civil war with Sudan in 2005 granted amnesty to the conflicting parties, thereby shelving the question of the accountability of the actors on both sides of the conflict. In Southern Sudan leaders of the warring factions were rewarded with top positions in government institutions, thereby creating the impression that violence pays and the bigger your gun, the better prospect of prominent recognition you will have. The historical negligence displayed towards the gross human rights abuses in the region entails that conflicting parties are unaware of or nonchalant about international justice.

After independence in 2011 already there had been sporadic outbreaks of violence in South Sudan before the outbreak of the civil war in December 2013.<sup>37</sup> This situation highlights the consequences of lingering impunity. Since 2013 when the civil war erupted the parties to the conflict have defied at least six major ceasefire deals, including those signed in January 2014, May 2014, February 2015, August 2015, December 2017 and as recently as June 2018. Indeed, heavy fighting often is witnessed hours after the signing of a ceasefire deal. This reality indicates that another move towards amnesty in the region will perpetuate the impunity.

A study by Deng et al reveals that there is a high demand for justice and accountability in South Sudanese societies.<sup>38</sup> A survey of 2016

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35 Since the first war broke out in the South Sudanese region on 18 August 1955 due to a mutiny at Torit, Equatorial, there has never been a concrete effort at investigating war crimes in the region. In 1983 the second war broke out when the government abrogated the 1973 agreements that ended the first civil war. The 1973 agreement under President Jafaar Nimeiri had granted autonomy to the south under a federal system of government. The government in 1983 abrogated the law and dissolved the Regional Assembly, leading to the South Sudan civil war that ended in 2005 after the signing of the Comprehensive Peace Agreement of 2005. The Agreement further paved the way for the secession of South Sudan from Sudan in 2011.

36 AU (n 25).

37 UN Security Council Report 'Chronology of events in South Sudan' (2016) <http://www.securitycouncilreport.org/chronology/south-sudan.php> (accessed 20 June 2016).

38 DK Deng et al *Search for a new beginning: Perceptions of truth, justice, reconciliation and healing in South Sudan* (2015), <http://www.undp.org/content/dam/south-sudan/library/Rule%20of%20Law/Perception%20Survey%20Report%20Transitional%20Justice%20Reconciliation%20and%20Healing%20-.pdf> (accessed 20 June 2016).

shows that a significant number of people do not believe that amnesties can contribute to lasting peace: 'Forty-eight per cent of respondents thought that amnesties would have either a negative effect (32%) or no effect (16%) on prospects for peace, while 47 per cent thought that it would have a positive impact on prospects for peace.'<sup>39</sup> A study conducted by the American Bar Association Rule of Law Initiative in South Sudan in 2014 revealed that 'every person interviewed indicated that there must be accountability, at all levels, for the atrocities committed during the current crisis'.<sup>40</sup> Even though the survey was taken in the context of the ongoing conflict, the opposition to amnesty demonstrates the frustration of people about the lack of accountability and the senseless suffering of victims in the region. One study highlights the need to tame the gun class who use violence as a means to achieve their narrow interests in South Sudan.<sup>41</sup>

Justice becomes imperative to break the cycle of violence and reverse the legacies of past human rights violations and widespread impunity. What is certain is that South Sudanese justice institutions lack capacity, institutional means and resources to satisfactorily prosecute international crimes. In addition, their independence and impartiality cannot be guaranteed.

### 3.3 Inefficiencies of domestic justice in South Sudan

A number of studies observe that South Sudan's statutory judicial systems have not proven to have the capacity to produce tangible results on issues of justice or holding perpetrators accountable. A study by the American Bar Association Rule of Law Initiative highlights the gross limitations of the justice institutions in terms of investigation, documentation and prosecution of human rights abuses.<sup>42</sup> Willems and Deng observe:<sup>43</sup>

South Sudan's justice system has a plural justice system comprised of parallel systems of statutory courts presided over by judges and trained legal personnel and customary courts presided over by chiefs and elders. The statutory courts are structured in a single hierarchy with the Supreme Court as the highest court of law, followed by three courts of appeal, high courts in each of the ten states and magistrate courts at the county level. But those courts have not yet been established. Indeed, there are not even magistrate courts present in many of the counties.

As in South Sudan, justice remains unfulfilled for many Africans wanting accountability, reconciliation and lasting peace since the

39 Deng & Willems (n 28) 12-14.

40 American Bar Association Rule of Law Initiative *Assessment of justice, accountability and reconciliation measures in South Sudan: Final report and recommendations* (2014).

41 Majak (n 12).

42 American Bar Association Rule of Law Initiative (n 40).

43 R Willems & D Deng *Justice and conflict in South Sudan: Observations from a pilot survey* (2015) 7.

early 1990s due to weak justice institutions.<sup>44</sup> This situation often has encouraged aggrieved actors to use force and extrajudicial approaches to realise their ends. The limitations of the internal judicial system of South Sudan have already contributed to making communities 'carry out violent attacks against neighbouring communities in retribution for harm that was done to them and as a deterrent against future attacks'.<sup>45</sup> In a statement to the AU PSC, President Mogae noted that 'if the legacy of conflict and impunity is to be finally broken in our continent's newest state, we must also act and not disappoint a new generation of South Sudanese'.<sup>46</sup>

President Kiir was quoted as saying: 'I will not protect anybody, and I have instructed the investigation committee ... to see that all these people who committed crimes must be punished, if need be, with death.'<sup>47</sup> However, the government has not made a comprehensive effort to hold people accountable since the war began in 2013. On 30 August 2016 the government through the military court made a token attempt to convict 60 soldiers for murdering civilians and looting during the fighting in Juba in July 2016.<sup>48</sup> This attempt, however, does not account for the systematic killing of civilians. The opposition leader, Machar, had also promised to investigate a massacre in Bentiu town, Unity state, by his rebel forces in April 2014, but no findings had been made public.

Moreover, although the leaders seem to suggest that field soldiers are culpable for crimes against humanity during the war, it is the warring leaders that have a central role and responsibility for the war crimes. Notably, criminal accountability involves different aspects of accountability and different levels of perpetrators. Leaders and senior military officers of warring parties may be responsible for human rights violations by subordinates. As discussed earlier, a number of reports hold leadership figures accountable for being the primary actors that orchestrate and lead the perpetration of war crimes and crimes against humanity.

Cognisant of the limitations of national courts, chapter 5 of the ARCISS provides for the establishment of the Hybrid Court for South Sudan to try and to prosecute war crimes, genocide and crimes against humanity. The question then is whether the HCSS can lead to effective justice. The following section discusses the responsibilities of

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44 International Centre for Transitional Justice (ICTJ) *Conflict and transitional justice in Africa* (2009).

45 Willems & Deng (n 43) 2.

46 D Booth 'South Sudan, Africa, and the challenge of peacemaking' (2016) <http://www.state.gov/p/af/rls/rm/2016/252466.htm> (accessed 12 August 2016).

47 <http://www.aa.com.tr/en/rss/329575--kiir-vows-to-try-people-involved-in-s-sudan-crimes> (accessed 12 August 2016).

48 'Court convicts 60 South Sudanese soldiers for murder' *Sudan Tribune* 30 August 2016 <http://www.sudantribune.com/spip.php?article60080> (accessed 12 August 2016).

the HCSS and how the AU's immunity principle thwarts the deterrent capacity of the HCSS.

#### 4 Hybrid court for South Sudan and the African Union

After the ARCSS of 2015 stalled following the outbreak of violence in July 2016, IGAD led a high-level revitalisation forum to revive the ARCSS. The new agreements were mainly around ceasefire as well as governance and security arrangements. The discussions were held in the knowledge that institutions such as the HCSS, the Commission for Truth, Reconciliation and Healing (CTRH) and the Compensation and Reparation Authority (CRA) would remain in the revised version of the ARCSS of 2015. Chapter 5 of the ARCSS provides for the establishment of an independent hybrid judicial body known as the Hybrid Court for South Sudan. Chapter 5(6.2.2) notes that the HCSS shall be independent and distinct from the national judiciary of South Sudan and the Court shall carry out its own investigations with primacy over any national courts in South Sudan.<sup>49</sup>

To ensure that influential domestic actors do not influence the outcome of the Court the agreement stipulates that the AU holds the primary responsibility for the development of the framework for the HCSS. Chapter 5(6.1.1) highlights this by noting that the Hybrid Court is to 'be established by the African Union Commission to investigate and prosecute individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period'. The HCSS is to be comprised of some South Sudanese and a majority of African (non-South Sudanese) judges, lawyers and administrative staff.

The Court will be the first to be established and administered by the AU. The AU Commission (AUC) is to provide relevant information on the location, funding, enforcement, jurisprudence, number of and composition of judges, and privileges and immunities of Court personnel. In this regard, the AU effort is critical for the attainment of justice in South Sudan and, by extension, to deter warring parties from committing war crimes.

The HCSS is intended to try every person regardless of position. As indicated in chapter 5(6.5.1) of the revised ARCSS, 'a person who planned, instigated, ordered, committed, aided and abetted, conspired or participated in a joint criminal enterprise in the planning, preparation or execution of a crime ... shall be individually responsible for the crime'. Chapter 5(6.5.4) further stipulates that 'the HCSS shall

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49 The HCSS is expected to 'independently promote the common objective of facilitating truth, reconciliation and healing, compensation and reparation in South Sudan' along with two other institutions, namely, the Commission for Truth, Reconciliation and Healing (CTRH) and the Compensation and Reparation Authority (CRA).

not be impeded or constrained by any statutes of limitations or the granting of pardons, immunities or amnesties'. Chapter 5(6.5.5) further provides that 'no one shall be exempted from criminal responsibility on account of their official capacity as a government official, an elected official or claiming the defence of superior orders'.

Although the agreement provides for the trial of every person who is worth prosecuting, it is doubtful that the AU will seek to try the sitting leaders and senior government officials of South Sudan, as observed in the previous section.

#### **4.1 Implications of the African Union's immunity principle for conflict resolution**

As argued earlier the AU over time has developed a principle of immunity for sitting heads of states and senior government officials. The AU's immunity principle is at the heart of the well-known conflict between the AU and the ICC, a conflict that has resulted in the AU exploring options for the collective withdrawal of African states from the ICC. This immunity clause has been included in article 46*Abis* of the Amendment Protocol, which provides that sitting heads of state and senior government officials will not face trial by the African Court. The AU has ardently argued in favour of the immunity principle in many international forums.

Thus, even if the AU intends to prosecute the leaders of South Sudan, such efforts will go against the organisation's insistence that the prosecution of sitting leaders and senior government officials is detrimental to sovereignty and the stability of African states.<sup>50</sup> This principle, which remains a topical issue on the continent, will cause affected groups to consider the AU 'hypocritical' – at least – if it should go ahead and try incumbent leaders and senior government officials in South Sudan.

A strategy paper emanating from a conference on truth, justice and reconciliation in South Sudan in August 2014 recommended that any transitional government that will be created should be bound through the peace agreement to 'ratify the Rome Statute, and to commit to doing so in any peace agreement that comes from the IGAD peace talks'.<sup>51</sup> The intention is to provide the ICC with the opportunity to intervene if the leaders attempt to undermine the effort of the HCSS. However, the African mediators did not consider any role for the ICC on the matter in view of the differences and fraught relations between the organisations. The African mediators were comfortable with the AU Commission – not the UN or another international institution – having jurisdiction over the justice outcomes. This decision is

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<sup>50</sup> Coalition for the International Criminal Court (n 4).

<sup>51</sup> 'Transitional justice strategy for South Sudan' Strategy paper, Conference on transitional justice in South Sudan entitled 'Towards a new beginning' (2014) 2.

particularly important to protect the value interests of African actors, especially as it pertains to the nature of justice.

In this regard leaders of the warring factions in South Sudan are not ignorant of this value held in the AU that is charged with establishing the HCSS. The new deal gave leaders of the warring factions leadership and senior positions in the transitional government as well as opportunities for future leadership positions in a stable South Sudan. Hence, the AU's immunity principle does little to deter the South Sudanese parties from continuing the war as they deem fit since those included in leadership positions are the warring leaders. Holding leadership positions, the AU will be in a difficult position if it attempts to try these persons.

It should be noted that the AU's immunity principle is not meant to prevent any future trial or prosecution of incumbent leaders and senior government officials provided they no longer are in power. However, the penchant of some regimes to hold on to power in Africa entails that justice remains a mirage for many victims of crimes committed by incumbent regimes. Notably, out of the 33 countries with term limits in Africa, 12 countries have sought to amend their constitutions to extend or remove these limits.<sup>52</sup> The recent trend in the DRC, Rwanda, Burundi, Uganda and Benin is evidence of the proclivity of leaders to remain firmly in office. Disturbingly, those countries that have experienced extensions in term limits are also facing human rights challenges. The stance of the AU thus creates a platform for leaders to remain in power, to avoid probes or abdicate powers only to their allies. In the East African region in which South Sudan is situated there is a strong trend for leaders to remain in power.

Without attempting to foretell the future of South Sudan, it is possible to foresee that the current leaders do all they can to remain in power for a long time. During this time, vital evidence could be lost and a possible resurgence of conflict could detract attention from issues of justice. The South Sudanese agreement does not entail that the leaders of the transitional government are not to run for the leadership in post-transition South Sudan as was the case in Madagascar. Madagascar underwent a political crisis in 2009 when Andy Rajoelina took control from President Marc Ravalomanana with the support of the military and opposition parties. The movement was regarded by the international community as a *coup d'état*.

The international community advanced an election in 2013 without the candidacy of Ravalomanana and Rajoelina who were the key divisive figures in the country. The 2013 elections led to the election of Hery Rajaonarimampianina as President. Although some political crises remain in the region, the elections provided an avenue for the

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52 'Can the AU deal with amendments to term limits' IPSS 21 September 2015 [http://www.ipss-addis.org/new-ipss/news-events/can\\_the\\_au\\_deal\\_with\\_amendments\\_to\\_term\\_limits-/](http://www.ipss-addis.org/new-ipss/news-events/can_the_au_deal_with_amendments_to_term_limits-/) (accessed 21 July 2016).

country to explore stability through a new leadership, thereby checking the powers of the previous leaders involved in the upheavals. Even though the crisis in South Sudan differs, the continued role of the protagonists of war in the future of South Sudan's threatens the attainment of a lasting peace and effective justice.

Will the leaders facilitate the functioning of the HCSS? The transitional government is expected to enact legislation that will formalise the AU-led HCSS into law in South Sudan. Although the ARCSS is silent on the role of the transitional government in the HCSS, chapter 5(1.2) clearly states that the transitional government would define the mandate and jurisdiction of the three institutions including, but not limited to, their establishment and funding, actors, and defined processes for public participation in the selection of their respective members. This position entails that the transitional government will play a crucial role in initiating 'legislation for the establishment of the transitional justice institutions' in line with chapter 5(1.1). Chapter 5(1.5) expects the transitional government to cooperate with the AU and the international community in operationalising the Court.

This gives the transitional government some leverage in influencing the establishment and mandate of the HCSS from the outset. The cooperation of the transitional government, however, is subject to question. Notably, after the formation of the transitional government, a news item appeared in the *New York Times*, allegedly written by Kiir and Machar. The piece holds that South Sudan requires merely truth telling and not trials:<sup>53</sup>

We intend to create a national truth and reconciliation commission modelled on those of South Africa and Northern Ireland. This commission would have wide-ranging powers to investigate and interview the people of South Sudan – from the poorest farmer to the most powerful politician – to compile a true account of events during the war. Those who tell the truth about what they saw or did would be granted amnesty from prosecution – even if they did not express remorse.

In contrast to reconciliation, disciplinary justice – even if delivered under international law – would destabilise efforts to unite our nation by keeping alive anger and hatred among the people of South Sudan ... That is why we call on the international community, and the United States and Britain in particular, to reconsider one element of the peace agreement to which they are co-signatories: support for a planned international tribunal, the Hybrid Court for South Sudan. We call on them instead to commit to global backing for a mediated peace, truth and reconciliation process.

Regardless of the legitimacy of the piece, the item highlights the disposition of the leaders to the question of justice in South Sudan. In this regard it is debatable how the transitional government would

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53 S Kiir & R Machar 'South Sudan needs truth, not trials' *New York Times* 7 June 2016 [http://www.nytimes.com/2016/06/08/opinion/south-sudan-needs-truth-not-trials.html?\\_r=0](http://www.nytimes.com/2016/06/08/opinion/south-sudan-needs-truth-not-trials.html?_r=0) (accessed 1 August 2016).



work with the AU to facilitate the establishment of the Court. Keppler notes that

after leading South Sudan into a two-year nightmare, its leaders Salva Kiir and Riek Machar now want to shield themselves and anyone else implicated in wartime atrocities from justice ... It is obvious why these leaders want to avoid trials – they were commanders-in-chief of forces implicated in grave crimes ... during the country's bloody civil war.<sup>54</sup>

During the recent peace process there has been less discussion of the role of the HCSS. While truth telling is crucial to the process, it is not an alternative for justice. The claim that justice will impede peace is rather untrue given the experiences in Sierra Leone, Chile, Chad and the former Yugoslavia which show that criminal trials do not undermine peace; rather they foster reconciliation.

October 2016 marked the sixth-month deadline for the finalisation of the memorandum of understanding, the mandate and jurisdiction of the HCSS in line with the ARCSS of 2015. Dating the establishment of the transitional government back to April 2016 when Machar returned to Juba and was made the First Vice-President, the mandate and jurisdiction of the HCSS should have been finalised in October 2016 and the operationalisation of the Court should have been in April 2017. The AU and South Sudan have signed a memorandum of understanding<sup>55</sup> to operationalise the HCSS, but it is not yet functional and the ongoing instability has created uncertainty around it. Moreover, IGAD mediators have not prioritised the deterrence capacity of the HCSS. The revitalised ARCSS does not contain a timeline of action on the HCSS. Even during the recent South Sudan peace process, IGAD argued against punitive measures on the warring elites stating that they will be detrimental to efforts to secure a peace deal from the warring parties.<sup>56</sup> The recent peace deal also did not contain international enforcement mechanisms as the implementation of the deal depends on the goodwill of South Sudanese elites.<sup>57</sup>

Given the disposition of the transitional government and the AU towards immunity for sitting leaders, the HCSS, when established, could end up trying and prosecuting scapegoats within the factions of Kiir and Machar while the top leaders go free despite their alleged

54 E Keppler 'Dispatches: Giving justice the slip in South Sudan' (2016) 1 <https://www.hrw.org/news/2016/06/08/dispatches-giving-justice-slip-south-sudan> (accessed 2 September 2016).

55 AU Press Release 'African Union Commission and the Republic of South Sudan successfully conclude working session on the draft legal instruments of the hybrid court for South Sudan' <https://au.int/en/pressreleases/20170814/african-union-commission-and-republic-south-sudan-successfully-conclude> (accessed 15 October 2018).

56 IGAD 'Press Release: 30th June 2018 7, Nouakchott, Mauritania', <https://igad.int/attachments/article/1878/Press%20Release-IGAD%20Council%20Sideline%20Meet-June%2030.pdf> (accessed 15 October 2018).

57 The AU also insists that trials against sitting leaders jeopardise the legitimacy of governments and provide conditions for the contestation of legitimate authorities in Africa.

involvement in ordering, instigating and planning the war crimes. It is thus argued that the possibility of effective justice in South Sudan is contingent on a policy/principle shift by the AU from immunity for sitting leaders to non-immunity on the continent.

While it is possible that justice against leaders could be attained when they no longer are in power, lessons from the *Habré* case highlight additional variables that complicate the quest for justice on the continent.

## 4.2 Lessons from the *Habré* case

The successful prosecution of former Chadian President Hissène Habré by an AU-mandated court in Senegal raises optimism about the AU's commitment to justice.<sup>58</sup> The AU-backed court sentenced Habré on 30 May 2016 to life imprisonment for crimes against humanity during his eight-year rule (1982-1990). Habré, who fled to exile in Senegal in 1990, was found guilty of committing heinous atrocities, including 40 000 politically-motivated murders and 200 000 cases of torture, as revealed by the Chadian National Truth Commission in May 1992.<sup>59</sup> Many survivors gave searing accounts of various forms of torture and inhuman treatment they suffered. These included 'attacks against the Hadjerai ethnic group (1987), the Zaghawas (1989), and southern populations including the so-called 'Black September' in 1984; the arrest and torture of political prisoners, and the treatment of prisoners of war'.<sup>60</sup> However, it took the victims of his rule over 17 years to attain justice.

It should be emphasised that the trial of Habré was made possible by the perseverance of Habré's victims with the support of Human Rights Watch and other human rights organisations. In January 2000 some Chadian victims brought complaints against Habré in Senegal, a decade after his deposition. Initially, the Senegalese court refused to prosecute Habré on the grounds that it did not have jurisdiction to try crimes committed in another country. The victims resorted to Belgium, given that the country has a universal law to try international crimes committed across the globe. In 2005 Belgium issued an arrest warrant for Habré after about four years of investigation.

The Senegalese government decided to arrest Habré. However, instead of extraditing him to Belgium as requested by the Belgium judiciary, the government – following a request by the AU in July 2006 – decided to prosecute Habré on behalf of Africa. The Senegalese Constitution was amended in 2008 to allow the

58 'Habré's trial brings momentum to African justice on the continent' *Daily Mail* 1 June 2016 <http://www.dailymail.co.uk/wires/afp/article-3619723/Habre-trial-brings-momentum-African-justice-continent.html> (accessed 10 July 2016).

59 USIP 'Truth Commission: Chad' (1990) <http://www.usip.org/publications/truth-commission-chad> (accessed 12 July 2016).

60 'Chad: Q & A – The case of Hissène Habré before the Extraordinary African Chambers in Senegal' *All Africa* 2016 <http://allafrica.com/stories/201605040004.html> (accessed 28 October 2018).

prosecution of war crimes and crimes against humanity in and out of Senegal. After some political wrangling and financial considerations, the AU and Senegal signed a deal to set up an Extraordinary African Chamber in August 2012 to try Habré. The Extraordinary African Court was formally inaugurated on 8 February 2013. The trial began on 20 July 2015 and ended on 11 February 2016 after the testimony of 93 witnesses had been heard.

Although the trial was considered a major step forward for justice in Africa, as noted by various media reports, it was only made possible as a result of a number of circumstances, which casts doubt on the optimism about the AU's future role in pursuing justice in Africa. Events leading to Habré's prosecution demonstrate that justice for crimes committed by incumbent leaders in Africa is achieved mainly when the leader loses political support and patronage.

Notably, the incumbent President of Chad, General Idriss Déby Itno, deposed Habré in 1990. Since 1990 Habré maintained a low profile in Senegal where he went into exile, while Déby fortified political power in Chad. When Habré was to be tried, the Chadian government provided support for the prosecution. In 2002 the government permitted the trial of Habré outside Chad.<sup>61</sup> Chad made the largest donation of US \$3 743 000 out of the approximately \$11 million budgeted for the trial. Ironically, there was no consideration of the role of President Déby Itno who 'was commander-in-chief of Habré's forces during the period known as 'Black September' in 1984 when a murderous wave of repression was unleashed to bring Southern Chad back into the fold of the central government'.<sup>62</sup> Even though the Court was free to bring charges against Déby it did not do so.<sup>63</sup>

Furthermore, Habré had already lost the support of the US and France that supported him throughout his abusive regime in the 1980s. With the support of the US, Habré had seized power in 1982 from Goukouni Oueddei, a former rebel comrade who had won elections but was considered to be pro-Libya – at a time when Libya was considered a threat to the West. The US and France supported Habré with military aid, logistical support and information. In two separate reports,<sup>64</sup> HRW revealed how the US and France had provided support to Habré throughout his rule and ignored his

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61 The Chadian government had also sentenced Habré to death *in absentia* for allegedly planning to overthrow the government in a 2008 rebellion, but Senegal did not repatriate Habré due to requests by the UN.

62 Chad: Q & A (n 60).

63 In addition, the chief prosecutors ordered the extradition of about five key officials of Habré's regime to Senegal but the Chadian government refused to extradite them.

64 Human Rights Watch (HRW) 'Enabling a dictator' (2016) <https://www.hrw.org/report/2016/06/28/enabling-dictator/united-states-and-chads-hissene-Habré-1982-1990> (accessed 25 August 2016); HRW 'US, France backed convicted Chad dictator' (2016) <https://www.hrw.org/news/2016/06/28/us-france-backed-convicted-chad-dictator> (accessed 26 August 2016).

leadership abuses and human rights violations in Chad. When the tide turned against Habré, the US and France became supporters of the trial of the dictator that they had enabled. The US government contributed US \$1 million and France contributed €300 000 towards the Extraordinary Court's budget.<sup>65</sup> This scenario shows that the fact that some cases against former leaders in Africa are tried is dependent on the political disfavour of the elite.<sup>66</sup>

In the case of South Sudan, even though IGAD has played a crucial role in the resolution of the dispute in South Sudan, a survey of the leaders in the East African region shows some disapproval to questions of international justice. Actors in the region, such as Kenya's President Uhuru and Vice-President Ruto, are strong advocates against international criminal justice for leaders and senior government officials having themselves faced attempted trials by the ICC.<sup>67</sup> Al Bashir of Sudan has been in power since 1989 with no end in sight to his leadership. The nature of politics in Ethiopia, Uganda, Eritrea and Djibouti also shows that leadership accountability and limits to leadership terms are not up for contestation. Ugandan President Yoweri Museveni has been in power for 35 years and reportedly has sent troops to back the South Sudanese government during the civil war.<sup>68</sup> In this regard it is 'not surprising, South Sudanese parties were highly attuned to these regional dynamics, and sought political advantage at each juncture, by soliciting support from neighbouring patrons'.<sup>69</sup>

The sentencing of Habré could be regarded merely as indicative of the fact that the wheels of justice turn slowly but surely. However, the victims of Habré's cruelty had to wait for over 17 years for the ex-Chadian leader to lose political support before securing justice. As argued earlier, the uncertainty about some leaders responsible for rights abuses losing power complicates the question of justice on the continent and in South Sudan, in particular. Kur notes that 'the Hybrid Court is a step in the right direction. But for it to achieve its goals and deter the warlords from initiating another conflict, it must ensure that war criminals at the highest chain of leadership never escape justice'.<sup>70</sup>

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65 HRW (n 64).

66 It is also worth noting that at the time of the AU's resolve to permit the trial of Habré, Libya's Gaddafi was a prominent actor in the AU with enormous influence on the reform and initiatives of the AU. Markedly, at the time of Habré's leadership in the 1980s, Habré and Gaddafi were practically sworn enemies. It could be assumed that Gaddafi would be a staunch advocate for the trial of Habré.

67 Committee of Intelligence and Security Services of Africa (CISSA), 13th ordinary session <http://www.peaceau.org/uploads/final-5th-august-communicuy-.pdf> (accessed 5 September 2016).

68 'In South Sudan, a warring elite deaf to peace' *Aljazeera* 8 October 2014 <http://www.aljazeera.com/news/africa/2014/10/south-sudan-war-talks-kir-machar-famine-201410892734144547.html> (accessed 6 August 2016).

69 Booth (n 46).

70 Kur (n 31).

With the current stance of the AU and its Protocol for the African Court the victims of abuses in South Sudan most probably will have to wait for a time when the leaders are likely to lose political backing to enable the trial of those leaders who orchestrated with near impunity the ongoing war in South Sudan from 2013 to 2018. As such, the immunity clause contributes to the atmosphere of violence being perpetuated, in part, by the leaders as they know they will not stand trial until such time as they cede power. The AU has to shift from its immunity stance to a non-immunity principle to end the senseless violence and impunity in the region.

It is worth noting that key debates on the topic of immunity for sitting leaders reveal that while incumbent political actors are the main critics of the indictment of sitting heads of state and senior government officials, civil society prefers the indictment of every suspect, including sitting heads of state. These conflicting positions show the divide between African political leaders and civil society on matters of accountability. The immunity clause for incumbent leaders raises doubts over the AU's purported transition from the interests of a few state elites to the interests and rights of the African people. The immunity clause for leaders further negates article 4(h) of the AU Constitutive Act, which espouses the AU's non-indifference to human rights abuses in member states if suspected leaders remain leading figures in the continental body and are immune from investigation and trial.

## 5 Conclusion

The article examined the AU's stance on immunity and its impact on conflict resolution in Africa. The article observes that the AU's immunity stance for sitting leaders undermines the deterrence and conflict resolution capacities of the African Court, as well as *ad hoc* courts such as the HCSS. Because of the immunity principle, the AU-led HCSS – despite being developed without any immunity provisions – will have difficulty in upholding efforts to prosecute the warring leaders who instigated, organised and commanded the war crimes and crimes against humanity in South Sudan. This outcome is because the peace deal allows the warring leaders to hold onto their leadership positions. Based on the AU's immunity stance, these leaders could evade justice.

In view of the ongoing skirmishes, the warring leaders are rarely deterred from perpetuating the historical culture of impunity in the region because they gained power through violence which bought them a place in the peace process. The impunity of the warring factions is evident from the defiance of the numerous ceasefire deals that were mediated by IGAD between 2013 and 2018. The HCSS would be likely to focus on prosecuting scapegoats of the warring camps as token attempt at justice in the region.

The AU's immunity clause further engenders a 'sit-tight-in' office syndrome. In the context of the AU's effort to prevent and resolve conflicts, the 'unintended' consequences of immunity for incumbent leaders entails that some leaders that are notorious for human rights abuses could be tempted to remain in power to avoid a trial, thereby engendering more grievances on the continent. In South Sudan the immunity clause for sitting leaders provides an opportunity for a calculated move by the South Sudanese leaders to pursue efforts to remain firmly in power to avoid any probe once they leave political office.

Accordingly, the case of former Chadian President Hissène Habré shows that justice – in terms of crimes committed by incumbent leaders – is only possible when a leader loses political support. However, the regional dynamics in Africa, particularly in IGAD, shows that the incumbent leaders are not willing to leave office, and the question of prolonged leadership is rarely debated. Hence, victims of war crimes in South Sudan will be forced to wait for the time when the leaders lose political support to attain justice if there is any evidence left to work on. The immunity clause thus inhibits and delays the imperative of justice and durable conflict resolution and reconciliation.

If the African Court as well as AU-initiated justice institutions such as the HCSS are to be effective in conflict resolution, the AU needs to make a strategic shift from the immunity clause to ensure the timely indictment of all accused persons regardless of position. This change would also play a key role not only in deterring others from pursuing violence but in ensuring that aggrieved persons do not resort to violence as a way of seeking justice. The resolution of the conflict in South Sudan is highly contingent upon the ability of African mediators to flag the capacity of the HCSS to hold accountable warring leaders for war crimes and crimes against humanity, among other efforts.

The removal of the immunity clause from the Amendment Protocol, and the willingness of leaders to be examined by an independent court, could enable regimes in Africa to gain more legitimacy and support from the population. Until then, other international institutions, such as the ICC and UN-mandated courts, remain a credible last resort for victims seeking justice in Africa.

## The domestic impact of the decisions of the East African Court of Justice

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### Summary

*The East African Court of Justice is the judicial arm of the East African Community and is vested with the primary mandate of interpreting and applying the Treaty for the Establishment of the East African Community. The EAC Treaty does not contain a catalogue of human rights, neither does it constitute the EACJ as a human rights court with the power to adjudicate human rights cases. Nonetheless, the EACJ over time has handed down decisions that have had the effect of safeguarding and promoting human rights within the Community. It is in this context that the article explores the influence of the EACJ's decisions within the legal frameworks of the respective member states, beyond mere compliance by the member states with the orders of the Court. Inclusive in this is an analysis of how these decisions have influenced the development, interpretation or application of law and policy, and the practices of state and non-state actors in the domestic sphere of the East African Community member states. The overall finding of the article is that there are clear linkages, albeit limited in scale and spread, between the decisions of the EACJ and national laws, policies and practices of national actors, which extend beyond the domestic implementation of the Court's decisions and which need to be further investigated and upscaled in order to harness their potential benefits for the EAC integration process.*

**Key words:** *East African Court of Justice; human rights; domestic impact; EAC Treaty*

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# 1 Introduction

The integration objectives of the East African Community (EAC) as set out in its constitutive treaty include enhancing cooperation among member states in the political, economic, social and cultural fields, and security, legal and judicial affairs,<sup>1</sup> through the creation of a Customs Union, a Common Market, a Monetary Union and, ultimately, a Political Federation.<sup>2</sup>

The 1999 Treaty for the Establishment of the East African Community (EAC Treaty) made a deliberate effort to hinge the achievement of these integration objectives on a set of principles that include adherence to principles of good governance, democracy and respect for human rights. Indeed, in articles 6(d) and 7(2) of the EAC Treaty, the EAC member states agree to a set of fundamental and operational principles such as good governance, democracy and the rule of law, 'gender equality as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights (ACHPR)'.<sup>3</sup> So significant are these principles that the East African Court of Justice (EACJ) has held that they are core and indispensable to the success of the integration agenda, and that their inclusion in the EAC Treaty denotes a serious commitment by member states to the promotion and protection of human rights in line with the Treaty imperatives.<sup>4</sup>

This article adopts the position that these commitments by the EAC member states can be of tangible value to their citizens and residents only if they translate into enhanced respect for and promotion of human rights in the domestic realm. For this to happen, the EAC member states must institute deliberate measures at the sub-regional level to promote and protect human rights, and these measures in

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1 See art 5(2) of the Treaty for the Establishment of the East African Community, signed in Arusha, Tanzania, on 30 November 1999; entered into force 7 July 2000.

2 In the theory of economic integration, a customs union is characterised by the elimination of tariffs between participating states, and a common external tariff for goods exported from the union. The EAC Customs Union Protocol was adopted by the Summit on 2 March 2004 and entered into force on 1 January 2005. A common market adds the free movement of factors of production to the customs union. In this regard, the Common Market Protocol was concluded in 2010. Its implementation will make possible the free movement of goods and services and factors of production (capital and labour) across the borders of the member states. The EAC member states have also concluded the East African Monetary Union Protocol, which was adopted and signed by the member states on 30 November 2013. It entered into force on 1 July 2014.

3 See art 6(d) of the EAC Treaty. Other provisions relating to human rights in the EAC framework are found in art 3(3)(b), arts 5(1) and 5(3)(f), arts 120, 123 and 124 as well as arts 146 and 147 of the EAC Treaty.

4 See *Samuel Mukira Mohochi v The Attorney-General of The Republic of Uganda* EACJ Reference 5 of 2011 para 36, as well as *Plaxeda Rugumba v Secretary-General of the EAC & Attorney General of Rwanda*, Ref 8 of 2010, EACJ First Instance Division, para 37.



turn should radiate from the sub-regional to the domestic sphere and impact their respective human rights frameworks for the benefit of their citizens and residents.<sup>5</sup>

The article pursues this proposition by evaluating the impact of the EACJ's decisions on human rights complaints litigated before it on the member states' respective national human rights frameworks. The understanding of 'impact' adopted for the purposes of the article is guided by several scholarly works,<sup>6</sup> but relies heavily on the writings of Okafor, who adopts and advocates a broader view, which evaluates impact beyond the traditional notions of state compliance with the decisions of monitoring regimes.<sup>7</sup> Therefore, for the purposes of the article impact is understood to go beyond mere state compliance with the decisions of the EACJ and therefore will be used to denote the influence of the EACJ's judgments on domestic law and policy, as well as the actions of domestic actors leading to changes in human rights practices in EAC member states.

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- 5 The EAC has taken up both binding (hard law) and soft law measures in an attempt to adhere to the treaty's human rights imperatives. Binding measures in this context include provisions of the EAC Treaty, its Protocols and Annexes, Acts of the Community, Regulations, Directives and Decisions of the Council as well as the decisions of the EACJ. Soft law measures, on the other hand, generally refer to standards of conduct which, although not legally binding, still have some legal significance and effect. These include resolutions and declarations made by the EALA; Bills passed by the EALA but pending assent by the heads of state; and policies and strategies by EAC organs such as the Secretariat and the Council. For an in-depth conceptual discussion of soft law, see U Mörtz 'Soft law and new modes of EU governance: A democratic problem?' (2005) [http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/research%20groups/6/Papers\\_Soft%20Mode/Moerth.pdf](http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/research%20groups/6/Papers_Soft%20Mode/Moerth.pdf) (accessed 26 November 2016).
  - 6 Heyns & Viljoen define impact as 'any influence the treaties may have had in ensuring realisation of the norms they espouse in individual countries'. See CH Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (2002) 6. Writing on the extent of state compliance with the recommendations of the African Commission, Viljoen & Louw distinguish between 'direct impact' and 'indirect impact' of human rights treaties and law. They define 'direct impact' as immediately demonstrable results expressed, eg, by the implementation of a finding of a treaty-monitoring body. 'Indirect impact' in their view is defined as incremental and occurring over time. See F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101 *American Journal of International Law* 1. See also J Krommendijk *The domestic impact and effectiveness of the process of state reporting under UN human rights treaties in The Netherlands, New Zealand and Finland: Paper pushing or policy promoting?* (2014) 368-375. A recent study on the national impact of the international human rights monitoring mechanisms in Kenya assesses impact 'through the influence of the monitoring mechanisms' judgments, decisions, concluding observations and recommendations on national courts, executive action and policy making, law making, activities of non-state actors'. See generally F Kabata 'Impact of international human rights monitoring mechanisms in Kenya' unpublished LLD thesis, University of Pretoria, 2015.
  - 7 In his view, impact may be incremental in nature, through influencing the thinking processes and actions of key domestic actors including national courts, the national executive, policy-making and legislative processes and civil society activists. See OC Okafor *The African human rights system, activist forces and international institutions* (2007).

The choice of the EACJ as a candidate for this impact analysis is borne out by the fact that it is one of the African sub-regional courts that has been the theatre of substantial human rights litigation, notwithstanding the fact that it lacks express jurisdiction to hear and determine human rights complaints. Its creativity in claiming for itself a limited human rights jurisdiction has seen it hand down a number of progressive and binding decisions that over time have influenced the member states' national human rights frameworks.

The first part of the article delves into the EACJ as the sub-regional court and the custodian of the EAC Treaty, including its commitment to the promotion and protection of human rights. Part two of the article evaluates the national impact of selected EACJ decisions to showcase the extent to which the Court's judgments have influenced member states' respective national human rights frameworks. The article concludes with a reflection on the national impact of the Court's judgments and their influence on the domestic human rights discourse in the respective member states.

## 2 EACJ and its human rights competence

Established under article 9 of the EAC Treaty, the EACJ is the Community's judicial arm, whose core function is to ensure the adherence to law in the interpretation and application of the Treaty.<sup>8</sup> The Court's jurisdiction covers both contentious and non-contentious matters relating to the interpretation and application of the Treaty.<sup>9</sup> The Court may be seized of a matter through references by natural and juristic persons resident within the Community, EAC member states and the EAC Secretary-General.<sup>10</sup> The EAC Council may also seek advisory opinions from the Court under article 14 of the Treaty.

The EACJ does not have express jurisdiction to hear and determine human rights cases. Article 27(2) of the EAC Treaty suspends the Court's human rights jurisdiction until a protocol has been adopted that would extend its jurisdiction to include human rights cases. A protocol adopted in 2014 under article 27(2) of the EAC Treaty

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8 The EACJ is different in composition and jurisdiction from the defunct East African Court of Appeal which was a court of appeal from decisions of the national courts on both civil and criminal matters except constitutional matters and the offence of treason in Tanzania. See HR Nsekela 'Overview of the East African Court of Justice' paper for presentation during the sensitisation workshop on the role of the EACJ in the EAC integration, Imperial Royale Hotel, Kampala, Uganda, 1-2 November 2011, <http://www.eacj.org/docs/Overview-of-the-EACJ.pdf> (accessed 12 February 2017).

9 It is also empowered to determine disputes between the EAC and its employees with regard to their terms and conditions of employment and arbitrate disputes pursuant to an arbitration clause contained in a contract agreement which confers such jurisdiction on the Court. Detailed provisions on the mandate and functions of the Court are outlined in arts 23-47 of the EAC Treaty. See also <http://www.eacj.org/establishment.php> (accessed 21 June 2016).

10 See arts 28-32 of the EAC Treaty.

excluded human rights jurisdiction based on the argument that member states already have acceded to the African Charter on Human and Peoples' Rights (African Charter) and, therefore, any human rights cases emanating from the member states should be argued at the African Court on Human and Peoples' Rights (African Court).<sup>11</sup> Furthermore, member states have argued that they have sufficient national constitutional safeguards for the protection of human rights without the need for a sub-regional human rights court.<sup>12</sup>

Nonetheless, the EACJ through a mix of judicial activism and creative interpretation has claimed for itself limited human rights jurisdiction. The landmark case in this regard was *James Katabazi & 21 Others v the Secretary-General of the EAC & Another*, where the Court held that although it not yet had jurisdiction to deal with human rights issues, it had jurisdiction to interpret the Treaty even if the matters complained of included human rights violations.<sup>13</sup> Accordingly, the Court proceeded to 'interpret' and 'apply' articles 6(d), 7(2) and 8(1)(c) of the Treaty and made a finding that the facts of the case disclosed a violation of the principle of the rule of law and, consequently, a contravention of the EAC Treaty.

This position continues to be reaffirmed in subsequent decisions by the Court. For instance, in *Independent Medical Legal Unit v the Attorney-General of the Republic of Kenya & 4 Others*, the Court held that it had jurisdiction to hear and determine a petition against the Republic of Kenya relating to allegations that it had failed to take measures to prevent, investigate or punish those responsible for human rights violations allegedly carried out by its military between 2006 and 2008 in violation of several international instruments, including the EAC Treaty.<sup>14</sup> Furthermore, in *Democratic Party v Secretary-General of the East African Community & 4 Others*, the EACJ unequivocally held that it had jurisdiction to interpret provisions of the African Charter, thereby reaffirming its position as a normative source of law within the EAC's legal framework.<sup>15</sup>

11 See Report of the 13th Meeting of the Sectoral Council on Legal and Judicial Affairs Ref EAC/ SCLJA/13/2012 and Report of the 16th Meeting of the Sectoral Council on Legal and Judicial Affairs Ref EACJ/ SCLJA/16/2014.

12 See Question EALA/PQ/OA/3/34/2013 (by Hon Dora Byamukama). Report of the 4th Meeting of the 2nd Session of the East African Legislative Assembly, Kampala, Uganda, 19-31 January 2014. See also reports of the 13th and 16th Sectoral Council on Legal and Judicial Affairs (n 11). At the 15th Ordinary Summit of the EAC Heads of State, the Summit endorsed recommendations by the Council to expand the Court's jurisdiction to cover trade and investment matters, as well as matters associated with the East African Monetary Union. See para 16 of the Communiqué of the 15th Ordinary Summit of the EAC Heads of State, 30 November 2013.

13 *James Katabazi & 21 Others v the Secretary-General of the EAC & Another* EACJ Reference 1 of 2007.

14 EACJ Reference 3 of 2010. See also *Attorney-General of Rwanda v Plaxeda Rugumba* EACJ Appeal 1 of 2012.

15 *Democratic Party v Secretary-General of the East African Community, the Attorney-General of the Republic of Uganda, the Attorney-General of the Republic of Burundi,*

The EACJ is not an appellate court from the domestic jurisdiction. Rather, it fulfils a complementary function to the national courts.<sup>16</sup> The EAC Treaty creates a system whereby national courts have limited jurisdiction to determine disputes relating to the application of Community law, but at the same time recognising that this is subject to the supremacy of the EACJ in the interpretation of all law made within the EAC framework.<sup>17</sup> As such, decisions of the EACJ, being part of Community law, take precedence over decisions of national courts insofar as the interpretation and application of the EAC Treaty is concerned. This position is reinforced by articles 8(4) and 33(2) of the EAC Treaty and was reaffirmed by the EACJ in the case of *Attorney-General of the Republic of Uganda v Tom Kyahurwenda*.<sup>18</sup>

The EACJ lacks its own implementation framework and, therefore, relies on national legal systems to implement its decisions, and in particular those that require some form of action at the national level. Judgments that impose a pecuniary obligation on a person are executed as per the rules of civil procedure of the member state concerned, thereby enforcing the EACJ's judgments in the same manner as decisions of national courts.<sup>19</sup> Those that do not impose pecuniary obligations are implemented under the broad framework of article 38(3) of the EAC Treaty, which requires the Council of Ministers or the member states to take measures to expeditiously implement the Court's decisions, thus to a large extent hingeing compliance on the political goodwill of member states.

### 3 Evaluating the national impact of the human rights judgments of the EACJ

Since its inauguration in 2001 the EACJ through its adjudicative, interpretative and advisory jurisdiction has played a critical role as the plumb line for policy, legislation and administrative action taken by member states in relation to the implementation of their Treaty obligations. As will be demonstrated in the cases analysed in this section, the EACJ through its bold and innovative decisions has

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*the Attorney-General of the Republic of Rwanda and the Attorney-General of the Republic of Kenya*, EACJ Reference 2 of 2012 and EACJ Appeal 1 of 2014.

- 16 The wording of art 33 of the Treaty recognises, albeit obliquely, that national courts also have jurisdiction to determine disputes concerning the application of EAC law.
- 17 See the case of *The East African Law Society & 4 Others v The Attorney-General of Kenya & 3 Others* Reference 3 of 2007, where the Court observed that by the provisions of arts 23, 33(2) and 34 the Treaty established the principle of overall supremacy of the Court over the interpretation and application of the Treaty, to ensure harmony and certainty.
- 18 Case Stated 1 of 2014 arising from Miscellaneous Application 558 of 2012 in Civil Suit 298 of 2012 of the High Court of Uganda. The Court held *inter alia* that its decisions in the interpretation of the Treaty take precedence over decisions of the national courts and tribunals on similar matters.
- 19 See Rule 74 of the EACJ Rules of Procedure.

distinguished itself as a champion for the promotion and protection of human rights notwithstanding the lack of express human rights jurisdiction. These cases have been selected having taken cognisance, among others, of the human rights issues that were raised in the arguments before the Court, the decisions of the Court thereon and their contribution to the human rights discourse and jurisprudence both at the EAC level and within the respective member states' national legal framework.

### 3.1 *Anyang' Nyong'o case*<sup>20</sup>

#### 3.1.1 Arguments and findings of the Court

The core of this reference was article 50 of the EAC Treaty, which provides that the National Assembly of each member state shall elect nine members to the East African Legislative Assembly (EALA) in accordance with such procedures as it may determine. It also stipulates that the elected members, as far as is feasible, shall be representative of specified groups, and sets out the qualifications for election.

Pursuant to this provision, the Kenya National Assembly enacted the Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001 (2001 Election Rules). The first nine members of the EALA from Kenya, whose terms expired on 29 November 2006, were elected under those rules. A dispute arose at the conclusion of the election of Kenya's representatives to the second Assembly in 2006, leading to the reference by the applicants to the EACJ claiming that the process of nomination and election adopted by the National Assembly of Kenya had been contrary to article 50 of the EAC Treaty in so far as no 'election' was held nor any debate allowed in Parliament on the matter.

Furthermore, they contended that the 2001 Election Rules did not allow for direct election of nominees to the EALA by citizens or residents of Kenya or their elected representatives and, therefore, were null and void for being contrary to the letter and spirit of the EAC Treaty. In addition to the reference, the applicants successfully made an interlocutory application for injunctive orders barring the swearing-in of the Kenyan nominees pending the final determination of the reference.

The respondents for their part argued that only the High Court of Kenya had the jurisdiction to determine questions of legality of elections conducted in Kenya, and that an assumption of jurisdiction thereon by the EACJ would be an usurpation of the national court's functions. Furthermore, the government of Kenya contended that

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20 *Peter Anyang' Nyong'o & 10 Others v the Attorney-General of the Republic of Kenya & 5 Others* EACJ Reference 1 of 2006 and EACJ Appeal 1 of 2009.

only the Attorney-General of Kenya could file a suit in the public interest, hence the applicants had no *locus standi* before the Court.

The Court in its final decision held that the 2001 Election Rules did not provide for a voting procedure for choosing or selecting the representatives to the EALA and were thus inconsistent with article 50 of the EAC Treaty.

The reasoning of the Court was grounded on the fact that the Rules failed to provide for actual parliamentary debate and approval of party nominees to the EALA and, thus, the ensuing process did not amount to an 'election' as contemplated by the EAC Treaty. Thus, Kenya had violated the provisions of article 50 of the EAC Treaty by holding a 'fictitious election in lieu of a real election'.<sup>21</sup> The Rules merely turned the national assembly into a rubber-stamping entity, approving the names of nominees submitted to it without any inquiry into their suitability for the position.<sup>22</sup>

On the question of *locus standi*, the EACJ held that article 30 of the EAC Treaty provided sufficient *locus* to the applicants to found a cause of action, and that there was no requirement of exhaustion of local remedies by applicants prior to instituting references before it.<sup>23</sup>

### 3.1.2 Influence on national laws, policies and actors

The immediate effect of the decision was that, since the Kenyan nominees to the EALA could not validly take office, the EALA could not conduct its business as it was not fully constituted as required by the EAC Treaty. Consequently, the Kenyan Parliament on 23 May 2007 passed fresh nomination rules in the form of the Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2007. These Rules set out an elaborate procedure for election of Kenya's EALA representatives taking into consideration the concerns raised by the EACJ in its judgment in the *Anyang' Nyong'o* case. According to these Rules, Parliament must debate and approve the nominees for the position of EALA members. Fresh 'elections' of Kenya's nominees were therefore conducted under these new Rules.

From a human rights perspective, the outcome of compliance by Kenya was legal reform in the nature of development of a more representative and more democratic framework for the election of members of the EALA from Kenya consistent with the EAC Treaty requirements, hence giving effect, among others, to the right to

21 See para 43 of the decision.

22 This was not only one of the cases in which the Court clearly showed its capacity to 'bite', but was also the first case before the EACJ in which the primacy of community law over domestic legal provisions in accordance with art 8 of the EAC Treaty was tested and upheld by the Court. Notably, the EACJ in its decision made reference to EU case law which established the primacy of EU law over domestic law; *Flaminio Costa v ENEL*, Case 6/64 ECR 585 and *Van Gend en Loos v Nederlandse Administratie der Belastingen*, ECJ Case 26/62 ECR 1.

23 See generally paras 17-20 of the decision.

political participation and effective representation in the regional parliament.

However, going beyond the compliance by Kenyan authorities in passing new election rules, the decision has had a considerable influence across the member states, as is demonstrated below.

Most notably, the EACJ's decision in this case had a spill-over effect, reverberating beyond Kenya's borders and influencing the filing of similar cases at the EACJ, challenging elections to the EALA by litigants in Uganda and Tanzania respectively. Two cases, *Democratic Party and Mukasa Mbidde v Secretary-General of the East African Community and the Attorney-General of the Republic of Uganda* and *Mtikila v Attorney-General of Tanzania & Others*,<sup>24</sup> were instituted in the wake of this decision, and similarly resulted in changes to domestic laws relating to the election of members of the EALA from these member states. To that extent, therefore, it confidently can be concluded that the decision not only influenced private citizens in the two other member states to pursue similar claims before the EACJ, but also contributed to legal reform in their respective jurisdictions, thereby enhancing the respect for democracy and the right to political participation.

Further evidence of the national impact of this decision is found in its use as legal precedent in litigation before national courts and, most notably, in human rights cases. A significant instance in this regard was the reliance on the *Anyang' Nyong'o* decision by the Ugandan Constitutional Court in *Jacob Oulanyah v Attorney-General*,<sup>25</sup> in which the petitioner argued that the 2006 electoral rules of the National Assembly of Uganda were inconsistent with the Constitution of Uganda to the extent that independent candidates were denied the right to be elected to the EALA. The Constitutional Court found that the rules not only were inconsistent with the Constitution but also with article 50 of the EAC Treaty. It is worth noting that this was the first instance in which a national court in a member state made reference to a decision of the EACJ in its judgment, thus signifying the legal value attached to EACJ's decisions by national courts.

The *Anyang' Nyong'o* case has been relied on in subsequent cases before the Ugandan High Court, notably in *Akidi Margaret v Adong Lilly and the Electoral Commission*<sup>26</sup> as well as in *Toolit Simon Akesha v Oulanyah Jacob L'Okori and Electoral Commission*,<sup>27</sup> both of which were election-related cases which hinged on the promotion of a transparent and representative elections framework. Save for Uganda,

24 *Democratic Party and Mukasa Mbidde v The Secretary-General of the East African Community and the Attorney-General of the Republic of Uganda* EACJ Reference 6 of 2011, First Instance Division; and *Mtikila v Attorney-General of Tanzania & Others* EACJ Reference 1 of 2007.

25 Constitutional Petition 28 of 2006.

26 Election Petition 0004 of 2011 (unreported).

27 High Court Election Petition 001 of 2011 (unreported).

this research, however, did not find evidence of the case being used as precedent in the national courts of the other member states.

Notwithstanding its positive influence as outlined above, the *Anyang' Nyong'o* case precipitated unprecedented negative ramifications in the overall legal, human rights and governance architecture both sub-regionally and in the respective EAC member states. This was borne out by the EACJ's decision in an interlocutory application by the applicants in which it issued injunctive orders barring the swearing in of Kenya's EALA nominees.<sup>28</sup> In a campaign spearheaded by the Kenyan government, the EAC Summit of Heads of State and the EAC Council of Ministers pushed through a raft of amendments to the EAC Treaty, which substantially altered the EACJ's structure and jurisdiction.<sup>29</sup> Consequently, the Court was split into a First Instance Division and an Appellate Division; new grounds for the removal of judges were introduced which allowed suspension on allegations of misconduct in the countries of origin; and a 60-day time limit was set for instituting references before the Court challenging violations of the Treaty. Furthermore, the Court's jurisdiction was limited with the inclusion of a provision to the effect that it had no power to review cases for which 'jurisdiction is conferred by the Treaty on organs of Partner States'.<sup>30</sup>

The outcomes of the political backlash and the amendments to the EAC Treaty had a negative impact on the work of the EACJ and on the human rights discourse in the sub-region, which then precipitated a negative ripple effect on the realisation of human rights in the respective national spheres. For instance, the introduction of a 60-day time limit within which to file cases before the EACJ has effectively blocked access to justice for individuals and communities who would wish to have their cases ventilated before the EACJ. It also denied the Court a chance to pronounce itself on fundamental issues of human rights and governance, which would enrich its jurisprudence. Three cases are instructive in this regard. As a result of the 60-day rule, the EACJ in *Attorney-General of Kenya v Independent Medical Legal Unit*,<sup>31</sup> *Omar Awadh & 6 Others v Attorney-General of the Republic of Uganda*<sup>32</sup> as well as *Mbugua Mureithi v The Attorney-General of the Republic of Uganda*<sup>33</sup> held that it could not determine the references on their merits as they had been filed outside the 60-day time limit. These cases raised substantial questions with regard to the human

28 KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) 27 *European Journal of International Law* 293.

29 For a detailed account and analysis of the backlash arising from the EACJ's decision in the *Anyang' Nyong'o* case, see J Gathii 'Mission creep or a search for relevance: The East African Court of Justice's human rights strategy' (2014) 24 *Duke Journal of Comparative and International Law* 249.

30 See arts 26(1), 26(2), 27(1) & 30(2) of the EAC Treaty.

31 Appeal 1 of 2011, Judgment of 15 March 2012.

32 EACJ Ref 4 of 2011, First Instance Division.

33 EACJ Reference 11 of 2011, First Instance Division.



rights obligations of national governments in the context of the maintenance of national security, including the fight against terrorism. The Court's pronouncements on these and other related questions would have greatly enhanced the EACJ's jurisprudence in addition to providing guidance to member states on their obligations under the EAC Treaty. This negative impact can be traced directly to the decision of the EACJ in the *Anyang' Nyong'o* case, albeit at the interlocutory stage.

Notwithstanding the negative effects from the backlash from the EAC's political organs, a silver lining that arose from the events of the *Anyang' Nyong'o* case was the galvanising of various non-state actors including the East African Law Society, legal scholars, Kenyan legislators and non-governmental organisations (NGOs) around the EACJ to shield it from the negative political fallout.<sup>34</sup> This show of solidarity around the EACJ at one of its most vulnerable points in recent history resulted in the creation of networks that have been sustained and that have played a critical role in litigating subsequent human rights cases before the EACJ.<sup>35</sup>

### 3.2 *Katabazi* case<sup>36</sup>

#### 3.2.1 Arguments and findings

This was one of the earliest cases litigated before the EACJ and which shaped the course of human rights litigation at the Court. The applicants in this case had been charged with treason before a Ugandan court in 2004 and remanded in custody. Fourteen of them subsequently applied for and were granted bail by the Ugandan High Court on 16 November 2006, whereupon the High Court was surrounded by security personnel who interfered with the preparation of bail documents, and the 14 applicants were rearrested and taken into custody. On 24 November 2006 all the applicants were brought before a military General Court Martial and charged with unlawful possession of firearms and terrorism and remanded in prison. The Uganda Law Society successfully challenged before the Constitutional Court the interference of the court process by the security agents and the constitutionality of simultaneously conducting prosecutions in civilian and military courts. The Ugandan government ignored the Constitutional Court's decision and continued to remand the applicants in custody. They therefore filed the reference before the EACJ with prayers for a declaration *inter alia* that the acts of the Ugandan government were an infringement of articles 7(2), 8(1)(c) and 6 of the EAC Treaty.

In finding for the applicants, the Court observed that 'the intervention by the armed security agents of Uganda to prevent the

34 See Alter, Gathii & Helfer (n 28).

35 See Gathii (n 29) 271.

36 *Katabazi* (n 13).

execution of a lawful court order violated the principle of the rule of law and consequently contravened the Treaty'.<sup>37</sup> Furthermore, the Court in this case creatively and authoritatively claimed for itself a limited human rights jurisdiction by holding that although it did not have express jurisdiction to deal with human rights complaints, it nonetheless had jurisdiction to interpret the treaty even if the matters complained of included human rights violations.

### 3.2.2 Influence on national laws, policies and actors

Respect for the rule of law, including the guarantees of a fair trial, is a fundamental pillar in the promotion and protection of human rights. Although this decision did not result in direct legal reform, its effect within the national realm was to facilitate an atmosphere in which courts are able to dispense justice in an impartial and independent manner without fear of any reprisals from security personnel. This conclusion is borne out of the fact that not only were the persons in question subsequently released from unlawful custody, but also that since there have been no similar instances of unlawful intimidation of the judiciary by the military.<sup>38</sup> This is evidenced, for instance, by the circumstances surrounding the arrest and arraignment of Dr Kizza Besigye in 2016 on charges of terrorism and treason, which were similar to those against the applicants in the *Katabazi* case. The response by the Ugandan authorities in the case of Dr Besigye was markedly different in that there was no interference with the judicial process upon his release on bail in July 2016.<sup>39</sup> Furthermore, in the aftermath of the Kasese crisis in Uganda in November 2016, which culminated in the arrest of Ruwenzururu King Charles Wesley Mumbere and approximately 150 members of his royal guard on a raft of charges including terrorism and murder, several suspects have been released on bail by the Ugandan High Court with no interference by security agencies.<sup>40</sup> Based on the foregoing, whereas there is no direct evidence to this effect, it is plausible to conclude that the restraint by the Ugandan authorities in part may be attributed to the outcome in the *Katabazi* case.

A clearer instance of the decision's national influence has been the use of this case as authority by litigants and the High Court of Uganda. In *Kamuruli Jeremiah Birungi & 2 Others v Attorney-General of Uganda and the Secretary-General of the EAC*,<sup>41</sup> the High Court referred

37 *Katabazi* para 23.

38 See interview with Justice Isaac Lenaola, Judge of the Supreme Court of Kenya and Principle Judge of the East African Court of Justice, 16 December 2014, Nairobi, Kenya (notes on file with author).

39 'Besigye released on bail' *Daily Monitor* <http://mobile.monitor.co.ug/News/Besigye-released-on-bail/2466686-3290918-format-xhtml-ppml77z/index.html> (accessed 10 November 2016).

40 'Mumbere granted bail but restricted to Kampala, Wakiso' *The Observer* <https://observer.ug/news/headlines/50771-mumbere-granted-bail-but-restricted-to-kampala-wakiso> (accessed 10 January 2018).

41 National Assembly Election Petition 2 of 2012 (unreported).

to the *Katabazi* decision to clarify the Secretary-General's responsibilities under the EAC Treaty. Notably, whereas the Court did not rely on the substantive decision of the EACJ on the facts of the *Katabazi* case, it nonetheless made reference to the other aspects of the Court's reasoning and, in this case, to determine whether the Secretary-General of the EAC was a proper party to the suit.

Similar to the *Anyang' Nyong'o* case, the *Katabazi* decision has reverberated across all the member states and has been revolutionary in terms of shaping human rights litigation before the EACJ. It is through this decision that the EACJ staked its claim to human rights jurisdiction, albeit in a limited fashion. Accordingly, it has served as a point of reference by litigants in all subsequent references filed at the EACJ in which claims of human rights violations have been made. Thus, in terms of national impact, the *Katabazi* case has influenced individual litigants, lawyers and civil society organisations in the EAC member states by opening a crucial door for them to ventilate human rights issues before the sub-regional court.

### 3.3 *Rugumba case*<sup>42</sup>

#### 3.3.1 Arguments and findings

The applicant in this reference, Plaxeda Rugumba, approached the EACJ claiming that her brother, Seveline Rugigana Ngabo, a lieutenant-colonel in the Defence Force of the Republic of Rwanda, had been arrested on 20 August 2010 and held *incommunicado* by the Rwandan government. She alleged also that Lieutenant-Colonel Ngabo had not been formally charged before any court of law and that his wife was not able successfully to file an application for *habeas corpus* as her attempts to follow up the detention of her husband had led to her being harassed into hiding by the Rwandan government.

It is on this basis that she sought a declaration by the Court that her brother's arrest and detention without trial was a breach of articles 6(d) and 7(2) of the EAC Treaty which demand that member states shall govern their populace on the principles of good governance and universally-accepted standards of human rights.

In defence, the respondent claimed that Lieutenant-Colonel Ngabo had been arrested on suspicion of having committed crimes against national security, and that the government had since regularised his detention and, as such, he was detained in a known military prison and was exercising his rights including visitation by his lawyers, family and friends. This, however, was subsequent to a decision of the Military High Court, which on 28 January 2011 ruled that his detention from the date of his arrest until arraignment in court was irregular and contravened the provisions of the Rwandan Code of Criminal Procedure.

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42 *Rugumba* (n 4).

In rendering its decision, the First Instance Division of the EACJ made a finding that the respondent had indeed violated the provisions of articles 6(d) and 7((2) of the EAC Treaty by holding the applicant's brother *incommunicado* for a period of five months. The Court in its judgment not only reaffirmed the *Katabazi* doctrine, but also proceeded to refer substantially to the provisions of article 6 of the African Charter which protects against unlawful detention. It further observed that 'the invocation of the provisions of the African Charter on Human and Peoples' Rights was not merely decorative of the Treaty but was meant to bind Partner States'.<sup>43</sup>

The respondent appealed the decision on grounds which included the fact that the EACJ had no jurisdiction to entertain the claim since it raised issues of violations of human rights.<sup>44</sup> In reaffirming its jurisdiction, the EACJ's Appeals Chamber acknowledged that although the Court as yet had no express human rights jurisdiction as envisaged under article 27(2), it did have jurisdiction to interpret and apply the treaty provisions. Given that the claim referred to articles 6(d) and 7(2) of the Treaty, it could not abdicate its interpretive jurisdiction merely on the basis that the claim included allegations of a violation of human rights. In its judgment the Court made substantial reference to the decision in *Katabazi* and the *IMLU* case, in which the Court clarified that it was not a human rights court adjudicating substantive claims of violations of specific rights, but that it was determining claims of breach of articles of the EAC Treaty.<sup>45</sup> The appellate court then proceeded to dismiss the appeal and upheld the decision of the First Instance Division.

### 3.3.2 Influence on national laws, policies and actors

It is arguable from the judgment of the First Instance Division that the case contributed to the promotion of human rights and respect for the rule of law by the Rwandan government, albeit in an oblique manner. Based on the facts, Lieutenant-Colonel Ngabo was arrested and detained *incommunicado* on 20 August 2010. His older sister filed the reference before the EACJ on 8 November 2010. It is only after this reference had been filed that the domestic wheels of justice began to turn in Rwanda with the subject being presented to the Military High Court on 21 January 2011. The Military High Court made its decision within a week and on 28 January 2011 declared his detention unlawful and thereafter proceeded to issue a valid preventive detention order as stipulated under the Rwandan Code of Criminal Procedure. Indeed, the Appellate Division of the EACJ acknowledged the impact that the filing of the reference had on the

43 See para 37 of the First Instance decision.

44 *Attorney-General of the Republic of Rwanda v Plaxeda Rugumba* EACJ Appeal 1 of 2012.

45 *Attorney-General of Kenya v Independent Medical Legal Unit* (n 31) as well as *Katabazi* (n 13).

national systems when it observed that 'it was agreed by both parties before the court below that upon the reference being filed; the Republic of Rwanda produced the subject before the Military High Court'.<sup>46</sup> In a departure from the other cases analysed in this article, it is noted that it was not the decision of the Court that spurred the government to cease the violation complained of, but rather the filing of the reference before the EACJ. This approach by a member state was also apparent in the case of *Democratic Party & Another v the Attorney-General of the Republic of Uganda*, where the authorities proceeded with haste to pass national legislation upon the filing of the reference at the EACJ. Thus, a unique form of influence is seen in these two instances, which may seem to be a departure from the overall object of this article, but which is significant for purposes of human rights litigation in general – that at times the filing of suits may influence states to cease ongoing violations or take positive steps to comply with their human rights obligations, thereby safeguarding human rights in the long run.<sup>47</sup>

### 3.4 *Burundi Press Law case*<sup>48</sup>

#### 3.4.1 Arguments and findings

This reference concerns the Burundi Press Law 1/11 of 4 June 2013, amending Law 1/025 of 27 November 2003 regulating the press in Burundi.<sup>49</sup> The applicant's contention was that the Press Law as enacted unjustifiably restricted the freedom of the press and the right to freedom of expression which form a cornerstone of democracy, the rule of law, accountability, transparency and good governance. As such, these restrictions contravened Burundi's obligations under articles 6(d) and 7(2) of the Treaty. The applicant requested from the Court declaratory relief to the effect that the Press Law was in violation of the right to press freedom and the right to freedom of expression, and consequently was inconsistent with Burundi's treaty obligations as set out in articles 6(d) and 7(2) of the Treaty. In their view a free press would result in an informed electorate who would then be able to hold their leaders to account and thus uphold the principles of good governance and democracy.

46 See of the decision of the Appellate Division (n 44) para 33.

47 Furthermore, it may be concluded that the decision has had a deterrent effect within the national framework. The inference here is that the reputational risks that come with a public litigation process at the EACJ which for EAC member states would amount to 'airing dirty linen in public' serves to deter state agents from engaging in acts that would result in references being filed at the EACJ. See also interview with Justice Isaac Lenaola (n 38). This of course does not rule out the possibility that member states' agents have resorted to other methods that are less public and less discoverable but which in essence still amount to human rights violations.

48 *Burundian Journalists Union v Attorney-General of the Republic of Burundi* EACJ Reference 4 of 2014, First Instance Division.

49 See generally para 8 of the decision.

The applicant also called for the Court to order the Republic of Burundi either to repeal the law or amend the offending provisions to bring them into compliance with the Treaty.

Specific provisions of the Press Law pointed out by the claimants as inconsistent with the Treaty included those relating to compulsory accreditation of all journalists; restrictions as to what may be published by the media; requirements for journalists to disclose confidential sources of information; the regulation of print and web media; provisions for a prior censorship regime for films proposed to be directed in Burundi; a right of reply and correction; and fines and penalties.

The government, on the other hand, maintained that the Press Law was consistent with the EAC Treaty and noted that the Parliament of Burundi had exercised its legislative mandate as the representative of the people and its decisions could not be replaced by the wishes of any other organisation or person. Furthermore, the respondent contended that in any event, the Press Law had been challenged in the Constitutional Court of Burundi and since its decision was yet to be delivered, the reference was premature and misconceived as the latter Court was the only court with jurisdiction to interpret its legality.

In its decision the EACJ observed that democracy of necessity must include adherence to press freedom and that free press goes hand-in-hand with the principles of accountability and transparency which are all entrenched in articles 6(d) and 7(2). Accordingly, the Court declared articles 19(b), (g), (i) and part of (j) of the Burundian Press Law in violation of the principles enshrined in articles 6(d) and 7(2) of the Treaty to the extent that they unreasonably restrict the dissemination of information on the stability of the currency; offensive articles or reports regarding public or private persons; information that may harm the credit of the state and the national economy; diplomacy; scientific research; and reports of commissions of inquiry by the state.

It further declared article 20 of the Press Law inconsistent with articles 6(d) and 7(2) of the EAC Treaty to the extent that it required journalists to reveal their sources of information before the competent authorities in situations where the information relates to offences against state security, public order, state defence secrets and against the moral and physical integrity of one or more persons. As such, the Court required the Republic of Burundi in accordance with article 38(3) of the Treaty to take measures, without delay, to implement the judgment within its internal legal mechanisms.

### **3.4.2 Influence on national laws, policies and actors**

The immediate impact of this decision was that Burundi's Parliament reviewed the Press Law and proposed new amendments thereto which would remove the contentious provisions in line with the decision of the EACJ. These amendments were debated and approved

by the Senate. A new Press Law 1/15 was passed and promulgated on 9 May 2015. However, four days later this was followed by an attack with heavy weapons on four prominent private radio stations which completely destroyed their physical infrastructure and rendered them inoperable. This attack was attributed to pro-establishment elements, but the government denied any such involvement. Furthermore, a raft of legislation deemed as repressive was also put in place to curtail freedom of assembly and freedom of information and, in particular, with reference to the regulation of social media and internet use. Thus, whereas on the one hand there was compliance with the decision of the EACJ, the overall human rights environment in Burundi took a turn for the worse following the decision. Going beyond mere compliance with and implementation of the Court's decision, it may be inferred that this decision did not have much positive traction in the member state to which it was directed. Indeed, the period following the decision has witnessed heightened attacks against freedom of the press in Burundi, which unfortunately has been in a state of national turmoil following the widespread unrest and aborted *coup* attempt in 2015. As such, given the unique circumstances in Burundi at the time of writing this article, it becomes difficult to isolate and track, beyond mere compliance with this specific decision on human rights laws, the influence of policies or state practice in such an environment.

### 3.5 *Rufyikiri case*<sup>50</sup>

#### 3.5.1 Arguments and findings

This was another reference filed against the Republic of Burundi by the East African Law Society on behalf of Mr Isidore Rufyikiri, who at the material time was the President of the Burundi Bar Association as well as the Burundi Centre for Arbitration and Conciliation (CEBAC). In early 2013 Mr Rufyikiri was charged and prosecuted in relation to allegations of corruption as the President of CEBAC. On 24 July 2013 he wrote a letter to the governor of Bubanza Province in Burundi with reference to one of his clients, which culminated in a complaint by the Prosecutor-General of the Bar Council alleging that the contents of the letter were defamatory and injurious. The Prosecutor requested the Bar Council to institute disciplinary proceedings against Mr Rufyikiri.

On 29 October 2013 Mr Rufyikiri held a press conference in which he is alleged to have made statements against state security and public peace. On 30 October 2013 the Prosecutor-General filed a second complaint against him, asking that he be disbarred from the roll of advocates based on the statements made at the press conference.

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50 *East African Law Society v Attorney-General of Burundi and the Secretary-General of the East African Community EACJ* Reference 1 of 2014, First Instance Division.

On 17 December 2013 the Prosecutor-General moved to the Court of Appeal and obtained an order dated 24 January 2014 disbarring Mr Rufyikiri from the roll of advocates. He applied for a review of the decision in March 2014, but the Court of Appeal reaffirmed its decision to disbar him. Meanwhile, the Prosecutor-General of the Anti-Corruption Court had also placed a travel ban on him, forbidding him from leaving Burundi.

Mr Rufyikiri approached the East Africa Law Society (EALS) to pursue a reference at the EACJ on his behalf, complaining that his prosecution for corruption, his disbarment from the roll of advocates as well as the travel ban imposed on him were all unprocedural and in breach of the rule of law, good governance and freedom of movement, as stipulated in articles 6(d) and 7(2) of the EAC Treaty.

The EALS also sued the Secretary-General of the EAC for alleged breach of his duty to monitor the observance by the Republic of Burundi of the EAC Treaty obligations pursuant to the provisions of article 71(1)(d) of the EAC Treaty.

The applicant sought several reliefs including a declaration that Mr Rufyikiri's prosecution, disbarment and travel restriction were a violation of the EAC Treaty; a declaration that the EAC Secretariat had breached its obligations under article 71 of the Treaty; and an order by the Court quashing his disbarment by the Court of Appeal and reinstating his name to the roll of advocates.

In its response, the government of Burundi maintained that the applicant had been barred from leaving the country as he wished to flee the country. It further argued that the applicant had been disbarred in accordance with the laws of Burundi on the grounds that he had violated his oath as an advocate by making statements that were prejudicial to state security and public peace.

The Secretary-General raised his defence by claiming that he was unaware of the matters complained of by the applicant, and therefore was not blameworthy for failure to discharge his duties under the Treaty. He further averred that as soon as he learnt of the issues raised by the applicant, he constituted a task force to investigate, among others, the alleged breaches of the EAC Treaty by Burundi, and the cause of increasing litigation at the EACJ emanating from Burundi.

On the allegations of malicious prosecution for corruption, the Court, upon examining Burundi's anti-corruption legislation and Penal Code, concluded that the relevant laws empowered the Prosecutor-General to initiate investigations and prosecutions against any person suspected of corruption and that, therefore, there was no violation of the EAC Treaty.

With reference to Mr Rufyikiri's disbarment, the Court examined the relevant provisions of the Burundi Advocates Act and concluded that the Prosecutor-General had moved to the Court of Appeal before the expiry of the statutory 60-day period within which the Bar Council was required to exercise its disciplinary processes over Mr Rufyikiri. As



such, the flawed procedure followed by the Prosecutor-General was a violation of due process and, therefore, inconsistent with articles 6(d) and 7(2) of the Treaty. Whereas the Court made a declaration that the failure of due process by the Court of Appeal was a Treaty violation, it declined to grant an order quashing and setting aside the Court of Appeal's decision to disbar Mr Rufyikiri, basing its decision on the fact that making such an order was outside its jurisdiction by virtue of the provision of article 27(1) of the Treaty.

With regard to the alleged failures by the Secretary-General, the Court noted his submissions that, prior to the institution of the reference, he had engaged with the Republic of Burundi and had formed a task force to investigate alleged breaches of the EAC Treaty and the causes of growing litigation at the EACJ emanating from Burundi. The Court also recorded the Secretary-General's report that he had not received any positive cooperation from Burundi with regard to the proposed investigations by the task force. The Court proceeded to order the Secretary-General to operationalise the task force to investigate the situation in Burundi, and further ordered the government of Burundi to take measures to implement its judgment including allowing the Secretary-General to conduct his investigative mission.

### 3.5.2 Influence on national laws, policies and actors

As has been discussed in the context of the *Press Law* case, this case reveals the difficult governance environment experienced by anti-establishment voices in Burundi.<sup>51</sup> A review of available information reveals that the task force created by the EAC Secretariat is yet to conduct its fact-finding visit to Burundi as ordered by the Court.<sup>52</sup> A follow-up communication from the East African Law Society has not elicited any feedback from the Secretary-General. From the foregoing and, taking into consideration the Secretary-General's veiled frustrations as may be deduced from their submissions in the case, it appears that not much headway has been made in terms of implementing the decision of the EACJ as envisaged. This may be attributed, on the one hand, to a lack of cooperation by Burundi with the EAC Secretariat in the discharge of its mandate under articles 29(1) and 71(1)(d) of the EAC Treaty<sup>53</sup> or, on the other hand, to reluctance on the part of the Secretary-General to engage with the Council and Summit in the case of an uncooperative member state. The overall result is that there has been no observable change in law or policy in Burundi which draws its origins to the decision of the EACJ

51 *Press Law Case* (n 48).

52 See letter from the Chairperson of the East African Law Society to the EAC Secretary-General regarding continuing breaches of human rights in Burundi, 22 September 2015 Re EALS/SG-EAC/5/2015. See also 2015 Annual Report of the East African Law Society, October 2015, [http://www.ealawsociety.org/images/publications/annual\\_report/annual\\_report\\_2015.pdf](http://www.ealawsociety.org/images/publications/annual_report/annual_report_2015.pdf) (accessed 10 May 2017).

53 See generally, para 27 of the *Rufyikiri* case (n 50).

in this case. A review of the EACJ case load shows that cases in which the government of Burundi is accused of human rights violations in the context of the EAC Treaty have escalated considerably and continue to mount, as observed by the EAC Secretary-General in arguments before the Court. Therefore, in this regard it may be concluded, taking into consideration the cases from Burundi referred to in this article, that political goodwill, in addition to a conducive democratic environment, are key ingredients for positive traction of EACJ decisions within the member states.

A notable observation in this case in terms of influence does not arise out of the decision itself, but rather out of the manner in which the litigation was conducted. This was one of the many cases that have been litigated by the EALS before the EACJ. However, it is one of the very few cases where the EALS has filed a reference before the EACJ on behalf of one of its members. In the *Anyang' Nyong'o* decision analysed earlier in this article, it was observed that one of the positive outcomes was the creation of sub-regional networks which have been exploited for, among other purposes, litigating human rights cases before the EACJ. As such, this case showcases the workings of the sub-regional advocacy and professional bodies in pursuance of respect for and promotion of good governance and human rights within the EAC.

#### 4 Reflections on the national impact of decisions of the EACJ

The EACJ as an organ of the Community has clearly distinguished itself in the realm of the promotion and protection of human rights. This is notwithstanding the fact that it is yet to be clothed with unfettered jurisdiction to adjudicate rights cases as provided for in article 27(2) of the EAC Treaty.

A review of the few cases analysed in the article reveals that going beyond the easily-observable compliance with the orders of the Court by the respective member states, one can decipher traces of influence that the Court's decisions have had on the human rights discourse within the EAC member states at various levels.

The study has revealed that the EACJ's decisions have influenced national judiciaries in member states in their determination of disputes at the national level. Although only documented in relation to Uganda, references to the *Anyang' Nyong'o* and *Katabazi* cases by the Constitutional Court in Uganda demonstrate the potential that the EACJ's decisions have in influencing the development and interpretation of national laws. Therein lies an untapped opportunity for the development of a common East African jurisprudence that benefits from decisions of both national and sub-regional jurisdictions.

A second layer of influence is found in the 'spill-over effect', where particular EACJ decisions have spurred litigants and non-state actors in

other member states to found claims of violations of human rights at the EACJ. Thus, for instance, the decision in the *Katabazi* case has influenced litigants across the EAC to frame their human rights claims on the basis of articles 6(d) and 7(2) of the EAC Treaty.<sup>54</sup> It is also credited with opening the door for litigants to approach the EACJ with human rights claims notwithstanding the fact that the EACJ does not have express jurisdiction to hear and determine claims of human rights violations.<sup>55</sup> Similarly, the *Anyang' Nyong'o* case precipitated the filing of similar cases at the EACJ from Uganda and Tanzania to address the election of representatives of these member states to the EALA.

In the third place, although in most instances the EACJ decisions have elicited a positive influence on the human rights framework, the political backlash experienced by the EACJ in the wake of its interlocutory ruling in the *Anyang' Nyong'o* case precipitated a negative effect, both in the short and long term, on the wider human rights framework within the EAC. The effects of the amendments to the EAC Treaty, and in particular the 60-day rule, have denied litigants access to justice even in instances where gross violations of human rights are alleged. Nonetheless, a silver lining of the *Anyang' Nyong'o* case was the galvanising of activists and NGOs to create a formidable network that has engaged in sustained litigation at the EACJ on thematic areas of governance and rights. Thus, for instance, the *Rufyikiri* case discussed above was filed and litigated by the East African Law Society.<sup>56</sup> Although there was no observable change in law or policy arising from the EACJ decision in that case, it has nonetheless profiled the ongoing rights abuses in Burundi and placed it at the centre stage at the sub-regional level.

A further area of influence, although not very clearly established, is based on what Justices Lenaola and Ntezilyayo refer to as the 'deterrent effect'. In their view, issues such as outright disregard for the rule of law, where the military intimidates the judiciary through acts of show of force, as exhibited in the facts of the *Katabazi* case, have not been reported in Uganda since the delivery of the EACJ decision, notwithstanding the fact that several cases of a similar nature have been brought before the Ugandan courts. Similarly, no references have been filed against Rwanda for *incommunicado* detentions as was the case in the *Plaxeda Rugumba* case. As such, a plausible conclusion is reached that the EACJ's decisions have served

54 See interview with Justice Isaac Lenaola (n 38).

55 Although not a change in law or policy, one can reasonably infer that the EACJ's decisions, and in particular on matters relevant to human rights, have served the function of emboldening EAC residents to file references with the Court. This has seen the EACJ's case load increase significantly, in particular with cases from Burundi, which had hitherto not had any references filed against it.

56 See para 14 of the *Rufyikiri* case (n 50) which details the circumstances in which the applicant sought assistance from the East African Law Society.

to deter certain breaches by member states.<sup>57</sup> It is, however, submitted that the flip side of this deterrence also is that member states adhere to human rights standards in order to avoid the obvious reputational risk that comes with litigation before the EACJ. Thus, compliance with human rights standards and the impact considered in this context may not arise from an overt act on the part of the member state concerned, but from refraining from acts that would otherwise have amounted to a breach of human rights in the context of the EAC Treaty.

Closely related to this finding is a special type of influence that is not based on the decision of the Court itself, but rather on the mere fact of filing a reference before the EACJ. This emerged clearly in the *Rugumba* case, where the Rwandese authorities proceeded with haste to undo a continuing violation upon the realisation that a reference had been filed at the EACJ. Similar circumstances played out in the *Democratic Party* case in Uganda where Parliament moved with unprecedented haste to pass national legislation upon the filing of the reference at the EACJ.

## 5 Conclusion

This article set out to evaluate the domestic impact of the EACJ's decisions on human rights complaints, with an understanding of impact as being the influence of the Court's decisions on national law, policy and actors, which extends beyond mere compliance by national authorities with orders of the Court. It emerges from the foregoing that the EACJ's decisions have had both a direct and indirect influence on both state and non-state actors in the sub-region, which has resulted in human rights gaining traction in the sub-region. Gathii attributes this result, among others, to efforts of human rights NGOs and pro-democracy activists that have consistently litigated human rights cases before the EACJ, proactive judges who have encouraged litigants to file human rights cases before the court, as well as positive action by governments to comply with EACJ decisions, sometimes spurred by political goodwill and at other times due to the 'name and shame' strategies where activists call out EAC member states for human rights violations.<sup>58</sup> From a theoretical standpoint it is plausible to conclude that this situation lends credence to the constructivist and liberalist thinking in which national preferences and ultimately national impact are influenced and shaped by the development and dissemination of norms and rational strategising by diverse constituents including non-state and

57 See interview with Justice Isaac Lenaola (n 38). See also interview with Justice Faustin Ntezilyayo at the EACJ headquarters, Arusha, Tanzania, 10 March 2016.

58 See JT Gathii 'Variation in the use of sub-regional integration courts between business and human rights actors: The case of the East African Court of Justice' (2016) 79 *Law and Contemporary Problems* 37.

sub-state actors. In the context of the EACJ decisions, rational strategising by actors in the wake of the *Anyang' Nyong'o* decision, for instance, precipitated similar suits in relation to Tanzania and Uganda, thereby resulting in changes to law and policy.

Importantly, however, one glaring point that must be reiterated is the lack of an express human rights jurisdiction of the EACJ. Whereas there is no mandatory treaty obligation on the member states to vest the EACJ with human rights jurisdiction, it is submitted that the EACJ would have more impact on national human rights practices if it were able to issue binding decisions to reinforce the Community's human rights commitments as stipulated in its founding Treaty. Moreover, the progressive integration of the EAC into a political federation requires a correspondingly robust framework for the promotion and protection of human rights, which would include an EACJ with clear jurisdiction to hear and determine complaints relating to the violation of human rights.

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## Challenges when drafting legal aid legislation to ensure access to justice in African and other developing countries with small numbers of lawyers: Overcoming obstacles to including the use of non-lawyers to assist persons in conflict with the law

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### Summary

*The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, the United Nations Commission on Legal Empowerment of the Poor Report, the United Nations Office of Drugs and Crime Early Access Handbook and the United Nations Model Legal Aid in Criminal Proceedings Law can all be used when drafting legal aid legislation to ensure the accessibility, effectiveness, sustainability and credibility of legal aid services. Challenges to referring to the UN Principles and Guidelines and other relevant UN documents when drafting legal aid legislation in developing countries – particularly in Africa – with small numbers of lawyers arise because of opposition by the organised legal profession and the judiciary. They object to the use of the assistance of*

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*non-lawyers such as paralegals, law students and lay persons, as well as traditional mechanisms of dispute resolution to provide legal aid. In order to provide access to justice for all and safeguard the rule of law the organised legal profession, legislative drafters and legislators need to 'think outside the box' when trying to provide access to justice in an environment where there are very few lawyers. A failure to establish an accessible, effective, sustainable and credible legal aid scheme may result in civil strife and even insurrection by disaffected communities.*

**Key words:** *legal aid; developing countries; few lawyers; non-lawyer assistance; dispute resolution; traditional mechanisms*

## 1 Introduction

In this article I provide a brief background to my involvement in drafting legal aid legislation for developing countries that have few lawyers and face other challenges. This is particularly true for Africa with large populations in rural areas. For instance, in 13 African countries it is estimated that rural populations constitute over 70 per cent of the total population.<sup>1</sup> Thereafter, the relevant United Nations (UN) Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems<sup>2</sup> (UN Principles and Guidelines) that can be used to address the issue will be discussed. I will mention the challenges faced when trying to incorporate these principles and guidelines in legislation for developing countries that have few lawyers.

Mention will be made of some of the precursors that influenced the development of the UN Principles and Guidelines, followed by some of the most important relevant Principles and Guidelines. Thereafter the main challenges that hindered the implementation of the UN Principles and Guidelines are considered. These are (a) the 'big city syndrome' affecting the judiciary and practising lawyers; (b) the lack of confidence in traditional dispute-resolution mechanisms; (c) scepticism regarding the use of paralegals; (d) scepticism regarding the use of law students; (e) the failure to recognise the value of assistance without representation where no lawyers are available; (f) over-bureaucratisation of the legal aid scheme; and (g) the lack of provision of the necessary resources by the state.

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1 See, eg, United Nations Office on Drugs and Crime (UNODC) *Access to legal aid in criminal justice systems in Africa: Survey Report* (2011) 11-12. Although in Sierra Leone rural people only constitute 62% of the population, in Kenya they constitute 78%, in Uganda 87% and in Malawi 81%.

2 United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013), adopted by the United Nations General Assembly on 20 December 2012 by Resolution 67/187.

## 2 Background

The author was one of the drafters of the Lilongwe Declaration<sup>3</sup> which was subsequently adopted by the African Commission of Human and Peoples' Rights (African Commission)<sup>4</sup> and the United Nations Economic and Social Council.<sup>5</sup> The author further assisted in the drafting of the UN Principles and Guidelines, the United Nations Office of Drugs and Crime (UNODC) *Early access to legal aid in criminal justice processes: A handbook for policy makers and practitioners* (UNODC *Early access handbook*)<sup>6</sup> and the United Nations Model Law on Legal Aid in Criminal Proceedings.<sup>7</sup> In addition he assisted with the drafting of legal aid legislation for four developing countries (one civil law<sup>8</sup> and three African common law jurisdictions),<sup>9</sup> and provided assistance in developing legal aid systems for ten more developing countries (five civil law<sup>10</sup> and five common law (including two African) jurisdictions).<sup>11</sup> The main experiences drawn on in this article are those arising from the drafting of legislation for Sierra Leone and Kenya, but passing reference will be made to other African and developing countries where similar obstacles were encountered.

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3 Lilongwe Declaration on Accessing Legal Aid in Criminal Justice Systems in Africa (2004) adopted by 128 delegates from 26 countries (including 21 from Africa), on 24 November 2004; Penal Reform International and the Blum Legal Clinic of the North Western School of Law *Access to justice in Africa and beyond: Making the rule of law a reality* (2007) ix 39.

4 Adopted on 29 November 2006 by the African Commission on Human and Peoples' Rights in Resolution 100 on the Adoption of the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System, <http://www.achpr.org/sessions/40th/resolutions/100/> (accessed 27 April 2017).

5 Adopted on 26 July 2007 by UN Economic and Social Council Resolution 2007/24 on International Cooperation for the Improvement of Access to Legal Aid in Criminal Justice Systems, particularly in Africa, which also informed the UN Principles and Guidelines (n 2).

6 UNODC *Early access to legal aid in criminal justice processes: A handbook for policy makers and practitioners* (2014).

7 UNODC *Model Law for Legal Aid in Criminal Proceedings* (2015).

8 Afghanistan.

9 Sierra Leone, Kenya and Uganda. In 2011 Sierra Leone had a population of 5 million, of which 60% were rural, and 100 lawyers with a ratio of one lawyer to every 50 000 people; Kenya had a population of 37 million of which 84% were rural, and 3 817 lawyers with a ratio of one lawyer to every 9 693 people; and Uganda had a population of 32 million, of which 86% were rural, and 2 000 lawyers with a ratio of one lawyer for every 16 000 people; UNODC *Handbook on improving access to legal aid in Africa* (2011) 13. These figures may be compared with the ratios in developed world countries such as Spain which has 114 143 lawyers for 45 million people (a ratio of 395:1); the United Kingdom, 151 043 lawyers for 61 million (a ratio of 401:1); Italy, 121 380 lawyers for 59 million (a ratio of 488:1); Germany, 151 043 lawyers for 82 million (a ratio of 593:1); United States, 1 143 358 lawyers for 303 million (a ratio of 265:1); Brazil, 571 360 lawyers for 186 million (a ratio of 321:1); and New Zealand, 10 523 lawyers for 4 million (a ratio of 391:1), [www.wiki.answers.com/Q/What\\_country\\_in\\_the\\_world\\_has\\_most\\_lawyers\\_per\\_capita](http://www.wiki.answers.com/Q/What_country_in_the_world_has_most_lawyers_per_capita) (accessed 22 February 2012).

10 Lithuania, Kyrgyzstan, Mongolia, Moldova and Indonesia.

11 Somaliland (Somalia), Myanmar (Burma), Nigeria, Fiji and Pakistan.



The process used for developing legal aid legislation includes stakeholders' meetings with justice stakeholders (a) to assess the legal aid needs of the country; (b) to develop a legal aid policy for the country; (c) to validate the policy at a stakeholders' workshop; (d) to develop draft legal aid legislation; and (e) to validate the draft legal aid legislation at a final stakeholders' meeting and to send the validation meeting's draft legislation to the legal drafters. Once the draft legislation is sent to the legal drafters, many of the provisions intended to provide access to legal aid in countries that have few lawyers or that have large rural populations are removed if they are not lawyer-centred.

The legal drafters appeared to be under the impression that only lawyers can assist people in criminal cases and that paralegals, law students and lay persons acting as 'McKenzie friends'<sup>12</sup> cannot play a role in providing such assistance. Sometimes this is done by the legal drafters themselves,<sup>13</sup> but usually as a result of objections by the local bar association<sup>14</sup> or the judiciary.<sup>15</sup> The result is that the poor, marginalised and often rural populations in these countries continue to be deprived of access to justice and legal aid despite the recommendations of the UN Commission on Legal Empowerment of the Poor Report<sup>16</sup> and the UN Principles and Guidelines,<sup>17</sup> both of which were unanimously adopted by all members of the UN.

### 3 Country initiatives prior to the adoption of the UN Principles and Guidelines

In Afghanistan in 2008, prior to the adoption of the UN Principles and Guidelines, the author and the then Deputy Minister of Justice developed a legal aid policy based on the principle that legal aid should be accessible, affordable, sustainable and credible when

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12 'McKenzie friend' is a term of art used in common law jurisdictions arising from the decision in *McKenzie v McKenzie* [1970] 3 All ER 1034 (CA) to describe a lay person who assists an unrepresented litigant during court proceedings with the permission of the court.

13 As occurred with the Taqin (Legal Drafting Department) in Afghanistan regarding civil legal aid.

14 As occurred in Malawi regarding the use of paralegals to defend accused persons in the previous Grade 4 magistrate's courts where the prosecutors are police officers with three months' training; the magistrates have six months' training; and the paralegals have 12 months' training – despite lawyers not appearing in such courts and magistrates being able to sentence convicted persons to one year in prison.

15 As occurred in Sierra Leone regarding the use of paralegals and traditional dispute resolution mechanisms – the President had to insist that these provisions be reinserted.

16 UN Commission on Legal Empowerment of the Poor *Making the law work for everybody* (2008) 42-43.

17 United Nations Principles and Guidelines Principle 10.

drafting the Legal Aid Regulation.<sup>18</sup> I subsequently included these principles when developing the legal aid policy and legislation for Sierra Leone in 2009, Kenya in 2010 and Uganda in 2011.<sup>19</sup>

I interpreted these principles as follows, based on my interactions with stakeholder groups in Afghanistan, Sierra Leone, Kenya and Uganda, as well as from my interactions with justice officials and lawyers from Kyrgyzstan, Mongolia, Moldova, Indonesia, Somaliland (Somalia), Myanmar (Burma), Fiji, the Solomon Islands and Nigeria, all of which are countries with considerable rural populations beyond the reach of lawyers. I ensured that these principles were included in the UN Principles and Guidelines when I was part of the group of experts responsible for drafting it.

### 3.1 Accessibility

Accessible legal aid services, in the criminal justice context, means that where it is in the interests of justice, every arrested and detained person in the country who cannot afford a lawyer must be provided with a lawyer by the state from the moment of their arrest or detention to ensure that they obtain 'a fair hearing'. Legal aid should be provided in both criminal and civil matters. Everyone who qualifies for legal aid should have access to legal advice and assistance as well as legal representation when this is required.<sup>20</sup> In appropriate situations, minor criminal and civil cases in the formal justice system should be diverted to traditional customary law dispute resolution bodies such as chief's and headman's courts, to be resolved in accordance with the principles of fundamental human rights.<sup>21</sup> For instance, in patriarchal traditional societies women are often discriminated against (such as inheritance).<sup>22</sup>

Accessible legal aid services must be available in the main cities as well as in the smaller towns and districts where there are courts. This is done by using legal practitioners, pupil legal practitioners, persons appointed by the court to represent accused persons in criminal cases, law students, legal assistants or paralegals employed by accredited non-governmental organisations (NGOs), or by allowing 'friends' employed by an accredited legal aid provider to assist accused persons. Accessible legal aid means that provision will have to be made for a mixed legal aid delivery scheme that covers the entire country using cooperation agreements between the national legal aid

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18 Afghanistan Legal Aid Policy adopted at Afghanistan Legal Aid Stakeholders' Meeting on 14 January 2008 (compare A Smith 'International Afghanistan National Legal Aid Policy 2008' (unpublished, on file) 4-6.

19 Regrettably, although a Legal Aid Bill for Uganda was unanimously approved by stakeholders at a validation meeting in August 2011, it was never presented to Parliament.

20 Smith (n 18) 4.

21 Compare Sierra Leone Legal Aid Act, 2012 sec 14(2)(b)..

22 See, eg, N Tebbe 'Inheritance and disinheritance: African customary law and constitutional rights' (2008) 88 *The Journal of Religion* 466.

body and accredited public and private legal aid providers. A matrix needs to be developed to identify which legal aid services are available in the different cities and towns so that steps may be taken by the independent national legal aid body to fill any gaps.<sup>23</sup>

### 3.2 Affordability

Affordable legal aid services means making the best use of available legal aid resources in the country, as previously mentioned, including public defenders and pupil public defenders; private legal practitioners and pupil legal practitioners; persons appointed by the court to represent accused persons in criminal cases; law students; or legal assistants or paralegals employed by NGOs accredited by the national legal aid body; or allowing 'friends' employed by an accredited legal aid provider to assist accused persons. The rights and duties of all these relevant legal aid providers should be specified in legal aid legislation.<sup>24</sup>

Members of the national legal aid body should be paid a 'sitting allowance' but should not be paid a salary for their membership. Employees of the national legal aid body should be remunerated in accordance with salary scales established by the national legal aid body and approved by the Ministry of Finance.<sup>25</sup>

### 3.3 Sustainability

In countries dependent on donor funding for their legal aid schemes, providing sustainable legal aid services means that mechanisms must be put in place to ensure that in the long term the provisions of the country's constitution and their international legal aid obligations will still be implemented through state funding when donor funding is no longer available. International experience<sup>26</sup> demonstrates that for a sustainable legal aid service, the cost of complying with the constitutional and international legal aid obligations of the state must be borne by the treasury through a special allocation of funding by Parliament. Such allocation must be 'ring-fenced' to ensure that the

23 Smith (n 18) 4.

24 Smith (n 18) 5.

25 As above.

26 Eg, probably the two best-resourced and independent legal aid schemes in the developing world are in Fiji and South Africa, both of which receive a budget specifically allocated to them by Parliament. Fiji spends approximately US \$2,5 *per capita* (Fiji Ministry of Finance *Economic and fiscal update: Supplement to the 2016 Budget Address* (2015) 41) and South Africa about US \$1,7 *per capita* on legal aid (from 2016-2017 Legal Aid South Africa received an allocation of R1,2 billion for about 55 million people or about R22 (or about US \$1,7) *per capita*: Legal Aid South Africa *Integrated Annual Report 2016-2017* (2017) 51. Most developing countries do not have independent legal aid structures and spend far less *per capita* on legal aid. Eg, in 2007 when South Africa spent US \$2 *per capita*, the spending *per capita* by some other African countries were Ghana, US \$0,03; Kenya, US \$0,03; Malawi, US \$0,015; Nigeria, US \$0,01; and Rwanda, US \$0,05: UNODC (n 1) 19.

funds cannot be used for other purposes (for instance, to balance the budget of the Ministry of Justice).<sup>27</sup>

Given the current financial state of the economies of many African and developing countries it is necessary for a mixed model to be used in which donors initially assist the state to fund both criminal and civil legal aid. However, some monetary and structural support is to be provided by the state from the inception of the national legal aid scheme (for instance, the provision of office accommodation in state-owned buildings). Provision must be made for the planned phasing in of state funding to enable the government of the day to meet its constitutional and international obligations to eventually fund legal aid on its own.<sup>28</sup>

### 3.4 Credibility

A credible legal aid service means that the legal aid system is not perceived to be an organ of state. The legal aid legislation should provide for the establishment of an independent statutory legal aid body, the powers and duties of which are clearly specified in the legislation.<sup>29</sup> A credible legal aid service also means that legal aid services provided by the independent legal aid body, as well as those provided by other public and private sector legal aid providers should be coordinated, monitored for quality and regulated by an independent statutory legal aid body. The national legal aid body should have a majority of members who are independent of government and should have the power to elect a neutral chairperson. The criteria for who qualifies for legal aid should ensure that poor, vulnerable and marginalised people have access to legal aid and should be included in legal aid legislation or its regulations. It should be widely publicised.<sup>30</sup>

These principles in one form or another have been included in the UN Principles and Guidelines.

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27 As above.

28 As above.

29 In transitional countries that are moving away from authoritarian regimes there is often a reluctance to allow an independent body to run the legal aid scheme with the result that such schemes often remain under the control of the Ministry of Justice or an equivalent department. This has happened, eg, in Afghanistan and Myanmar (Burma). Initially it also happened in the Republic of Georgia during which period there was not a single acquittal in criminal cases defended by legal aid lawyers. This may change because there is now an independent body responsible for legal aid; Open Society Justice Initiative 'New Legal Aid Law in Georgia' (2007) [Open Society Foundations.org/press-releases/new-legal-aid-law-adopted-georgia](https://www.opensocietyfoundations.org/press-releases/new-legal-aid-law-adopted-georgia) (accessed 6 May 2017).

30 Smith (n 18) 5-6.

## 4 UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

The UN Principles and Guidelines state that legal aid is a fundamental right that should be provided for in national legislation and constitutions.<sup>31</sup> The Principles and Guidelines also state that legal aid providers should be independent of state interference<sup>32</sup> and that legal aid should be accessible, effective, sustainable and credible.<sup>33</sup> In the UN Principles and Guidelines the word 'effective' was used instead of the term 'affordable'. The author used the term 'affordable' for the policies in Afghanistan, Sierra Leone, Kenya and Uganda.<sup>34</sup> The legal experts drafting the UN Principles and Guidelines were of the view that for legal aid to be 'effective', it should be 'affordable'. Legal aid schemes should use legal aid bodies in both the public and private sectors and include qualified lawyers, aspiring lawyers, law students and paralegals.<sup>35</sup> The UNODC has produced the *Early access handbook*<sup>36</sup> to assist states when implementing the UN Principles and Guidelines.

Based on personal experience, the *Early access handbook* is intended to deal mainly with the challenges to accessibility of legal aid in criminal justice systems in African and developing countries that have few lawyers, as this seems to be where legal drafters and legislators fail to consider the use that can be made of non-lawyers in assisting indigent people in rural areas, or the urban poor in areas where no lawyers are available to assist them.

## 5 Challenges to implementing the UN Principles and Guidelines on Access to Justice

### 5.1 Challenge 1: 'Big city syndrome' affecting the judiciary and practising lawyers

Principle 10 of the UN Principles and Guidelines state:<sup>37</sup>

States should also ensure that there is legal aid for persons living in rural, remote and economically and socially disadvantaged areas and to persons who are members of economically and socially disadvantaged groups.

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31 UN Principles and Guidelines Principle 1.

32 UN Principles and Guidelines Principles 2 and 12.

33 UN Principles and Guidelines Principle 2.

34 UN Principles and Guidelines Principle 2 para 3.

35 UN Principles and Guidelines Principle 14.

36 UNODC *Early access handbook* (n 6).

37 UN Principles and Guidelines Principle 10.

Principle 14 states:<sup>38</sup>

States should, in accordance with their national law and where appropriate, recognise the role played by paralegals or similar service providers in providing legal aid services where access to lawyers is limited.

However, the judiciary and lawyers in African and developing countries often view the provision of legal aid as if they were practising in a 'big city' such as a foreign capital (for instance, London or Paris) rather than in a resource-starved environment without enough lawyers and with large rural and socially-disadvantaged populations.<sup>39</sup> Despite the majority of lawyers being concentrated in capital cities,<sup>40</sup> the legal profession usually opposes attempts to allow paralegals to represent indigent people or assist in court in rural or socially-disadvantaged areas even when there are no lawyers available.<sup>41</sup> Such opposition applies to paralegals acting in 'paralegal' criminal courts (for instance, where a judicial officer has a six-month diploma; a police officer prosecutor has a three-month diploma; and paralegals have a one-year diploma that might include trial advocacy, and no lawyers practise in the courts concerned).<sup>42</sup> The judiciary and practising lawyers also seem to oppose the incorporation of traditional dispute resolution mechanisms into legal aid to divert petty crimes even where such practices are made to conform to a constitutional bill of rights.<sup>43</sup>

Therefore, the following provisions based on the English 'McKenzie rule' approach<sup>44</sup> have been adopted at stakeholders' meetings but rejected by legal drafters and/or legislators:<sup>45</sup>

In towns, especially in rural areas, where there are no lawyers and where lawyers will not go, the court has the discretion to allow paralegals, law students and lay advisers to assist – but not represent – litigants and accused persons.

Where an unrepresented accused person – even if he or she is assisted by a paralegal, law student or lay adviser – is sentenced to a term of imprisonment, the record of the case goes on automatic review to a

38 UN Principles and Guidelines Principle 14.

39 UN Principles and Guidelines Principle 14 para 2.

40 Eg, in Sierra Leone in 2009, 98 out of 100 lawyers were located in the capital city of Freetown.

41 UN Principles and Guidelines Principle 14 para 2 and fn 14 regarding the attitude of lawyers in Malawi.

42 As above.

43 See fnn 14 & 15.

44 *McKenzie v McKenzie* (n 12).

45 Sierra Leone Draft Legal Aid Bill 2009 sec 16. The Kenya Draft Legal Aid Bill 2010 sec 37(c) referred to such persons as 'intermediaries', but when the final Legal Aid Act, 2016 was passed, no mention was made of this provision. A similar clause was also included in the Uganda Draft Legal Aid Bill 2011 sec 37 that was validated by all stakeholders, but a Legal Aid Act was never passed by Parliament.

High Court judge in chambers for him or her to certify that the trial, verdict and sentence were in accordance with justice.<sup>46</sup>

Linked to the above was the provision that it is a criminal offence for a paralegal, law student or lay adviser to charge a fee.<sup>47</sup>

Such clauses should be considered by law makers in situations where no lawyers are available as they are consistent with the UN Principles and Guidelines.<sup>48</sup>

## 5.2 Challenge 2: Lack of confidence in traditional dispute resolution mechanisms consistent with human rights

The UN Commission on Legal Empowerment of the Poor recognises the value and importance of traditional dispute resolution mechanisms<sup>49</sup> and states:<sup>50</sup>

[T]o improve the state justice systems, reformers should seek out opportunities for strategic interventions that improve the operation of informal or customary justice systems and facilitate the efficient integration of the formal and informal systems.

The judiciary and legal profession, however, often are opposed to any attempts to incorporate traditional alternative dispute-resolution mechanisms into legal aid schemes – even when such mechanisms can only be used if they are consistent with fundamental human rights.<sup>51</sup> The result is that wrongdoers in rural communities are likely to be brought before the criminal courts for minor crimes that could be settled expeditiously through traditional mechanisms involving restorative justice. This lack of confidence in traditional dispute resolution mechanisms means that justice is delayed and the courts may become clogged up with unnecessary minor criminal cases.<sup>52</sup>

46 This was not accepted at the validation meetings in Sierra Leone and Kenya, but was validated by all stakeholders for the Uganda Draft Legal Aid Bill 2011 sec 38 although, as mentioned previously, the Bill was never presented to Parliament.

47 Sierra Leone Draft Legal Aid Bill 2009 secs 16(2) and (3); Kenya Draft Legal Aid Bill 2010 sec 37b for paralegals and sec 37c for intermediaries. A similar clause was also included in the Uganda Draft Legal Aid Bill 2011 secs 37(2) and (3) that was validated by all stakeholders.

48 UN Principles and Guidelines Principle 10; Guideline 14.

49 Eg, the Commission points out that 'in sub-Saharan Africa, customary land tenure law covers roughly 75 per cent of land and in some countries, such as Mozambique and Ghana, over 90 per cent of land transactions are governed by customary law', and that in Afghanistan '[t]raditional decision-making assemblies are estimated to account for more than 80 per cent of cases settled throughout Afghanistan' (UN Commission on Legal Empowerment of the Poor (n 16) 42).

50 UN Commission on Legal Empowerment of the Poor (n 16) 42-43.

51 This occurred in Sierra Leone and Kenya. In Sierra Leone the clause was reinstated in the final Legal Aid Act, 2012 sec 14(2) at the request of the President.

52 Mongolia has a formal alternate dispute resolution system based on restorative justice whereby minor crimes are diverted from the courts after a mediated meeting between the prosecutor, the victim and the perpetrator of the crime has taken place. Thus, art 25(1) of the Criminal Procedure Law of Mongolia, 2002 provides: 'If victims of minor crimes provided for by the Criminal Law of Mongolia reconciles with the accused or defendant, the case shall be terminated.'

For example, if a rural person steals a chicken, it is better for this matter to be diverted from the formal court system and left to a traditional dispute-resolution mechanism whereby the perpetrator, for instance, could pay compensation of two chickens instead of facing formal court charges for theft. Although the procedure is not enshrined in legislation in Malawi, the Paralegal Advisory Service Institute (PASI) has trained community-based paralegals to advise traditional leaders when cases should be diverted from traditional dispute-resolution mechanisms to the formal justice system. Conversely, they also advise the courts when minor offences could be dealt with using traditional dispute resolution systems.<sup>53</sup>

The following provisions have been adopted at stakeholders' meetings but rejected by legal drafters and/or legislators:<sup>54</sup>

Where an accused person is charged with a minor offence, community-based paralegals may assist the prosecutor to divert the case to a traditional dispute resolution mechanism – provided that it is consistent with fundamental human rights.

The converse of this would be that where it is not in the public interest for an accused person to be brought before a traditional tribunal, community-based paralegals may assist the traditional presiding officer to divert the case to the formal criminal justice system.

Such clauses should be considered by law makers as they are consistent with some of the issues raised in the UN Commission on Legal Empowerment of the Poor Report.<sup>55</sup>

### 5.3 Challenge 3: Scepticism regarding the use of paralegals

The UN Principles and Guidelines emphasise the importance of paralegals in providing access to justice and state the following:<sup>56</sup>

States should recognise and encourage the contribution of lawyers' associations, universities, civil society and other groups and institutions in providing legal aid.<sup>57</sup>

States should, in consultation with civil society and justice agencies and professional associations, introduce measures –

- (a) to develop, where appropriate, a nationwide scheme of paralegal services with standardised training curricula and accreditation schemes, including appropriate screening and vetting;

53 Paralegal Advisory Service Institute 'Village Mediation Programme' [www.pasimalawi.org/vmp.html](http://www.pasimalawi.org/vmp.html) (accessed 28 April 2017).

54 This provision was included in the Sierra Leone Draft Legal Aid Bill 2009 sec 33(3), but rejected after consultations with the judiciary. As mentioned in n 51, it was then reinstated at the request of the President in the final Sierra Leone Legal Aid sec 14(2). A similar clause was also included in the Uganda Draft Legal Aid Bill 2011 sec 36, but the Bill was never passed by Parliament.

55 UN Commission on Legal Empowerment of the Poor (n 16) 42-43.

56 UN Principles and Guidelines Guideline 14 para 68.

57 UN Principles and Guidelines Principle 14.



- (b) to ensure that quality standards for paralegal services are set and that paralegals receive adequate training and operate under the supervision of qualified lawyers;
- (c) to ensure the availability of monitoring and evaluation mechanisms to guarantee the quality of the services provided by paralegals;
- (d) to promote, in consultation with civil society and justice agencies, the development of a code of conduct that is binding for all paralegals working in the criminal justice system;
- (e) to specify the types of legal services that can be provided by paralegals and the types of services that must be provided exclusively by lawyers, unless such determination is within the competence of the courts or bar associations;
- (f) to ensure access for accredited paralegals who are assigned to provide legal aid to police stations and prisons, facilities of detention or pre-trial detention centres, and so forth;
- (g) to allow, in accordance with national law and regulations, court accredited and duly trained paralegals to participate in court proceedings and advise the accused when there are no lawyers available to do so.

As mentioned previously,<sup>58</sup> the judiciary and legal profession in African and developing countries resist the idea of paralegals representing accused persons in simple criminal trials. This applies to paralegals acting in 'paralegal' low-level criminal courts where lawyers do not practise. Lawyers never represent clients in these low-level courts even though the 'paralegal' judicial officer may sentence an accused to imprisonment.<sup>59</sup>

There is less resistance to paralegals assisting with the preliminary stages of legal advice and assistance, and liaising with the police and prisons, and this sometimes needs to be spelt out in legislation to ensure compliance. Thus, the Kenyan Legal Aid Act allows paralegals to give assistance and advice.<sup>60</sup>

While provisions regarding the role of paralegals and their being formally incorporated into national legal aid schemes (subject to accreditation by such schemes) have been adopted at stakeholders' meetings and by some legislative drafters, the following provisions have been rejected by legal drafters and/or legislators:<sup>61</sup>

In small towns where there are no legal aid offices paralegals or legal assistants are stationed at every court to assist court officials in ensuring that access to justice is available by providing legal advice and assistance or referring persons to legal aid providers.

58 UN Principles and Guidelines Guideline 14 para 2.

59 See n 14.

60 Kenya Legal Aid Act 2016 sec 68(1).

61 Uganda Draft Legal Aid Bill 2011 secs 35 and 46(4) which was validated by all stakeholders but never presented to Parliament. Compare the Kenya Draft Legal Aid Bill 2010 sec 65 which provided that every ward of every county should have a 'justice advice centre'.

Such clauses should be considered by law makers as they are consistent with the UN Principles and Guidelines.<sup>62</sup>

#### 5.4 Challenge 4: Scepticism regarding the use of law clinic students in simple criminal cases

As in the case of paralegals,<sup>63</sup> the UN Principles and Guidelines provide that governments should cooperate with NGOs and universities<sup>64</sup> – especially law faculties – and encourage the establishment of law clinics and the development of student practice rules.<sup>65</sup>

Guideline 16 provides that states should, where appropriate, also take measures:<sup>66</sup>

- (a) to encourage and support the establishment of legal aid clinics in law departments within universities to promote clinical and public interest law programmes among faculty members and the student body, including in the accredited curriculum of universities;
- (b) to encourage and provide incentives to law students to participate, under proper supervision and in accordance with national law or practice, in a legal aid clinic or other legal aid community scheme, as part of their academic curriculum or professional development;
- (c) to develop, where they do not already exist, student practice rules that allow students to practise in the courts under the supervision of qualified lawyers or faculty staff, provided that such rules are developed in consultation with and accepted by the competent courts or bodies that regulate the practice of law before the courts;
- (d) to develop, in jurisdictions requiring law students to undertake legal internships, rules for them to be allowed to practise in the courts under the supervision of qualified lawyers.

However, the judiciary and legal profession in African and developing countries often resist the idea of law clinic students under qualified supervision representing accused persons in simple criminal trials. This applies to law clinic students acting in ‘paralegal’ low-level criminal courts where lawyers do not practice, but where a judicial officer may sentence an accused to imprisonment.<sup>67</sup> As in the case of paralegals, there is less resistance to law clinic students helping with the preliminary stages of legal advice and assistance,<sup>68</sup> but it is still advisable to define their role in legislation or subsidiary legislation in

62 UN Principles and Guidelines Introduction paras 9 & 10; Principle 14.

63 UN Principles and Guidelines Introduction para 5.4.

64 UN Principles and Guidelines Principle 14 and Guideline 16.

65 UN Principles and Guidelines Guideline 16(b)-(d).

66 As above.

67 n 12.

68 See, eg, Sierra Leone Legal Aid Act 2012 where ‘legal aid’ is defined to include ‘legal advice and assistance’ and the latter is defined as being the function of a ‘university law clinic’ (sec 1). The Kenya Legal Aid Act 2016 defines a ‘legal aid clinic’ as a ‘law clinic accredited by the [Legal Aid] Service’ (sec 2) and includes them in the definition of ‘legal aid provider’ (sec 2).

order to ensure compliance. The legal profession appears to adopt a more flexible approach regarding legal representation by law graduate interns, bar course or law graduates awaiting their enrolment.<sup>69</sup>

While provisions regarding the role of law clinics and their being formally incorporated into national legal aid schemes (subject to accreditation by such schemes) have been adopted at some stakeholders' meetings and by legislative drafters, the types of provisions recommended by the UN Principles and Guidelines have not been adopted in most developing countries. Such rules should apply where no lawyers are available to assist accused persons in criminal matters and the law students are attached to law clinics and are properly supervised by a qualified legal practitioner.

If the principle of law clinic student practice is included in the principal legal aid legislation, the mechanics of its implementation can be spelt out in subsidiary legislation.

Some developing countries such as the Philippines introduced student practice rules many years ago.<sup>70</sup> The Philippines law states:<sup>71</sup>

A law student who has successfully completed his 3rd year of the regular four year prescribed law curriculum and is enrolled in a recognised law school's clinical legal education programme approved by the Supreme Court, may appear without compensation in any civil, criminal or administrative case before any trial court, tribunal, board or officer, to represent indigent clients accepted by the legal clinic of the law school.

In South Africa an early attempt was made to draft student practice rules for the country in 1975,<sup>72</sup> and a modified set of the rules was drafted by the author and published in 1982.<sup>73</sup> These rules were aimed at delimiting the area in which law students could operate, providing mechanisms for certification of students, and ensuring proper supervision.<sup>74</sup> The rules were approved by the then Association of Law Societies and the university law deans, but were never implemented by the then apartheid government. The first Minister of Justice under South Africa's new democratic government also committed to introducing student practice rules but this never materialised.<sup>75</sup> The reasons have not been articulated, but there seems to be less enthusiasm for such rules after an undergraduate four-year LLB was introduced in place of the previous five-year LLB

69 Sierra Leone Legal Aid Act sec 1; compare Kenya Legal Aid Act 2016 sec 2.

70 See Rules of Civil Procedure (1997) Rule 138-A.

71 As above.

72 See P Ellum *Legal aid developments in South Africa July 1973-June 1975* (1975) 64-65; compare DJ McQuoid-Mason 'Student practice rules' in DJ McQuoid-Mason (ed) *Legal aid and law clinics in South Africa* (1985) 137-138.

73 See DJ McQuoid-Mason *An outline of legal aid in South Africa* (1982) 194-197.

74 McQuoid-Mason (n 72) 139.

75 See, eg, the proposed South African Student Practice rules in DJ McQuoid-Mason 'Whatever happened to the Proposed South African Student Practice Rules?' (2008) 41 *De Jure* 580.

programme, although the five-year LLB degree is still offered by several universities. While it was suggested that student practice could be included in such programmes,<sup>76</sup> on reflection there is no reason in principle why it should not include students in the four-year programmes, provided that the students are properly trained and supervised.

In African and developing countries where law graduates are sufficiently mature and properly supervised, such clauses should be considered by law makers as they are consistent with the UN Principles and Guidelines.<sup>77</sup>

### **5.5 Challenge 5: Failure to recognise the value of assistance without representation where lawyers are not available**

The UN Principles and Guidelines provide that (a) legal aid should be provided for people living in rural and remote areas;<sup>78</sup> (b) states should encourage widespread partnerships in dealing with legal aid;<sup>79</sup> and (c) states should recognise the role played by paralegals or similar service providers.<sup>80</sup>

Principle 10 states:

- 33 States should also ensure that legal aid is provided to persons living in rural, remote and economically and socially disadvantaged areas and to persons who are members of economically and socially disadvantaged groups.

Principle 14 states:

- 40 Where appropriate, public-private and other forms of partnership should be established to extend the reach of legal aid.

Guideline 13 states:

- 65 Where there is a shortage of qualified lawyers, the provision of legal aid services may also include non-lawyers or paralegals.

Guideline 14 states:

- 67 States should, in accordance with their national law and where appropriate, recognise the role played by paralegals or similar service providers in providing legal aid services where access to lawyers is limited.

There is resistance in African and developing countries to allowing paralegals, law students or lay advisers to assist an indigent litigant or accused person in court as a 'McKenzie friend'<sup>81</sup> when no lawyers are available.<sup>82</sup> The suggestion is that the court may allow such persons

76 See generally McQuoid-Mason (n 75). See Annexure A.

77 UN Principles and Guidelines Guideline 16.

78 UN Principles and Guidelines Principle 10.

79 UN Principles and Guidelines Principle 14.

80 UN Principles and Guidelines Guidelines 13 & 14.

81 n 12.

or litigants to be advised and assisted by a paralegal, law student or lay adviser who may not represent the accused person or litigant but may assist the accused before and during trial.<sup>83</sup> This provision would apply to unsupervised paralegals, law students or lay advisers, for instance, in deep rural areas.

Decisions by the court in such unrepresented cases that resulted in imprisonment could go on automatic review to a High Court judge in chambers, as is the practice in South Africa for unrepresented accused subjected to certain periods of imprisonment.<sup>84</sup> Some countries prohibit anyone except qualified lawyers from giving legal advice and assistance – a clear contradiction of the UN Principles and Guidelines.<sup>85</sup>

The following provisions have been adopted at stakeholders' meetings but rejected by most legal drafters and/or legislators:

- 1 Before the trial a paralegal, law student or lay adviser may:
  - advise and assist litigants regarding civil claims and accused persons on all preliminary matters including bail applications, pleading to charges and such other matters.<sup>86</sup>
- 2 During the trial a paralegal, law student or lay adviser may:
  - (a) take notes and quietly advise and assist the accused person or litigant in such a manner as not to disturb the proceedings;
  - (b) suggest questions that the accused person or litigant might ask in examination in chief, cross-examination or re-examination;
  - (c) assist the accused person or litigant to make opening or closing statements and in the case of an accused person who is convicted a plea in mitigation.<sup>87</sup>

In Afghanistan, prior to the formation of the Independent Bar Association of Afghanistan, in terms of the Interim Criminal Code for Courts (Interim Criminal Code),<sup>88</sup> the courts used to have the

82 *McKenzie v McKenzie* (n 12).

83 *McKenzie v McKenzie* (n 12) para 5.2.

84 The South African Criminal Procedure Act 51 of 1977 provides that where an unrepresented accused is (a) sentenced to a term of imprisonment without the option of a fine for a period of three months or more by a magistrate of less than seven years' standing; or (b) sentenced to a term of imprisonment without the option of a fine for a period of six months or more by a magistrate of more than seven years' standing, the conviction and sentence must be automatically reviewed by a High Court judge (sec 302).

85 UN Principles and Guidelines Introduction paras 9 & 10; Guideline 14.

86 Uganda Legal Aid Bill, 2011 sec 37(1)(a); compare Sierra Leone Legal Aid Act, 2010 sec 16(1)(a) and Kenya Legal Aid Bill, 2010 sec 37(c) which allowed an 'intermediary' to assist unrepresented persons, but this was not incorporated into the Kenya Legal Aid Act of 2016.

87 Uganda Legal Aid Bill, 2011 sec 37(1)(ii); compare Sierra Leone Legal Aid Act, 2010 sec 16(1)(b)-(e); Sierra Leone Legal Aid Act, 2010 sec 16(1)(a); Kenya Legal Aid Bill, 2010 sec 37(c) which allowed an 'intermediary' to assist unrepresented persons, but this was not included in the Kenya Legal Aid Act of 2016.

88 Interim Criminal Code for Courts, 2004.

discretion to appoint 'an educated person with knowledge of the law' to represent criminal accused.

Article 96 of the Afghanistan Interim Criminal Code provided for 'interim defence counsel' in the following circumstances:

- 1 Up to when in the country there will be not available a sufficient number of defence counsels, as established in article 18, the suspect or the accused can have recourse to the assistance of an educated person having some knowledge of legal issues (*sic*).
- 2 To this end the President of each Court shall institute a list of persons having the qualities indicated in the previous paragraph following the indications from the Capital of the Ministry of Justice and for Districts and Provincial Courts of Government Cases Department (*sic*).

To ensure that people who live in remote areas where there are courts but no lawyers, are assisted during criminal trials, legal aid legislation should contain provisions that allow paralegals, law students or lay persons to assist them as this is consistent with the flexible approach to legal aid in criminal matters recommended by the UN Principles and Guidelines.<sup>89</sup>

## 5.6 Challenge 6: Over-bureaucratisation of the legal aid scheme

Principles 3, 7 and 9 of the UN Principles and Guidelines provide that (a) legal aid should be provided without a means test where the interests of justice so require; (b) states should ensure effective legal aid; and (c) states should provide safeguards if legal aid is delayed.<sup>90</sup>

Principle 3 states:

- 21 Legal aid should also be provided, regardless of the person's means, if the interests of justice so require, for example, given the urgency or complexity of the case or the severity of the potential penalty.

Principle 7 states:

- 27 States should ensure that effective legal aid is provided promptly at all stages of the criminal justice process.
- 28 Effective legal aid includes, but is not limited to, unhindered access to legal aid providers for detained persons, confidentiality of communications, access to case files and adequate time and facilities to prepare their defence.

Principle 9 states:

- 31 States should establish effective remedies and safeguards that apply if access to legal aid is undermined, delayed or denied or if persons have not been adequately informed of their right to legal aid.

There is a tendency in countries where earlier legal aid schemes have been administered by the courts or by government officials for there to be excessive documentation requirements when applying for legal

<sup>89</sup> UN Principles and Guidelines Principles 10 & 14; Guidelines 13 & 14.

<sup>90</sup> UN Principles and Guidelines Principles 3, 7 & 9.

aid. Legal aid applicants sometimes have to obtain certificates from a number of government officials in order to substantiate that they are unemployed or indigent, instead of simply completing a form and attaching a salary slip or making a sworn declaration that they are unemployed.<sup>91</sup>

Appeal procedures may also be cumbersome, requiring legal aid applicants who are refused legal aid to apply to an appeals committee, instead of the next highest legal aid officer.<sup>92</sup> Some countries prefer the national legal aid scheme to be run as part of the Ministry of Justice and subject to its bureaucracy, both of which undermine its credibility and accessibility.<sup>93</sup>

The following provisions have been adopted at stakeholders' meetings and are often accepted by most legal drafters and/or legislators for inclusion in the principal Act or subsidiary legislation:

- (a) Applicants need only complete one form disclosing their income and assets and liabilities backed by supporting documentation where it exists (eg, a salary slip, or income and expenditure statement from self-employed persons).<sup>94</sup>
- (b) In the case of unemployed persons they make a sworn statement to the effect that they have made attempts to find work but remain unemployed.
- (c) If a person knowingly makes a false statement on his or her application form the person may be prosecuted.
- (d) Emergency legal aid is provided in urgent cases for persons who appear to be indigent without a formal application for legal aid being made at the time.<sup>95</sup>

Such clauses should be included in legal aid legislation and regulations of countries in order to bring their legal aid systems into line with the UN Principles and Guidelines.<sup>96</sup>

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91 This happened in many of the Eastern and Central European and Central Asian countries before their legal aid systems were reformed.

92 Eg, the Sierra Leone Legal Aid Act, 2012 requires appeals against the Board's decision to refuse legal aid to be made to an 'Appeals Panel' consisting of a Judge of Appeal as Chairperson, the Chief Social Welfare Officer 'or his representative not below the rank of Deputy Secretary', a retired public officer nominated by the Public Service Commission and two representatives of civil society organisations accredited to provide legal aid, one of whom shall be a woman (sec 28(2)).

93 As, eg, in Afghanistan because there was mutual mistrust between the Ministry of Justice NGOs and the Republic of Georgia when its legal aid scheme was first established as a division in the Ministry of Justice but was supposedly insulated from interference by the Ministry in its daily operations. The Georgia legal aid scheme is now completely independent of the Ministry.

94 These provisions are usually mentioned in the subsidiary legislation such as Ministerial regulations or a legal aid guide (compare Legal Aid South Africa *Legal aid guide* (2014) 269).

95 Sierra Leone Legal Aid Act 2012 sec 29.

96 UN Principles and Guidelines Principles 3, 7 & 9.

## 5.7 Challenge 7: Lack of provision of necessary resources by the state

The UN Principles and Guidelines provide that states should provide the necessary human and financial resources for a nationwide legal aid scheme.<sup>97</sup>

Principle 2 states that 'states should allocate the necessary human and financial resources to the legal aid system'.<sup>98</sup> Guideline 12 adds that

states should, where appropriate, make adequate and specific budget provisions for legal aid services that are commensurate with their needs, including by providing dedicated and sustainable funding mechanisms for the national legal aid system.<sup>99</sup>

Guideline 12 also suggests that states could take the following measures:<sup>100</sup>

- (a) to establish a legal aid fund to finance legal aid schemes, including public defender schemes, to support legal aid provision by legal or bar associations; to support university law clinics; and to sponsor non-governmental organisations and other organisations, including paralegal organisations, in providing legal aid services throughout the country, especially in rural and economically and socially disadvantaged areas;
- (b) to identify fiscal mechanisms for channelling funds to legal aid, such as:
  - (i) allocating a percentage of the State's criminal justice budget to legal aid services that are commensurate with the needs of effective legal aid provision;
  - (ii) using funds recovered from criminal activities through seizures or fines to cover legal aid for victims;
- (c) to identify and put in place incentives for lawyers to work in rural areas and economically and socially disadvantaged areas (eg tax exemptions or reductions, student loan payment reductions);
- (d) to ensure fair and proportional distribution of funds between prosecution and legal aid agencies.

Guideline 12 also states:<sup>101</sup>

The budget for legal aid should cover the full range of services to be provided to persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence, and to victims. Adequate special funding should be dedicated to defence expenses such as expenses for copying relevant files and documents and collection of evidence, expenses related to expert witnesses, forensic experts and social workers, and travel expenses. Payments should be timely.

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<sup>97</sup> UN Principles and Guidelines Principle 2 and Guideline 12.

<sup>98</sup> UN Principles and Guidelines Principle 2 para 15.

<sup>99</sup> UN Principles and Guidelines Guideline 12 para 60.

<sup>100</sup> UN Principles and Guidelines Guideline 12 para 61.

<sup>101</sup> UN Principles and Guidelines Guideline 12 para 62.



Governments often profess to support a legal aid system but are reluctant to provide sufficient resources – either in money or in kind. It is useful to give such governments examples of the *per capita* expenditure on legal aid in different countries so that they may establish a suitable benchmark.<sup>102</sup> Another useful guideline is to compare the amount spent on the prosecution service with that provided for legal aid: There should be some degree of parity to ensure equality of arms.<sup>103</sup> The Fiji Legal Aid Commission's state-funded budget is 80 per cent that of the Directorate of Public Prosecutions – excluding the budget for police prosecutors who are used outside the main towns.<sup>104</sup>

The state should not expect to run a legal aid scheme solely on *pro bono* services by lawyers,<sup>105</sup> although this may be a useful adjunct to a national legal aid scheme.

Guideline 11 encourages *pro bono* legal aid work by lawyers:<sup>106</sup>

States should also take measures:

- (a) to encourage legal and bar associations to support the provision of legal aid by offering a range of services, including those that are free (*pro bono*), in line with their professional calling and ethical duty;
- (b) to identify incentives for lawyers to work in economically and socially disadvantaged areas (eg, tax exemption, fellowships and travel and subsistence allowances);
- (c) to encourage lawyers to organise regular circuits of lawyers around the country to provide legal aid to those in need.

While provisions stating that funding for legal aid must be specifically appropriated by the treasury for that purpose have only been adopted at stakeholders' meetings and by legislative drafters, the following provisions are likely to be rejected by legislative drafters and/or legislators:

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102 Eg, for the year 2010-2011 in South Africa, Parliament allocated R1,1 billion (about US \$110 million) to Legal Aid South Africa (Legal Aid South Africa *Annual Report* (2012) 94) or an amount of about \$2,20 per head for each member of South Africa's approximately 50 million people. This compares with the per capita expenditure during 2010 on legal aid in England and Wales of US \$59 (£39) and in New Zealand of US \$27 (£18) (Ministry of Justice (UK) *International comparisons of public expenditure on legally aided services: Ad hoc statistics note* (2011) 3). In 2008 England and Wales spent S \$59 (£39) per capita; Scotland US \$47 (£31); Spain and France each US \$8 (£5); and Portugal US \$5 (£3) (Ministry of Justice (UK) above 7). Fiji at US \$3 per capita (Fiji Legal Aid Commission *Functional review* (2016) (unpublished) 9-10 is probably the best-funded legal aid scheme in a developing country followed by South Africa).

103 UN Principles and Guidelines Guideline 12 para 61(d).

104 Fiji Legal Aid Commission *Functional Review* (n 102) 9-10.

105 South Africa tried this in 1962 and failed; GW Cook 'A history of legal aid in South Africa' in Faculty of Law, University of Natal *Legal aid in South Africa* (1974) 31-32.

106 UN Principles and Guidelines Guideline 11 para 56.

- (a) Funding should be based on *per capita* expenditure for the population of the country as a whole.<sup>107</sup>
- (b) Funding for legal aid should be partially commensurate with the expenditure on prosecution services.<sup>108</sup>
- (c) Not more than about a third of the money allocated for legal aid should be spent on administrative support – the majority of funding should be used for legal aid service delivery.<sup>109</sup>
- (d) Incentives should be given to legal aid providers working in rural or socially disadvantaged areas (eg tax exemptions or student loan payment reductions).<sup>110</sup>

Legal aid legislation and regulations in African and developing countries should include such provisions in order to make them consistent with UN Guideline 12.

## 6 Conclusion

The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems and the UNODC *Early access handbook* may be used when drafting legal aid legislation to ensure the accessibility, effectiveness, sustainability and credibility of legal aid services.

The challenges to the UN Principles and Guidelines when seeking to provide legal aid in African and developing countries that have small numbers of lawyers can be overcome by including appropriate legislative provisions that are consistent with the Principles and Guidelines.

Ensuring access to justice for all and the rule of law requires legislative drafters and legislators to consider how the needs of poor and vulnerable people in remote areas in conflict with the law, where there are no lawyers, can obtain assistance, rather than bowing to vested interests.

As paragraph 1 of the Introduction to the UN Principles and Guidelines reminds us, '[l]egal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law'.

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107 Compare n 96.

108 Compare text accompanying n 98.

109 This is roughly the ratio of expenditure by Legal Aid South Africa.

110 The writer is not aware of a country that includes such a provision in their legal aid legislation.

The failure to establish an accessible, effective, sustainable and credible legal aid scheme may result in civil strife and even insurrection by disaffected communities, as occurred in Sierra Leone where the lack of access to justice was a major contributor to the outbreak of the Civil War.<sup>111</sup>

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111 Personal remark made to the author by the President of Sierra Leone when he was discussing the policy for the drafting of the Legal Aid Bill for Sierra Leone in April 2009.

## Survival rights for children: What are the national and global barriers?

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### Summary

*Most children die in low and middle-income countries as a result of structural injustice, and while it may not be possible to prove causality between economic policies and breaches of rights, it is possible to audit policy and practices through the lens of human rights. Child health advocates need to highlight the fact that technical interventions, in the absence of action on structural injustice, cannot address the fundamental causes of poor health. It could even be said that we collude in the fallacy that injustices can be solved with technical solutions. The determinants of health, water, food, shelter, primary education and health care are minimum core human rights, are the rights required for survival and today should be available to every child (and their families) in all countries. However, there are national and global limitations on the ability of countries to determine policy and generate the revenue required for core*

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*human rights. The authors conducted a review of the literature on the main leakages from government revenues in low and middle-income countries to identify obstacles to children enjoying their right to survival. Based on the review the authors suggest a framework for an upstream audit that can be carried out, country by country, to identify barriers in terms of policies and the generation, allocation and utilisation of revenues. This audit involves systematically screening the policies and practices of the main actors: national governments, high-income country partners, multinational enterprises, and international organisations, for possible influence on the realisation of human rights. Human rights advocates and child health associations could lead or commission an upstream audit on behalf of children in their countries in order to identify the fundamental causes and real remedies.*

**Key words:** *minimum core economic and social rights; human rights impact assessment; economic policies; duty bearers; low and middle-income countries; socio-economic rights; survival rights; children's rights*

## 1 Introduction

It is known that in order to survive and be healthy children require clean water, sanitation, health care and education.<sup>1</sup> These are the minimum core economic and social rights that are critically important for children. If children do not enjoy these rights and if their mother is uneducated, they are less likely to survive. Since they are required for survival, these rights could (or should) be called survival rights.<sup>2</sup> Most children in high-income countries have access to these rights, but many children in low and middle-income countries do not, which results in different outcomes, see box 1 and figure 1. The risk of a child dying before the age of five years in low-income countries is 14 times higher than in high-income countries, namely, 69 per 1 000 live births in comparison with five per 1 000 live births.<sup>3</sup> The fundamental causes of preventable child mortality are limited access to the determinants of health or survival rights, and healthcare interventions can only mitigate the impact.<sup>4</sup>

The UN Committee on Economic, Social and Cultural Rights (ESCR Committee) stated that these rights are of immediate effect and serve as the lowest bar for countries to progressively realise other human

1 S Kuruvilla, J Schweitzer, D Bishai et al 'Success factors for reducing maternal and child mortality' (2014) 92 *Bulletin of the World Health Organisation* 533.

2 S Pemberton, D Gordon, S Nandy et al 'Child rights and child poverty: Can the international framework of children's rights be used to improve child survival rates?' (2007) 4 *PLoS Medicine* 1567.

3 World Health Organization 'Global Health Observatory Data' (2017) <http://www.who.int/gho/en/> (accessed 18 November 2018).

4 B O'Hare, D Devakumar & S Allen 'Using international human rights law to improve child health in low-income countries?: A framework for healthcare professionals' (2016) 16 *BMC International Health and Human Rights* 11.

rights.<sup>5</sup> Many governments of low and middle-income countries do not have adequate revenue to provide the public services that are essential to ensure core rights. However, international human rights law tends to identify the nation state as the sole duty bearer of core economic and social rights, despite the reduced policy space available in a globalised world.<sup>6</sup> Yet, all states have extra-territorial responsibilities regarding human rights and, similarly, countries that have delegated powers to international organisations are responsible for the decisions of those bodies.<sup>7</sup> In addition, General Comment 24 of the ESCR Committee states that high-income countries should not remain passive but must act to prevent violations of survival rights abroad by entities domiciled in their territories.<sup>8</sup> At the same time, reduced room for manoeuvre does not exonerate low and middle-income countries from their responsibilities, and they also are responsible for the conduct of entities that operate in their territory or that undertake state functions.<sup>9</sup>

This interdisciplinary article aims to propose a four-step framework to facilitate an audit of the national and international influences on survival rights. It is suggested that this audit is carried out one country at a time, as the influences vary from country to country. The purpose of the audit is to identify barriers in order to propose remedies.

## 2 Methods: Developing a tool to audit the upstream influences on survival rights

For most children, access to survival rights depends on public services (water, sanitation, health care and education), that generally are provided by governments. Government revenue, as well as allocation decisions, will influence the amount that is available for public services and thus survival rights. Government revenue in low and middle-income countries derives from tax (70 per cent), non-tax revenues and user fees (11 per cent) and grants or aid (17 per cent).<sup>10</sup>

Governments determine domestic taxation policies, but there are significant and interwoven global influences on taxation, and low and

5 ESCR Committee UN E/C.12/2000/4 General Comment 14 (2000): The right to the highest attainable standard of health (art 12) para 43.

6 E Ashford 'The infliction of subsistence deprivations as a perfect crime' (2018) 118 *Proceedings of the Aristotelian Society* 83.

7 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011).

8 ESCR Committee E/C.12/GC/24 General Comment 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (2017) para 27.

9 DM Chirwa 'The doctrine of state responsibility as a potential means of holding private actors accountable for human rights' (2004) 5 *Melbourne Journal of International Law* 2.

10 M Moore 'Obstacles to increasing tax revenues in low-income countries' [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2436437](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2436437) (accessed 28 November 2018).

middle-income countries are disadvantaged by international rules, as a significant proportion of global wealth is held offshore (that is, in secrecy and in low tax jurisdictions) and is untaxed.<sup>11</sup> The amount of income tax paid by corporations is influenced by the practices of multinational enterprises (MNEs) working in the country, but tax policies are also guided by the International Monetary Fund (IMF) and thus high-income countries. These entities encourage a reduction in corporate and personal income tax, international trade tax and a replacement with value-added taxes, often considered to be regressive.<sup>12</sup> When a country is impoverished or indebted, the volume of aid and credit is significant and decided mainly by high-income countries, the World Bank and the IMF.<sup>13</sup>

An examination of leakages of revenue from low and middle-income countries' governments shows that the most significant are tax avoidance in the informal sector, tax incentives granted to the corporate sector and international corporate tax avoidance,<sup>14</sup> while other leakages include corruption and debt repayments.<sup>15</sup> These leakages may be increased or decreased by the policies and practices of MNEs, high-income countries and international organisations, the IMF and the World Bank.

Current frameworks to assess compliance with the obligation to fulfil economic, social and cultural rights are cognisant of the responsibilities of a state for the realisation of these rights.<sup>16</sup> However, there is a need for an extended framework to include global actors. Given this gap, we developed a framework to facilitate the systematic audit of the policies and practices of the main global actors that may affect leakages of revenue and thus public services and survival rights in low and middle-income countries, see figure 2. This is similar to other frameworks developed to analyse the impact of globalisation, but viewed through the lens of human rights, which are also among the Sustainable Development Goals (SDGs).<sup>17</sup> It is an upstream extension of the OPERA framework (outcomes, policy effort, resources

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- 11 M Moore, W Prichard & O-H Fjeldstad *Taxing Africa: Coercion, reform and development* (2018).
  - 12 C Kumar 'Africa rising?' (2014) <https://www.christianaid.org.uk/sites/default/files/2017-08/africa-rising-inequalities-essential-role-fair-taxation-february-2014.pdf> (accessed 28 November 2018).
  - 13 TH Stubbs, AE Kentikelenis & LP King 'Catalyzing aid? The IMF and donor behaviour in aid allocation' (2016) 78 *World Development* 511.
  - 14 M Curtis & B O'Hare 'Lost revenues in low income countries' (2017) 3 <http://curtisresearch.org/publications/lost-revenues-in-low-income-countries/> (accessed 28 November 2018).
  - 15 B O'Hare & I Makuta 'An analysis of the potential for achieving the fourth millennium development goal in SSA with domestic resources' (2015) 11 *Global Health* 8.
  - 16 Ashford (n 6).
  - 17 R Labonte & R Torgerson 'Interrogating globalisation, health and development: Towards a comprehensive framework for research, policy and political action' (2005) 15 *Critical Public Health* 157.

and assessment), as the influence of global actors on (a) the policies and (b) revenues available (generation and allocation) is included.<sup>18</sup>

In terms of measuring the outcomes with respect to survival rights, socio-economic data is collected by many organisations and is widely available and well-suited to analysing levels of rights, provided the data is reported as the percentage of the population (and, therefore, children) who do not have access to water, sanitation, health care and primary education.<sup>19</sup> For example, if 70 per cent of children have access to improved water, then 30 per cent of children do not have access to this right.

### **3 Results: A four-step audit of upstream influences on the survival rights of children in low and middle-income countries**

The following four steps may be used to systematically analyse the influences of the national government and global actors on policy effort and revenue, in terms of both generation and allocation, which impact the realisation of survival rights, see table 1 for the upstream influences on revenue. This article highlights some aspects to consider in each of the steps, but the analysis need not be limited to these suggestions.

#### **3.1 Step I: National**

##### **3.1.1 Policy effort**

Has the country ratified the international covenants and treaties? Are survival rights in the constitution and national legislation? Is there an implementation strategy and guidelines? Are socio-economic rights justiciable and is justice accessible in the national human rights system? What are the outcomes of litigation on survival rights or minimum core economic and social rights?

##### **3.1.2 Resource generation**

The audit of resources should include how effectively a country raises revenue, including tax, as this will influence the ability to meet their human rights obligations.<sup>20</sup> Has the country designed their tax regimes to facilitate human rights obligations, for instance, by

18 Centre for Economic and Social Rights *The OPERA framework: Assessing compliance with the obligation to fulfil economic, social and cultural rights* (2012) 1 <http://cesr.org/opera-landing> (accessed 18 November 2018).

19 Office of the United Nations High Commissioner for Human Rights *Human rights indicators: A guide to measurement and implementation* (2012) [http://www.ohchr.org/Documents/Publications/Human\\_rights\\_indicators\\_en.pdf](http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf) (accessed 28 November 2018); O'Hare, Devakumar & Allen (n 4).

20 R Balakrishnan, D Elson & R Patel 'Rethinking macro-economic strategies from a human rights perspective' (2010) 53 *Development* 27-36



redistributing wealth to mitigate social inequalities and to generate a revenue stream for social goods?<sup>21</sup>

Government revenue is lower in low and middle-income countries than in high-income countries (18 per cent of gross domestic product (GDP) versus 42 per cent in high-income countries).<sup>22</sup> The tax gap is the difference between revenue collected and what could be collected, and not taxing the informal sector contributes significantly to the gap. In many low and middle-income countries, the informal sector constitutes between 30 and 50 per cent of total productivity.<sup>23</sup> If a country does not demonstrate due diligence in raising taxes and is unable to provide survival rights due to a shortage of revenue, then human rights obligations are not being met. However, raising taxes in low and middle-income countries is challenging for logistic and political reasons. Low and middle-income countries generally are agricultural and use physical verification rather than account-based taxing and tax administrations tend to be underresourced regarding staff and funding.<sup>24</sup> Also, there may be a lack of political will to tax the wealthy elite due to vested interests.<sup>25</sup> Tax incentives are commonly used to attract direct foreign investment, but investors also need a good infrastructure and regulatory environment, which cannot be provided without government revenue.<sup>26</sup> The IMF and World Bank note that tax incentives create an administrative burden for tax authorities and do not promote investment, yet more than half the African countries offer generous incentives. For example, in 2007 it was estimated that Mozambique lost 77 per cent of corporate income tax due to incentives.<sup>27</sup> While there is parliamentary scrutiny of general budgets, tax policies may not receive the same degree of oversight.<sup>28</sup> Donor agencies themselves are often beneficiaries of tax exemptions, which increases the transaction costs of aid and increases

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21 D McCoy, S Chigudu & T Tillmann 'Framing the tax and health nexus?: A neglected aspect of public health concern' (2017) 12 *Health Economics, Policy and Law* 179.

22 Moore (n 10).

23 L Medina, A Jonelis & M Cangul 'The informal economy in sub-Saharan Africa?: Size and determinants' (2017) <http://www.imf.org/en/Publications/WP/Issues/2017/07/10/The-Informal-Economy-in-Sub-Saharan-Africa-Size-and-Determinants-45017?cid=em-COM-123-35579> (accessed 18 November 2018).

24 Moore (n 10).

25 A Waris 'How Kenya has implemented and adjusted to the changes in international transfer pricing regulations, 1920-2016' International Centre for Tax and Development Working Paper 69 (2017).

26 OECD *Action plan on base erosion and profit shifting* (2013)

27 Action Aid 'Give us a break: How big companies are getting tax-free deals' June 2013, [http://www.actionaid.org/sites/files/actionaid/give\\_us\\_a\\_break\\_-\\_how\\_big\\_companies\\_are\\_getting\\_tax-free\\_deals\\_2.pdf](http://www.actionaid.org/sites/files/actionaid/give_us_a_break_-_how_big_companies_are_getting_tax-free_deals_2.pdf) (accessed 18 November 2018).

28 M Hearson 'Tax-motivated illicit financial flows: A guide for development practitioners' (2014) <http://www.u4.no/publications/tax-motivated-illicit-financial-flows-a-guide-for-development-practitioners/> (accessed 18 November 2018).

tax fraud.<sup>29</sup> Import taxes are a vital source of government revenue for low and middle-income countries, but these have decreased as a result of liberalisation policies,<sup>30</sup> and aid.<sup>31</sup>

The High-Level Panel on illicit financial flows from Africa has defined flows as

money that is illegally earned, transferred or utilised. These funds typically originate from three sources: commercial tax evasion, trade misinvoicing and abusive transfer pricing; criminal activities, including the drug trade, human trafficking, illegal arms dealing, and smuggling of contraband; and bribery and theft by corrupt government officials.<sup>32</sup>

Most instances of illicit financial flight are to avoid taxes, generally commercial tax abuse. Corporate income tax is due when profit is declared, and overestimating costs and underestimating profit may be used for transactions between related entities (called transfer pricing) to artificially lower profits and thus taxes. Sales between related entities are supposed to use an 'arm's length' approach to pricing, but this is rarely used. Profits are thus shifted from jurisdictions with higher levels of taxation to low tax jurisdictions, which may also have high levels of secrecy. Tax treaties between high-income countries and low and middle-income countries are used, and companies are established in a country where there is a tax treaty in place in order to divert profits and minimise tax. High-income countries lose the most in absolute terms, but low and middle-income countries lose the most as a proportion of revenue.<sup>33</sup> The impact is compounded by a heavy reliance on corporate income tax due to a large informal sector.

Due diligence is required with respect to raising revenue and includes taxing the informal sector and the wealthy. In terms of international corporate tax avoidance, tax treaties and incentives must be carefully and transparently considered prior to signature and all MNCs should be required to submit their global country-by-country reports of profits and taxes paid, to the revenue authorities of the low and middle-income countries where they operate.

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29 V Thuronyi 'Committee of Experts on International Cooperation in Tax Matters' (2005) [http://www.un.org/esa/ffd/wp-content/uploads/2014/10/1STM\\_tax-aspects-E-C18-2005-9.pdf](http://www.un.org/esa/ffd/wp-content/uploads/2014/10/1STM_tax-aspects-E-C18-2005-9.pdf) (accessed 18 November 2018).

30 Moore (n 10).

31 W Prichard, JF Brun & O Morrissey 'Donors, aid and taxation in developing countries: An overview' (2012) Report 6 <http://www.ictd.ac/publication/donors-aid-and-taxation-in-developing-countries-an-overview/> (accessed 18 November 2018).

32 United Nations Economic Commission for Africa 'Report of the High-Level Panel on Illicit Financial Flows from Africa' (2014).

33 A Cobham & P Janský 'Global distribution of revenue loss from corporate tax avoidance?: Re-estimation and country results' (2018) 232 *Journal of International Development* 206.

### 3.1.3 Resource allocation and utilisation

As well as legislating and raising revenue, governments are obliged to channel resources towards human rights, and these rights can only be sustainably funded with a fiscal process that is legitimate (transparent, accountable and participatory) and uses domestic revenues for public services in order to strengthen the state-citizen relationship, which, in turn, will generate ongoing tax revenues.<sup>34</sup> Therefore a state's budget needs to be aligned with these ambitions. Resource allocation concerning survival rights should be assessed according to the proportion of the government's budget allocated to goods that will promote human development. Countries that have recently been involved in conflict tend to spend more on defence and less on health and education, which will compromise survival rights.<sup>35</sup> Corruption, whether bureaucratic or political, decreases available resources for survival rights and has a negative impact on economic growth and, therefore, on tax generation.<sup>36</sup> The allocation of government revenue through a corrupt system will result in public services of poor quality, which reduces tax morale and increases avoidance.<sup>37</sup> Therefore public spending has little impact on outcomes in the presence of corruption,<sup>38</sup> and the school dropout rate is five times higher in corrupt countries.<sup>39</sup> A more efficient government is more likely to meet their human rights obligations with scarce resources, for example, the same amount of health expenditure has a greater impact on health outcomes where there is good governance.<sup>40</sup> An inefficient administration and procurement practice, overpricing and absenteeism hinder the implementation of well-intended social policies.<sup>41</sup>

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- 34 A Waris & LA Latif 'Towards establishing fiscal legitimacy through settled fiscal principles in global health financing' (2015) 23 *Health Care Analysis* 376.
  - 35 B O'Hare & DP Southall 'First do no harm: The impact of recent armed conflict on maternal and child health in sub-Saharan Africa' (2007) 100 *Journal of the Royal Society of Medicine* 564.
  - 36 M Ugur & N Dasgupta 'Systematic review: Evidence on the economic growth impacts of corruption in low-income countries and beyond' (2011) [http://r4d.dfid.gov.uk/PDF/Outputs/SystematicReviews/Corruption\\_impact\\_2011\\_Ugur\\_report.pdf](http://r4d.dfid.gov.uk/PDF/Outputs/SystematicReviews/Corruption_impact_2011_Ugur_report.pdf) (accessed 18 November 2018).
  - 37 S Gupta, M Verhoeven & ER Tiongson 'The effectiveness of government spending on education and health care in developing and transition economies' (2002) 18 *European Journal of Political Economy* 717.
  - 38 I Makuta & B O'Hare 'Quality of governance, public spending on health and health status in sub-Saharan Africa: A panel data regression analysis' (2015) 15 *BMC Public Health* 932.
  - 39 Gupta, Verhoeven Tiongson (n 37).
  - 40 E Willebois, EM Halter, R Harrison et al 'The puppet masters: How the corrupt use legal structures to hide stolen assets and what to do about it' (2011) 267 <https://star.worldbank.org/star/sites/star/files/puppetmastersv1.pdf> (accessed 18 November 2018).
  - 41 The World Bank 'Silent and lethal: How quiet corruption undermines Africa's development efforts' (2010) <http://documents.worldbank.org/curated/en/316051468009960660/Silent-and-lethal-how-quiet-corruption-undermines-Africas-development-efforts> (accessed 18 November 2018).

### 3.2 Step II: Multinational enterprises

#### 3.2.1 Influence on policy effort

Multinational enterprises may positively influence policy space with good corporate responsibility towards the country and communities where they work or negatively by using bribery or political lobbying to change policies in their interest.<sup>42</sup> MNEs also have huge latent power due to their ability to relocate investment elsewhere.<sup>43</sup>

#### 3.2.2 Influence on resource generation

MNEs positively and significantly add to government revenue through job creation and taxes. Corporate tax is especially crucial in low and middle-income countries as the ratio of corporate income tax to other taxes is much higher than in high-income countries.<sup>44</sup> However, MNEs may seek to avoid tax by eroding their tax base by shifting profits to low tax jurisdictions or by seeking tax incentives. Favourable terms are more likely when there is a lack of transparency. Tax avoided by MNEs in low and middle-income countries ends up in high-income countries and in offshore financial centres, and the enabling role of accountants, lawyers and bankers is increasingly recognised.<sup>45</sup>

### 3.3 Step III: High-income countries including development partners

#### 3.3.1 Influence on policy effort

The role of donors in allocation decisions needs to be carefully considered, especially where most of the government budget is derived from aid. It is crucial that survival rights be prioritised by donors where there is not complete coverage. For example, despite the importance of maternal education to child health,<sup>46</sup> aid allocated to education is stagnating.<sup>47</sup> The non-aid policies of high-income countries, may indirectly, either positively or negatively, impact survival rights in low and middle-income countries. For example, policies that protect the environment and support the transfer of new technology and fair trade will promote survival rights. Negative

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42 Willebois, Halter & Harrison (n 40) 267.

43 Chirwa (n 9).

44 Moore (n 10).

45 International Bar Association 'Tax abuses, poverty and human rights' (2013) [http://www.ibanet.org/Human\\_Rights\\_Institute/TaskForce\\_IllicitFinancialFlows\\_Poverty\\_HumanRights.aspx](http://www.ibanet.org/Human_Rights_Institute/TaskForce_IllicitFinancialFlows_Poverty_HumanRights.aspx) (accessed 18 November 2018).

46 E Gakidou, K Cowling, R Lozano et al 'Increased educational attainment and its effect on child mortality in 175 countries between 1970 and 2009: A systematic analysis' (2010) 376 *The Lancet* 959.

47 UNESCO 'Aid to education is stagnating and not going to countries most in need' (2017) <http://unesdoc.unesco.org/images/0024/002495/249568e.pdf> (accessed 18 November 2018).

interventions, such as economic sanctions, military interventions and financial secrecy adversely impacts survival rights.<sup>48</sup> Countries that initiate or vote for actions on international bodies bear responsibility if human rights are violated.

### 3.3.2 Influence on resource generation

Aid used for human development, infrastructure and supporting tax administrations may increase survival rights. However, aid-funded goods and services are exempt from taxation, and this situation burdens under-resourced tax administration which compromises the core objective of establishing a sustainable tax base.<sup>49</sup> Donor conditions may include tied procurement which may be more expensive and result in an extra level of bureaucracy.

Tax avoidance by MNEs, often headquartered in high-income countries which may also be development partners, decreases the government revenue available for survival rights. Countries that provide financial secrecy are facilitating tax abuses and thus human rights abuses.<sup>50</sup> Tax treaties between high-income countries and low and middle-income countries often limit the latter's ability to tax MNEs and allows 'treaty shopping', which occurs when a subsidiary is opened in a country which offers the most favourable treaty in order to divert profits.<sup>51</sup> Repayment of debt can reduce the resources available for survival rights,<sup>52</sup> for example, 50 per cent of capital loaned to African countries as public debt (which has to be repaid), was deposited in private bank accounts in high-income countries within months of the loan being granted. Debts that did not benefit the population, about which they had no knowledge and in situations where the creditors were aware of the circumstances, are defined as odious in international law.<sup>53</sup> These debts need to be audited and repudiated, and the role of high-income countries in which the lending institutions are domiciled need to consider their obligations when granting loans. Obstacles to trade in agricultural products are significant and include subsidies granted to farmers in high-income countries which lowers world prices, and other barriers such as import tariffs, quotas and stringent phyto-sanitary conditions. High-income

48 Centre for Global Development, 'Commitment to Development Index', 2015 <http://www.cgdev.org/cdi-2015> (accessed 18 November 2018)

49 Prichard, Brun & Morrissey (n 31).

50 Cobham, Alex, Petr Janský, and Markus Meinzer, 'The Financial Secrecy Index? Shedding New Light on the Geography of Secrecy Working Paper 404', 2015 <https://www.cgdev.org/publication/financial-secrecy-index-shedding-new-light-geography-secrecy-working-paper-404> (accessed 18 November 2018)

51 ActionAid 'Mistreated The tax treaties that are depriving the world's poorest countries of vital revenue' (2016) [http://www.actionaid.org/sites/files/actionaid/actionaid\\_-\\_mistreated\\_tax\\_treaties\\_report\\_-\\_feb\\_2016.pdf](http://www.actionaid.org/sites/files/actionaid/actionaid_-_mistreated_tax_treaties_report_-_feb_2016.pdf) (accessed 18 November 2018).

52 O'Hare & Makuta (n 14) 8.

53 L Ndikumana & J Boyce *Africas odious debts: How foreign loans and capital flight bled a continent* (2011) 152.

countries may promote the sale of arms to low and middle-income countries by protecting the profit of arms traders through offering a guarantee for their investment.<sup>54</sup>

### 3.4 Step IV: International organisations

#### 3.4.1 Influence on policy effort

The IMF is the gatekeeper for World Bank credit<sup>55</sup> and aid flows,<sup>56</sup> and is an important player in global development.<sup>57</sup> The IMF will impact survival rights when privatisation is promoted or if a restriction on social spending prohibits a country's ability to provide for all.<sup>58</sup> The World Bank decides about credit allocation and to whom low-interest loans are awarded. The scale of their portfolio makes oversight difficult, and criticisms include their corrupting influence, with 10 to 40 per cent of loans and grants lost due to a lack of fiduciary oversight,<sup>59</sup> corruption impacts the efficiency with which a government provides survival rights.<sup>60</sup> Voting power at the IMF and World Bank is skewed towards high-income countries (see Table 2). The failure of countries to meet their obligations to provide survival rights, as a result of the policies of international organisations is the responsibility of the countries that have delegated powers to them.

#### 3.4.2 Influence on resource generation

Adjustment and poverty reduction loans often come with the conditionality of reducing import taxes and opening markets to foreign trade and investment. The reduction in import taxes has resulted in the loss of government revenue, and most low and middle-income countries have managed to replace only 30 per cent of this, as their economies predominantly are informal economies with a narrow tax base.<sup>61</sup> Conditionalities need to be viewed through the lens of human rights. This requirement may compromise new industries which may not be competitive in a global marketplace, although, for importing countries, goods may be cheaper. The IMF has been involved in the reform of national tax agencies to optimise domestic resource mobilisation. However, without global tax reform

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54 O'Hare & Southall (n 35) 564.

55 CD Gowen 'IMF conditionality and armed civil conflict?: An analysis of sub-Saharan Africa' (2007) [http://scholarworks.gsu.edu/political\\_science\\_theses/15/](http://scholarworks.gsu.edu/political_science_theses/15/) (accessed 18 November 2018).

56 B Clements, S Gupta & M Nozaki 'What happens to social spending in IMF-supported programmes?' (2013) 48 *Applied Economics* 4022.

57 Stubbs, Kentikelenis & King (n 13) 511.

58 AE Kentikelenis 'Structural adjustment and health: A conceptual framework and evidence on pathways' (2016) 187 *Social Science and Medicine* 296.

59 S Berkman *The World Bank and the gods of lending* (2008).

60 Makuta & O'Hare (n 38).

61 O Fjeldstad 'Taxation and development: A review of donor support to strengthen tax systems in developing countries' (2013) WIDER Working Paper 2013/010.

the impact is likely to be negligible.<sup>62</sup> If credit is in the form of a loan from the World Bank, then repayment may compromise the provision of survival rights. Loans may be worthwhile if used to support economic growth and human development, but credit which is not productive, will result in citizens repaying a debt from which they did not benefit.

### 3.4.3 Resource allocation and utilisation

The allocation of revenue towards survival rights may be influenced by a budgetary deficit, as debt often results in conditions including the privatisation of public goods such as health care or education, reduced social spending and caps on public sector salaries. The IMF has been associated with these policies,<sup>63</sup> which generally reduces access to survival rights.

## 4 Discussion

The purpose of this audit is to identify modifiable barriers to children's right to survive which should increase the efficiency of child advocacy, as it allows targeting scarce advocacy resources towards the correct institutions. If violations are identified, it may be possible to remedy these through negotiation, for example, by requesting that international assistance prioritises changes in the policies of high-income countries, which have a spill-over impact on low and middle-income countries, that is, requesting development partners to have coherent policies. If tax avoidance plays a role, explaining to MNEs working in the country the importance of corporate tax to government revenue, public services and survival rights and negotiating for increased tax revenues as part of the corporation's social responsibility obligations, in preference to, or as well as sponsoring small projects for the local community.<sup>64</sup>

The decision regarding litigation to promote the realisation of core socio-economic rights will depend on several factors, including investigating whether the rights are recognised in the constitution; how easy it is to access courts in the country; the possibilities for public interest litigation; and how autonomous the judiciary is. A final question arises as to whether previous social rights litigation has improved access for the poor and vulnerable in the country. The

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62 Moore (n 10).

63 AE Kentikelenis, TH Stubbs & LP King 'Structural adjustment and public spending on health: Evidence from IMF programmes in low-income countries' (2015) 126 *Social Science and Medicine* 169.

64 Office of the United Nations High Commissioner for Human Rights. Guiding Principles on Business and Human Rights (2011), [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (accessed 18 November 2018).

various factors need to be weighed and assessed in order to decide how to proceed.<sup>65</sup>

As far as international organisations are concerned, global institutional arrangements are decided by the governments of affluent countries, answerable to citizens in these countries, who therefore are duty bearers for the arrangements made in their name.<sup>66</sup> Professional enablers, such as bankers and nominees of shell companies, are many steps closer regarding influence or duty, but we are all complicit, by our voting, banking, consuming and investing decisions if these contribute to institutions, policies and practices that produce structural injustices.<sup>67</sup>

## 5 Conclusion

Children's rights advocates have long awaited the resolution of structural injustices that deprive children of their right to survive. However, by not vocally advocating for immediate action on survival rights, we have colluded in the fallacy that technical solutions will solve problems caused by economic injustices. To close the gap between *de jure* and *de facto* children's rights to survival, associations or individuals can start to look upstream for fundamental causes and remedies of a legal or persuasive nature, country by country, and advocate immediate change.

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65 AE Yamin & S Gloppen (eds) *Litigating health rights: Can courts bring more justice to health?* (2011).

66 TWM Pogge 'World poverty and human rights' (2005) 19 *Ethics and International Affairs* 1.

67 IM Young 'Political responsibility and structural injustice' (2003) [https://www.bc.edu/content/dam/files/schools/cas\\_sites/sociology/pdf/PoliticalResponsibility.pdf](https://www.bc.edu/content/dam/files/schools/cas_sites/sociology/pdf/PoliticalResponsibility.pdf) (accessed 18 November 2018). B O'Hare 'Active Global Citizenship: Ethical Living to Promote Human Rights' *Health and Human Rights Journal*, <https://www.hhrjournal.org/2018/11/active-global-citizenship-ethical-living-to-promote-human-rights/>.



**Box 1: Minimum core economic and social rights<sup>68</sup>**

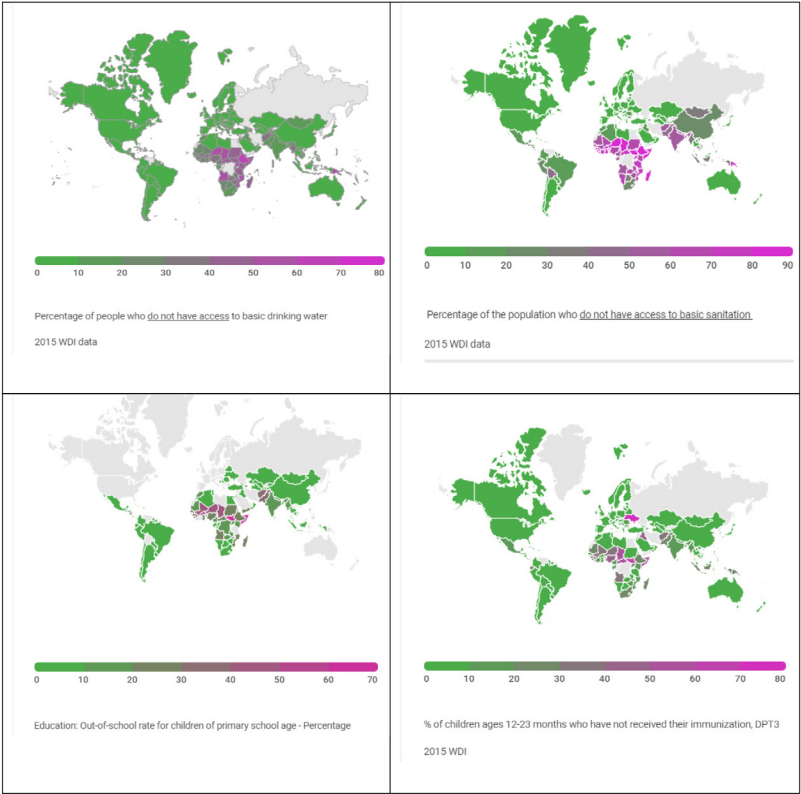
The minimum core obligations are of immediate effect and require states to –

- ensure the right of access to employment, especially for disadvantaged and marginalised individuals and groups, enabling them to live a life of dignity;
- ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger for everyone;
- ensure access to basic shelter, housing and sanitation, and an adequate supply of safe drinking water;
- provide essential drugs as defined under the World Health Organisation (WHO) Action Programme on Essential Drugs;
- ensure free and compulsory primary education to all;
- ensure access to a social security scheme that provides a minimum essential level of benefits that cover at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

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68 ESCR Committee General Comment 14 (n 5).

**Figure 1: Coverage of minimum core economic, social and cultural rights; water, sanitation, primary school education, essential vaccination.<sup>69</sup>**



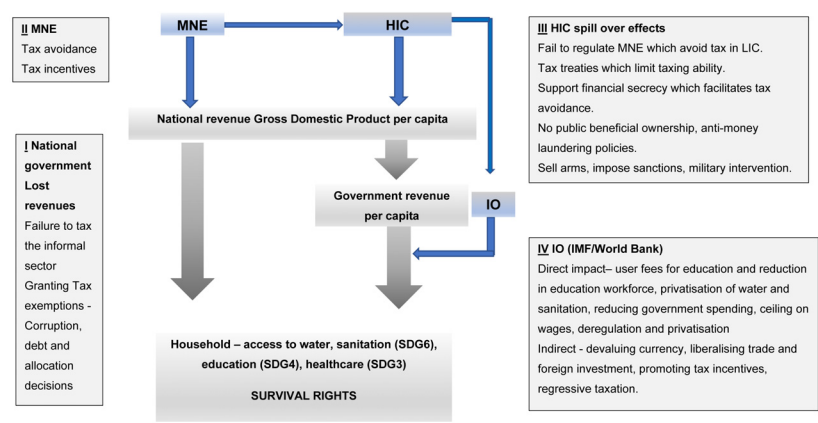
69 The World Bank. Databank – The World Bank. 2018. Available from: <https://data.worldbank.org/> (accessed 18 November 2018).

**Table 1: Upstream influences on government revenue (generation and allocation) in low and middle-income countries**  
 (-) a barrier or likely adverse impact on access to survival rights  
 (+) facilitate or likely positive impact on access to survival rights

	LMIC governments	MNE	HIC	IO
Tax avoidance in the informal economy	Tax administrations underfunded / staffed (-) Well-resourced tax administrations (+)		Aid used/not used to support tax administrations. (+/-) Embassies and aid industry pay/do not pay tax. (+/-)	IMF technical assistance for tax administrations (+) Global tax rules (-)
Tax incentives	Transparency /no transparency around contracts. (+/-) Parliamentary oversight/no parliamentary oversight of incentives awarded. (+/-)	Aggressively seek/do not seek tax incentives in LMIC. (-/+)	HIC government do not lobby/do lobby LMIC to grant their MNE tax incentives. (+/-)	Encourage incentives to attract foreign direct investment by MNEs which do/do not avoid tax. (-/+)
International corporate tax avoidance	Legislation/no legislation for country-by-country reporting by all MNE doing business in the country. (+/-) Not a signatory/signatory to treaties which reduces tax sovereignty. (+/-)	The use of tax planning to lower tax due in LMIC. (-) Subsidiaries in jurisdictions with low tax rates. (-) No use of tax avoidance by MNE. (+) Country-by-country reporting of profits and tax paid. (+)	Public country-by-country reporting by MNE/no reporting by MNE. (+/-) Regulate/ do not regulate domiciled MNE which avoid tax in LMIC, (even those which are development partners). (+/-) No tax treaties/tax treaties which limit LMIC taxing ability. (+/-)	Contracts to MNE which avoid tax. (-) Due diligence regarding awarding contracts to MNE re tax. (+)

Corruption	Strong/weak anti-corruption policies.(+/-)	Use/avoid bribery to obtain incentives or contracts. (+/-)	Do not enforce anti-money laundering policies or support stolen asset recovery. (-) No public beneficial ownership legislation.(-) Support financial secrecy. (-)	Little oversight/ oversight of loans and grants. (-/+)
Debt repayment	Carry out/do not carry out debt audits.(+/-) Public aware/unaware of credit and purpose. (+/-)		Support/do not support debt audits and asset recovery. (+/-)	Loans. (-) Grants with fiduciary oversight (+)
<b>Import tax barriers to exports or prices with subsidies</b>			Promote liberalisation policies. (-) Protect HIC industries and subsidise agriculture. (-)	Liberalisation policies which v tax on imports and increase competition for local business. (-)
Allocation	Minimal/excessive defence spending. (+/-) No debt/ large debt repayment. (+/-)	Promote militarisation. (-) Do not promote defence spending in countries with low survival rights coverage. (+)	Aid allocation which does not prioritise survival rights. (-) Untied/tied aid. (+/-) Promote militarisation, license arms transfers and provide credit guarantees for arms exports to LMIC. (-)	The privatisation of providers of survival rights. (-) Promote restriction on social spending. (-)

**Figure 2: Conceptual framework to analyse the upstream obstacles to survival rights. Step 1-IV of the four step audit of national and global barriers**



**Table 2: Voting power as a percentage of total at international financial organisations.<sup>70</sup>**

	IMF	International Bank for Reconstruction and Development (IBRD)	International Finance Corporation (IFC)
USA	16.52	15.98	20.99
Japan	6.15	6.89	6.01
China	6.09	4.45	2.30
Germany	5.32	4.03	4.77
France	4.03	3.78	4.48
UK	4.03	3.78	4.48
Italy	3.02	2.66	3.02
Russia	2.59	2.82	3.82
Canada	2.22	2.45	3.02
Saudi Arabia	2.02	2.79	1.91
SUBTOTAL	51.99	49.63	54.8
Rest of World	48.01	50.37	45.2

70 The World Bank. International bank for Reconstruction and Development (IBRD): SUBSCRIPTIONS AND VOTING POWER OF MEMBER COUNTRIES. 2018, <http://pubdocs.worldbank.org/en/795101541106471736/IBRDCountryVotingTable.pdf> (accessed 18 November 2018).

The World Bank. International Finance Corporation (IFC): SUBSCRIPTIONS AND VOTING POWER OF MEMBER COUNTRIES. 2018, [http://pub docs.worldbank.org/en/280961541106482420/IFCCountryVotingTable.pdf](http://pubdocs.worldbank.org/en/280961541106482420/IFCCountryVotingTable.pdf) (accessed 18 November 2018).

## Recent legal responses to child marriage in Southern Africa: The case of Zimbabwe, South Africa and Malawi

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### Summary

*Child marriage occurs when one of the parties is below the age of 18 years. In Zimbabwe, South Africa and Malawi research has shown that most child marriages are linked to harmful practices that are embedded in culture. Law reform to end child marriage, therefore, is a difficult task since it presents a potential conflict between children's rights and cultural rights. This article critically examines how these selected countries seek to address the conflict between cultural practices that lead to child marriage and the protection of children's rights. It also highlights conceptual as well as practical difficulties that law reformers face in regulating cultural practices, and the gaps in the reforms that need to be addressed.*

**Key words:** *child marriage; cultural practices; law reforms; Southern Africa*

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# 1 Introduction

The global campaign, led by the consortium Girls Not Brides<sup>1</sup> and the African Union Campaign to End Child Marriage,<sup>2</sup> has put child marriage<sup>3</sup> in Africa in the spotlight.<sup>4</sup> Girls Not Brides estimates that '15 of the 20 countries with the highest rates of child marriages in the world come from Africa'.<sup>5</sup> In sub-Saharan Africa it is estimated that 39 per cent of girls are married before their 18th birthday; while 13 per

- 1 Girls Not Brides: The Global Partnership to End Child Marriage (Girls Not Brides) is a global partnership of more than 800 civil society organisations. It is committed to ending child marriages and enabling girls to fulfil their potential. It was introduced in September 2011 by a group of independent global leaders working together for peace and human rights. Girls Not Brides became an independent charity in 2013, [www.sharednation.org/collections/shared-nation-fall-2017/products/girls-not-brides](http://www.sharednation.org/collections/shared-nation-fall-2017/products/girls-not-brides) (accessed 8 December 2017).
- 2 The African Union Campaign to End Child Marriage was launched in 2014 at the AU headquarters in Addis Ababa, Ethiopia, and adopted at the African Union Summit in June 2015 (see [http://pages.au.int/sites/default/files/AU%20Common%20Position%20on%20Ending%20Child%20Marriage\\_English\\_0.pdf](http://pages.au.int/sites/default/files/AU%20Common%20Position%20on%20Ending%20Child%20Marriage_English_0.pdf) (accessed 6 December 2017)). The Campaign is organised in partnership with the United Nations International Children's Fund (UNICEF) and United Nations Fund for Population Activities (UNFPA). It brings together a wide range of partners including the Ford Foundation; the United Nations Economic Commission for Africa (UNECA); Save the Children; Plan International; Africa Child Policy Forum (ACPF); and the UK Department for International Development (DFID). The aim of the Campaign is to promote, protect and advocate the rights of women and girls in Africa. It is complemented by country launches in several countries where child marriage is common, as well as by the adoption of the African Union Common Position on Ending Child Marriage. Human Rights Watch Ending Child Marriage in Africa observed that in September 2015, leaders from Africa joined other governments from around the world in adopting the United Nations Sustainable Development Goals (SDGs) including a target to end child marriage in the next 15 years; <https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa> (accessed 11 December 2017).
- 3 According to Plan 18+ Programme on Ending Child Marriage in Southern Africa: Policy Brief: Ending Child Marriage in Zimbabwe: Gaps and Opportunities in Legal and Regulatory Frameworks, child marriage is any marriage where at least one of the parties is under 18 years of age. See also para 19 of the Joint General Recommendation/General Comment 31 of the Committee on the Elimination of Discrimination against Women (CEDAW) and 18 of the Committee on the Rights of the Child on Harmful Practices, CEDAW/C/GC/31/CRC/C/GC/18, in which it was considered that child marriage is a form of forced marriage given that one or both parties have not expressed their full, free and informed consent.
- 4 All African countries are faced with the challenge of child marriage, whether with a high prevalence such as Niger at 75% or a low prevalence such as South Africa at 6%. See also observations made by J Sloth-Nielsen 'Child marriage in Zimbabwe: The Constitutional Court rules no' in B Atkin (ed) *International survey of family law* (2016) 537 at 538.
- 5 Worldwide, it is estimated that every year 15 million girls are married before the age of 18 years, [www.sharednation.org/collections/shared-nation-fall-2017/products/girls-not-brides](http://www.sharednation.org/collections/shared-nation-fall-2017/products/girls-not-brides) (accessed 8 December 2017). According to a 2015 UNICEF report, 'The State of the World's Children 2015: Reimagine the future', between 2005 and 2013 20 countries with the highest rates of child marriage before age 18 include Niger (76%); Chad and Central African Republic (68%); Bangladesh (65%); Mali (55%); Burkina Faso and South Sudan (52%); Malawi (50%); Mozambique (48%); India (47%); Lesotho (45%); Sierra Leone (44%); Zambia (42%); Dominican Republic (41%); Nepal (41%); Ethiopia and Eritrea



cent are married by their 15th birthday.<sup>6</sup> Child brides are most likely to be found in rural areas, among the poorest and most illiterate segments of the population.<sup>7</sup> Among other factors, child marriage in Africa has been linked to harmful practices (to be discussed later) that are embedded in culture.<sup>8</sup> This is compounded by the fact that in many African communities drifting from tradition could mean exclusion from the community.<sup>9</sup> Law reform to end child marriage, therefore, is a difficult task since it presents a potential conflict between children's rights and cultural rights. According to the United Nations Children's Fund (UNICEF), 'the fastest progress in reducing child marriage in Africa has been in the northern region, with Southern Africa lagging behind'.<sup>10</sup> Yet, all Southern African countries are state parties to the major international and regional instruments

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- 5 (41%); and Uganda and Cuba (40%). See also World Vision 'Ten worst places for child marriages' <http://www.worldvision.org/newsstoriesvideos/ten-worst-places-child-marriage> (accessed 2 December 2017).
  - 6 UNICEF 'The state of the world's children 2015: Reimagine the future', [data.unicef.org/wp-content/uploads/2015/12/sowc\\_2015\\_Summary\\_and\\_Tables\\_210.pdf](http://data.unicef.org/wp-content/uploads/2015/12/sowc_2015_Summary_and_Tables_210.pdf) (accessed 8 December 2017).
  - 7 UNICEF [https://data.unicef.org/wp-content/uploads/2015/11/UNICEF-Child-Marriage-Brochure-High-Single\\_246.pdf](https://data.unicef.org/wp-content/uploads/2015/11/UNICEF-Child-Marriage-Brochure-High-Single_246.pdf) (accessed 11 December 2017). It is also common in countries where literacy levels are low.
  - 8 It is widely observed that some cultures put pressure on parents to marry off their daughters in an effort to prevent them from becoming sexually active before marriage; <http://www.icrw.org/child-marriage-facts-and-figures> (accessed 8 December 2017). See also observations by L Mwambene & H Kruuse 'The thin edge of the wedge: *Ukuthwala*, alienation and consent' (2017) 33 *South African Journal on Human Rights* 25 at 30 where, in the context of the South African customary practice of *ukuthwala*, which is the mock abduction of an unmarried woman or girl by a man who intends to marry her, their research findings found that the community support the practice because, among other reasons, it helps with 'the prevention of children to be born out of wedlock'. Other causes of child marriages in the literature include poverty; a lack of education; gender discrimination; and weak and inadequate laws to address the problem; see generally C Tsiachris 'Child marriages in Southern Africa: Causes, consequences and proposals for transformation' [http://www.academia.edu/23700508/Child\\_marriage\\_in\\_Sub-Saharan\\_Africa\\_Causes\\_consequences\\_and\\_proposals\\_for\\_transformation](http://www.academia.edu/23700508/Child_marriage_in_Sub-Saharan_Africa_Causes_consequences_and_proposals_for_transformation) (accessed 8 December 2017). See also paras 19 and 20 of the Joint General Recommendation/General Comment 31 of the Committee on the Elimination of Discrimination against Women (CEDAW) and 18 of the Committee on the Rights of the Child on Harmful Practices, CEDAW/C/GC/31/CRC/C/GC/18. See, eg, the CRC Committee's Concluding Observations on Malawi in July 2016 (CRC/COPSC/MWI/CO/1 para 19 (e)), where it expressed its deep concern about the harmful customs known as *kupimbira* and *kutomera*, which involve pledging, or selling a girl into forced marriage, which are still practised due to debts owed by that parents. Similar concerns were expressed when Zimbabwe reported to the CRC Committee in January 2016 (CRC/C/ZWE/CO2 para 46(a)), as also observed by Sloth-Nielsen (n 4) 540.
  - 9 In traditional rural settings, belonging to a community entitles members to, eg, access land, dispute resolution mechanisms which are important for their social-economic survival in a village setup.
  - 10 UNICEF [https://data.unicef.org/wp-content/uploads/2015/11/UNICEF-Child-Marriage-Brochure-High-Single\\_246.pdf](https://data.unicef.org/wp-content/uploads/2015/11/UNICEF-Child-Marriage-Brochure-High-Single_246.pdf) (accessed 11 December 2017).

that condemn child marriage.<sup>11</sup>

Against this background, a number of Southern African countries have recently developed national initiatives aimed at ending child marriages. For example, in 2015 the Constitutional Court in Zimbabwe outlawed child marriages concluded under any law.<sup>12</sup> In the same year, South Africa, through the South African Law Reform Commission, proposed criminalising both forced and child marriages as a result of, among others, harmful cultural practices.<sup>13</sup> Much more recently, in 2017, Malawi amended its constitutional provision and unequivocally set the marriageable age of both women and men at 18 years.<sup>14</sup>

In view of these initiatives this article examines how the selected countries seek to address the conflict between cultural practices that lead to child marriage and the protection of children's rights.<sup>15</sup> It also highlights both the theoretical and the practical problems that law reformers face in regulating cultural practices, as well as the gaps in the reforms that need to be addressed. The article is divided into six parts including this introduction. The second part sets the scene by highlighting the prevalence of child marriage and some cultural or religious practices that lead to child marriage in the selected countries. As background to how the domestic legal framework is responding to the conflict, the third part discusses the international and regional legal position on child marriage and cultural practices.<sup>16</sup> The fourth part discusses the countries' specific legal responses, focusing on how they resolve the conflict in order to protect children's rights in the context of child marriage. The fifth part is a critical analysis of the different approaches to addressing child marriage. The conclusion argues that law reform initiatives are important but have to be coupled with practical ways of addressing those factors (namely, harmful practices and poverty) that lead to child marriage.

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11 Eg, art 21 the African Children's Charter, art 6 the African Women's Protocol, and art 8 of the SADC Gender Protocol which all prescribe the marriageable age at 18 without exception.

12 *Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs* (CCZ 12/15).

13 See, eg, the South African Law Reform Commission Discussion Paper 132 (Project 138: The practice of *ukuthwala*), which contains the Prohibition of Forced Marriages and Child Marriages Bill, 2015.

14 Before the constitutional amendment, sec 22 of the Constitution provided that children between 15 and 18 years could marry with their parental consent.

15 State parties have been urged to take all measures necessary to eliminate harmful practices that lead to child and forced marriages, eg, the CRC Committee's recommendation on Malawi (CRC/C/OPSC/MWI/CO/1) (accessed 2 December 2017).

16 All three countries under discussion are parties to both the CRC and the African Children's Charter.

## 2 Prevalence of child marriage in the selected countries

The prevalence of child marriage is defined as 'the percentage of women aged between 20-24 years who were married or in a union before they were 18 years old'.<sup>17</sup> Plan International's 18+ Programme and Sloth-Nielsen have extensively discussed the prevalence of child marriage in Zimbabwe.<sup>18</sup> It therefore is not necessary to repeat this. However, for purposes of this discussion it is important to highlight some indicators of child marriage in Zimbabwe as follows: Plan International's 18+ Programme estimates that, on average, one in every three girls is married before the age of 18.<sup>19</sup> The child population is estimated at 47 per cent, and of this number 4 per cent of girls are married before the age of 15 years, and 31 per cent of girls are married before the age of 18 years.<sup>20</sup> Overall, Zimbabwe is ranked at 41 in the number of countries where children marry before the age of 18 years.<sup>21</sup>

Several factors lead to child marriage in Zimbabwe. These include the persistence of deeply-entrenched social attitudes, which support early and underage marriage;<sup>22</sup> and religious beliefs, particularly amongst the Apostolic church communities, which encourage girls between 12 and 16 years to get married in order not to sin by having sexual relations outside marriage.<sup>23</sup> In addition, before the *Mudzuru* judgment (discussed later), legislation that regulates marriages in Zimbabwe perpetuated girl child marriage.<sup>24</sup> For example, the

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- 17 See also UNICEF 'State of the world's children 2016: A fair chance for every child', [https://www.unicef.org/publications/files/UNICEF\\_SOWC\\_2016.pdf](https://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf) (accessed 2 December 2017); UNICEF 'The state of the world's children 2015: Reimagine the future', [data.unicef.org/wp-content/uploads/2015/12/sowc\\_2015\\_Summary\\_and\\_Tables\\_210.pdf](https://data.unicef.org/wp-content/uploads/2015/12/sowc_2015_Summary_and_Tables_210.pdf) (accessed 8 December 2017). See also accounts by Sloth-Nielsen (n 4) 538.
  - 18 Plan International *In-depth review of legal and regulatory frameworks on child marriage in Zimbabwe* (2016) 20 [https://www.girlsnotbrides.org/wp-content/uploads/2016/11/PLAN\\_18\\_country\\_report\\_zimbabwe\\_final.pdf](https://www.girlsnotbrides.org/wp-content/uploads/2016/11/PLAN_18_country_report_zimbabwe_final.pdf) (accessed 6 December 2017). See also UNICEF (n 17). See also Sloth-Nielsen (n 4) 538.
  - 19 Plan International (n 18). See also UNICEF 'State of the world's children, 2016'; Zimbabwe – Child marriage around the world. Girls Not Brides, <https://www.girlsnotbrides.org/child-marriage/zimbabwe/> (accessed 8 April 2018).
  - 20 Plan International (n 18) 8 20. See also UNICEF (n 17).
  - 21 Plan International (n 18) 20. See also Sloth-Nielsen (n 4) 538; Panos Institute Southern Africa 'Media brief on ending child marriage in Zimbabwe' 3 <http://www.panos.org.zm/wp-content/uploads/2017/04/PSAf-ECM-Media-Brief-or-Zimbabwe.pdf> (accessed 2 December 2017).
  - 22 Plan International (n 18) 23.
  - 23 UNICEF Zimbabwe Country Office, 2014 Gender Review Report (UNICEF 2014). See also Human Rights Watch <https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa> (accessed 11 December 2017).
  - 24 See, eg, the Marriage Act (Cap 55:11) and the Customary Marriages Act (Cap 5:07).

Marriage Act<sup>25</sup> allowed girls to be married at 16 years and boys at 18 years of age.<sup>26</sup> Furthermore, the Customary Marriage Act<sup>27</sup> does not contain a prescribed marriageable age. Instead, this is determined by puberty, a factor generally resulting in child marriage, considering that this is attained at different age groups.

In South Africa much public attention on child marriage has been focused on the customary practice of *ukuthwala*.<sup>28</sup> *Ukuthwala* is the mock abduction of an unmarried woman or girl for the purpose of a customary marriage.<sup>29</sup> Unfortunately there is no data available to indicate the relationship between *ukuthwala* and child marriage, and the prevalence of the practice.<sup>30</sup> Media and other reports indicate that the practice is commonly practised in the rural parts of the Eastern Cape and KwaZulu-Natal.<sup>31</sup> However, it is important to emphasise the fact that as a legitimate traditional practice that may lead to a valid customary marriage, children who have not reached the marriageable age were not involved in the practice.<sup>32</sup> However,

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- 25 The Marriage Act (Cap 55:11) was enacted in 1965. Sloth-Nielsen (n 4) 544-545 thus observed that this was at a time when the international community had not agreed on a prescribed marriageable age.
  - 26 See sec 22 of the Marriage Act (Cap 55:11).
  - 27 The Customary Marriage Act (Cap 5:07) was enacted in 1951. The Act only regulates registered customary marriages, leaving the majority of unregistered marriages regulated by traditional customary laws.
  - 28 See, eg, media reports: D Mabusa 'Ukuthwala: Is it culturally relative?' *De Rebus* 23 July 2015, [www.derebus.org.za/ukuthwala-culturally-relative/](http://www.derebus.org.za/ukuthwala-culturally-relative/) (accessed 17 November 2017); L Maduna 'Ukuthwala: The sex trafficking scandal devastating rural South Africa' *Mail and Guardian* 29 November 2017; A Scheepers *Ukuthwala: Forced child marriages in South Africa* *Women24*, [www.w24.co.za/Wellness/Mind/ukuthwala-forced-marriages-in-sa-20160202](http://www.w24.co.za/Wellness/Mind/ukuthwala-forced-marriages-in-sa-20160202) (accessed 17 November 2017). See also the case of *R v Jezile* (2015 (2) SA 62 (WCC)) where a man from the Eastern Cape was convicted and sentenced to 22 years' imprisonment in 2014 after having married a girl who was 14 years old in the name of *ukuthwala*.
  - 29 See general discussions on the practice in L Mwambene & J Sloth-Nielsen 'Benign accommodation? *Ukuthwala*, "forced marriage" and the South African Children's Act' (2011) 11 *African Human Rights Law Journal* 1; Mwambene & Kruuse (n 8); and DS Koyana & JC Bekker 'The indomitable *ukuthwala* custom' (2007) *De Jure* 139-144.
  - 30 The prevalence of *ukuthwala* can be depicted from what Koyana & Bekker (n 29) 139 note: 'From the enquiries that we made and on the basis of our own observations we are assured that the *twala* custom is still widely practised in Nguni communities.' More recently, a Mwambene and Kruuse field study (n 8) conducted in September 2015 and April 2016 in Engcobo, where the *Jezile* case originated, revealed that *ukuthwala* was still practised and was a respected cultural practice that is strongly linked to child marriage.
  - 31 'The community of KwaCele, near Lusikisiki, has promised to end the practice of *ukuthwala*' *Media 24.com* 24 March 2011; 'Salvation Army calls for end to *ukuthwala*' *IOLNews* 7 December 2015; 'Ukuthwala: The sex trafficking scandal devastating rural South Africa' *Mail and Guardian* 29 November 2017; and 'Hawks rescue E girl from *ukuthwala*' @SABCNewsOnline 25 December 2017.
  - 32 Mwambene & Sloth-Nielsen (n 29); Mwambene & Kruuse (n 8) 25-45. See also recounts of the practice by the expert witness in *R v Jezile* (n 28). There are different reasons for *ukuthwala*: the fact that it allows a girl or woman to get married to a man of her choice; it forces the father to enter into marriage negotiations of his daughter's marriage where he may have not wanted to; and

the fact that the marriageable age according to custom is the age of puberty, which is usually attained before the age of 18 years, means that *ukuthwala* leads to child marriage.<sup>33</sup> In addition, the laws that govern customary marriages, namely, the Recognition of Customary Marriage Act (RCMA),<sup>34</sup> read together with the Marriages Act<sup>35</sup> which allows minors to get married provided they have the necessary consent, arguably may be contributors to the challenge to ending child marriages in South Africa.<sup>36</sup>

Statistics regarding child marriage in South Africa estimate that 6 per cent of girls marry before the age of 18 years, and 1 per cent by the age of 15 years.<sup>37</sup> This figure is far lower compared to that of Zimbabwe (4 per cent marrying by the age of 15, and 31 per cent girls before 18 years) and Malawi (12 per cent marrying by the age of 15, and 50 per cent before the age 18 years).<sup>38</sup> However, the fact remains that child marriage in South Africa is a reality, which is a threat to the protection of children's rights.<sup>39</sup> For example, in 2013 Statistics South Africa reported that 14 grooms and 172 brides, under the age of 18, were married according to civil law.<sup>40</sup> In the same year nine grooms and 79 brides under the age of 18 were married according to customary law.<sup>41</sup> In addition, the 2016 Community Survey results, also released by Statistics South Africa, indicate that more than 91 000 South African girls between the ages of 12 and 17 years are either married, divorced, widowed or living with a partner.<sup>42</sup>

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helps to get women to have children within a marriage wedlock.

- 33 It is general knowledge that puberty can be reached at different ages, even as low as between 9 and 12 years of age.
- 34 Recognition of Customary Marriages Act 108 of 1998, which entered into force on 15 November 2000.
- 35 Marriage Act 25 of 1961.
- 36 Secs 3(a) and (b) of the RCMA read with sec 25 of the Marriage Act allows both boys and girls of under 18 to get married provided they have the consent of a parent, guardian, or Commissioner of Welfare/Minister of Home Affairs. In particular, sec 3(a) of the RCMA provides that '[i]f either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian must consent to the marriage'. Sec 3(b) provides: 'If the consent of the parent or legal guardians cannot be obtained, section 25 of the Marriage Act, 1961 applies.' However, it is interesting to note that while all minors must obtain the consent of the Minister of Home Affairs in terms of the RCMA, girls above the age of 15 do not need ministerial consent in terms of sec 26 of the Marriage Act. This differentiation of minors concluding marriages under the Marriage Act and RCMA may arguably be challenged on constitutional grounds.
- 37 UNICEF (n 17).
- 38 UNICEF (n 6).
- 39 UNICEF (n 17).
- 40 Statistics South Africa 'Marriages and divorces 2013' [www.statssa.gov.za/publications/p0307/p03072013.pdf](http://www.statssa.gov.za/publications/p0307/p03072013.pdf) (accessed 17 December 2017).
- 41 As above.
- 42 As above. Of this figure, KwaZulu-Natal ranks the highest with 25 205 and Gauteng with 15 929 young girls married before the age of 18 years.

Moreover, the 2016 UNICEF data revealed a rise in child marriages in South Africa.<sup>43</sup>

By comparison, Malawi is one of the top ten countries with the highest rates of child marriage in Africa.<sup>44</sup> Reports indicate that in 2010, approximately 50 per cent of women aged 20 to 24 years were married before the age of 18 years.<sup>45</sup> Despite this alarming figure, data reveals very little change in the prevalence of child marriage since 2000. Studies show that child marriage in Malawi is also higher than the regional average for sub-Saharan Africa, which is at 37 per cent.<sup>46</sup> Four per cent of the population marry before their fifteenth birthday and 24 per cent of the population before their nineteenth birthday.<sup>47</sup> Further, UNICEF statistics revealed that Malawi has the eleventh highest child marriage rate in the world, with nearly one in two girls married before the age of 18 years.<sup>48</sup> It is also estimated that between 2010 and 2013, 27 612 girls in primary school and 4 053 high school girls dropped out of school because of forced marriage.<sup>49</sup>

The 2005 Malawi Human Rights Commission study found that child and forced marriages are deeply entrenched in Malawi's traditions and patriarchal cultures, which encourage early sexual initiation and marriage.<sup>50</sup> Marriage is also regarded as a means of protecting girls who fall pregnant from embarrassing the family honour.<sup>51</sup> In addition, the prevalence of child marriage in Malawi is also linked to the lack of education of girls and women. The latest figures show that nearly 65 per cent of women in Malawi with no formal education are child

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43 UNICEF 'A profile of child marriage in Africa' <https://data.unicef.org/resources/a-profile-of-child-marriage-in-africa/> (accessed 2 December 2017).

44 Girls Not Brides, 'Child marriages around the world: Malawi' <https://www.girlsnotbrides.org/child-marriage/malawi/> (accessed 2 December 2017).

45 Human Rights Watch 2014 'Child marriage in Malawi' <https://www.hrw.org/report/2014/03/06/ive-never-experienced-happiness/child-marriage-malawi> (accessed 8 December 2017). Malawi also remains one of the countries with a high HIV infection rate. The National AIDS Commission (NAC) estimated that the total HIV infection rate is 898 888 of which adult women over the age of 15 years represented 53% (CEDAW, Sixth Report, 2008). Approximately 30 000 out of 100 000 new infections have been attributed to mother-to-child transmission, including mothers below the age of 18 years.

46 S White 'No ifs or buts: Child marriage needs to be abolished in Malawi once and for all' 2015, <http://edition.cnn.com/2015/03/03/africa/seodi-white-child-marriage/index.html> (accessed 19 December 2017).

47 Human Rights Watch (n 45). See also White (n 46).

48 United Nations International Children Education Fund 'Ending child marriage: Progress and prospects' UNICEF, New York 2014, [https://www.unicef.org/media/files/Child\\_Marriage\\_Report\\_7\\_17\\_LR.pdf](https://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR.pdf) (accessed 2 December 2017).

49 Human Rights Watch (n 45).

50 See the general discussion on the different cultural practices by the Malawi Human Rights Commission 'Cultural practices and their impact on the enjoyment of human rights, particularly the rights of women and children in Malawi' 2005, <https://searchworks.stanford.edu/view/6842923> (accessed 19 December 2017).

51 Human Rights Watch (n 45).

brides, compared to 5 per cent of women who attended secondary school or higher education.<sup>52</sup>

### 3 International context on child marriage and cultural practices

As pointed out, Zimbabwe, South Africa and Malawi are state parties to major international instruments for the protection of children's rights.<sup>53</sup> Several international instruments set standards for the protection of children's rights as follows: As far as child marriage is concerned, the Joint General Recommendation/General Comment 31 of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and General Comment 18 of the Committee on the Rights of the Child on Harmful Practices (2014)<sup>54</sup> have been lauded as 'comprehensively spell[ing] out the position of these two Committees on the topic of child, early and forced marriage'.<sup>55</sup> These unequivocally regard child marriage as forced marriage.<sup>56</sup> Examples of forced marriage, according to the General Recommendation/General Comment include situations where one or both parties to a marriage have not personally expressed their full and free consent through, for example, marrying girls too young; the marriage of girls by armed forces in conflict situations; the payment of dowry and bride price which increases the vulnerability of women and girls to violence; situations where families will agree to the temporary marriage of their daughter in exchange for financial gain; and allowing a rapist to escape criminal sanction by marrying the victim.<sup>57</sup> Sloth-Nielsen and Kachika have highlighted these examples to strengthen advocacy to eradicate forced child marriages in all

52 Girls Not Brides 2015 'Ending child marriage in Africa' <https://www.girlsnotbrides.org/wp-content/uploads/2015/02/Child-marriage-in-Africa-A-brief-by-Girls-Not-Brides.pdf> (accessed 19 December 2017).

53 By ratification, these states undertook a legal obligation to implement the rights recognised in the particular treaty. In addition, these states undertake to put in place domestic measures and legislation compatible with their treaty obligations. They also commit to submitting regular reports on how the rights are being implemented to the monitoring committee set up under the treaty. See also similar observations by Sloth-Nielsen (n 4).

54 CRC/C/GC/18 (2014). See also similar observations by Sloth-Nielsen (n 4) 538.

55 See, generally, discussed in the Plan18+ Programme (n 18) 13, L Mwambene & O Mawodza 'Children's rights standards and child marriage in Malawi' (2017) *African Studies Quarterly*, <http://www.africa.ufl.edu/asq/v17/v17i3a2.pdf>; Sloth-Nielsen (n 4) 538.

56 Para 20 Joint General Recommendation/General Comment 31 of the Committee on the Elimination of Discrimination against Women CEDAW and 18 of the Committee on the Rights of the Child on Harmful Practices (2014). See also cited in Mwambene & Mawodza (n 55).

57 Para 23, Joint General Recommendation/General Comment 31 (n 56) of the Committee on the Elimination of Discrimination against Women CEDAW and 18 of the Committee on the Rights of the Child on Harmful Practices (2014).

contexts.<sup>58</sup> Consequently, the General Recommendation/General Comment places an obligation on state parties to establish legal structures to ensure that harmful practices are promptly and impartially investigated and that effective remedies are provided to those who have been harmed.<sup>59</sup>

The General Recommendation/General Comment sets an 'absolute ceiling for minimum age at 16, meaning that states parties will not be justified for any reason whatsoever to accept marriages where a party is lower than this age'.<sup>60</sup> This is a standard lower than that in article 21(2) of the African Charter on the Rights and Welfare of the Child (African Children's Charter), and article 6(b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), that unequivocally set the marriageable age at 18.

In addition, numerous other General Comments and Recommendations of the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Human Rights Committee are relevant to this discussion. These include the CRC Committee's General Comment 3: HIV/AIDS and the Rights of the Child (2003) that addresses child marriage by reiterating that a female child often is subjected to harmful traditional practices that violate her rights and make her more vulnerable.<sup>61</sup> The CRC Committee's General Comment 13: The Rights of the Child to Freedom from all Forms of Violence (2011) depicts forced and early marriage as harmful practices, bringing both within the ambit of violence against children.<sup>62</sup> More importantly, the CRC Committee's General Comment 13 regards the failure to adopt or revise legislation and other provisions, and the inadequate implementation of the laws as a breach of CRC, and thus a violation of children's rights.<sup>63</sup>

Furthermore, the CEDAW Committee's General Recommendation 24: Women and Health (1999) reminds state parties of article 16(2) of CEDAW, which proscribes the betrothal and marriage of children, an important factor in preventing the physical and emotional harm arising from early childbirth.<sup>64</sup> Moreover, the Concluding Observations of the International Covenant on Economic, Social and Cultural Rights (ICESCR) have elaborated further concerns regarding

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58 J Sloth-Nielsen & T Kachika 'Applicable international and regional law and policy: Child, early and forced marriage' submitted to Plan+18 Programme.

59 Paras 31-36, Joint General Recommendation/General Comment 31 (n 56) and 18 of the Committee on the Rights of the Child on Harmful Practices (2014).

60 Sloth-Nielsen & Kachika (n 58) 14.

61 Para 6 CRC General Comment 3 on HIV/AIDS and the Rights of the Child 2003.

62 CRC Committee General Comment 13 on the Right of the Child to Freedom from All Forms of Violence (2011) para 27.

63 See observations by Sloth-Nielsen & Kachika (n 58).

64 Paras 15(d) and 28, CEDAW Committee General Recommendation 24: Women and Health (1999).



child marriage, such as the differences in marriageable age of males and females in the Marriage Act, and recommended that the state party should harmonise its laws so that the minimum age for both girls and boys reflect international standards.<sup>65</sup>

Additionally, few other examples of international instruments are implicated, including the Universal Declaration of Human Rights (Universal Declaration);<sup>66</sup> CRC;<sup>67</sup> the CRC Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2002);<sup>68</sup> the Convention on the Elimination of All Forms of Discrimination against Women (1979);<sup>69</sup> the International Covenant on Civil and Political Rights (ICCPR);<sup>70</sup> the Convention on the Consent to Marriage, Minimum age for Marriage and Registration of Marriage (1962);<sup>71</sup> the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (2000);<sup>72</sup> the African Children's Charter;<sup>73</sup> the African Youth Charter (2006);<sup>74</sup> the African Women's Protocol;<sup>75</sup> and the Southern African Development Community (SADC) Protocol on Gender and Development (2008).<sup>76</sup> Of special relevance is the 2014 Declaration by the African Union (AU), urging all member states to set the

65 ICSECR Concluding comments, South Africa, E/C.12/ZAF/CO/1 2018 paras 52-53. Art 10 of ICSECR provides that marriage shall be entered with the free consent of the intending parties.

66 See, eg, art 16(2) of the Universal Declaration.

67 See arts 2, 3, 6, 12, 17, 19, 24, 28, 31, 32, 34, 35 & 39 of CRC. CRC was ratified by Zimbabwe in 1990; by South Africa in 1995; and by Malawi in 1991.

68 See art 2(a); ratified by Zimbabwe in 2012; by South Africa in 2003; and by Malawi in 2009.

69 See arts 2(f), 5(a) and 16(2) of CEDAW, ratified by Zimbabwe in 1991; by South Africa in 1995; by Malawi in 1987, initially with reservations on art 5, which carries the obligation for state parties to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women. The reservation was withdrawn on 24 October 1991.

70 Ratified by Zimbabwe in 1991; by South Africa in 1998; Malawi has not yet ratified it.

71 Ratified by Zimbabwe in 1994; by South Africa in 1993; Malawi has not yet ratified it.

72 Ratified by Zimbabwe in 2013; by South Africa in 2004; by Malawi in 2005.

73 Ratified by Zimbabwe in 1995; by South Africa in 2000; and by Malawi in 1999. Art 21 of the African Children's Charter obliges 'states parties to the present Charter to take all appropriate measures to eliminate harmful, social and cultural practices affecting the welfare, dignity, normal growth and development of the child, in particular (a) those practices prejudicial to the health or life of the child and (b) those customs and practices discriminatory on the grounds of sex or other status'.

74 Ratified by Zimbabwe in 2009; by South Africa in 2009; and by Malawi in 2010.

75 Ratified by Zimbabwe in 2008; by South Africa in 2004; and by Malawi 2005.

76 Ratified by Zimbabwe in 2008; South Africa not ratified; and by Malawi in 2013.

minimum age for marriage at 18 years for both boys and girls.<sup>77</sup> It is also important to highlight that the need to end child marriage and other harmful practices affecting women and girls is also embedded in Agenda 2063, the AU's 50-year vision for the development of the continent, to end child marriages.<sup>78</sup>

The most recent regional standard in addressing child marriage on the African continent is the Joint General Comment of the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on Ending Child Marriage (2017).<sup>79</sup> It unequivocally sets the marriageable age at 18, and defines child marriage as 'a marriage in which either one of the parties or both is or was a child under the age of 18 at the time of the union'.<sup>80</sup> The position adopted by this Joint General Comment is to be applauded. It has effectively laid down a higher standard, reviewing all legislation that allows the majority age to be attained through marriage.<sup>81</sup>

The following key principles may be drawn from these international instruments, many of which articulate the need for a uniform marriage age, and also emphasise the importance of free and full consent to marriage as a means of protecting the rights of women and girls in the following ways.<sup>82</sup> First, these instruments generally prohibit child marriage and the betrothal of both girls and boys.<sup>83</sup> To this end, they require that state parties take effective action, including legislation to specify the minimum age of marriage to be 18 years.<sup>84</sup>

77 Addis Ababa Declaration on Ending Child Marriage in Africa, <http://srsq.violenceagainstchildren.org/sites/default/files/documents/docs/ACERWC-Declaration-on-Ending-Child-Marriage-in-Africa.pdf> (accessed 10 December 2017).

78 'Agenda 2063: The Africa We Want', <http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf> (accessed 10 December 2017).

79 'Joint General Comment of the African Commission on Human and Peoples' Rights (ACHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on Ending Child Marriage' (2017) [http://www.achpr.org/files/news/2018/01/d321/joint\\_gc\\_acerwc\\_achpr\\_ending\\_child\\_marriage\\_eng.pdf](http://www.achpr.org/files/news/2018/01/d321/joint_gc_acerwc_achpr_ending_child_marriage_eng.pdf) (accessed 22 October 2018).

80 Joint General Comment (n 79) para 6.

81 See, eg, sec 24(2) of the South African Marriage Act 1961 where a minor effectively becomes a major upon concluding a valid marriage.

82 See, eg, art 16(2) of the Universal Declaration; art 16(2) of CEDAW; and art 6 of the African Women's Protocol.

83 Art 21(2) of the African Children's Charter declares that 'child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory'. Similar prescriptions are to be found in art 16 (2) of CEDAW; paras 36-39 of CEDAW Committee General Recommendation 21: Equality in Marriage and Family Relations (1994); paras 15(d) and 28 of CEDAW Committee General Recommendation 24: Women and Health (1999).

84 See, eg, art 16(2) of the Universal Declaration; art 21(2) of the African Children's Charter; art 6 of the African Women's Protocol; art 10 of ICSECR; arts 1, 2 & 3 of the Marriage Convention.

They also require state parties to make the registration of marriages compulsory.<sup>85</sup> As rightly observed,

this is an important obligation for states parties to ensure that children are not getting married below the internationally accepted minimum age of marriage and that systematic registration of marriages is used to ensure that minimum marriage age is enforced.<sup>86</sup>

In addition, these international instruments prescribe that spouses enjoy equal rights and are regarded as equal partners in marriage.<sup>87</sup> Consequently, they oblige state parties to enact appropriate national legislative measures to guarantee that no marriage takes place without the free and full consent of both parties.<sup>88</sup> The ICCPR Human Rights Committee's General Comment 28 elaborates on the obligation of state parties to eradicate harmful cultural practices that lead to inequality between men and women as follows:<sup>89</sup>

Inequality in the enjoyment of rights by women is deeply embedded in tradition, history and culture, including religious attitudes ... States parties should ensure that traditional, historical, religious and cultural attitudes are not used to justify violations of women's rights to equality before the law and to equal enjoyment of all Covenant rights.

Particularly focusing on the rights of the girl child mostly affected by child marriage, international standards require state parties to take appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.<sup>90</sup> Thus, early marriage is now understood to be harmful to the health of children.<sup>91</sup>

To sum up, all the international standards stipulate that where cultural practices hinder or stand in the way of children's rights, the cultural practice must give way.<sup>92</sup> The following discussion will assess whether this happens in practice.

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85 Art 3 Marriage Convention; art 8(2) SADC Protocol on Gender and Development 2008.

86 Sloth-Nielsen & Kachika (n 58).

87 Art 6 African Women's Protocol.

88 Art 1(c)(i) of the Abolition of Slavery Convention that equates any marriage that is forced upon a girl by her guardian to slavery. See also art 23(3) of ICCPR; art 16(2) of the Universal Declaration; art 6 of the African Women's Protocol.

89 CCPR Committee General Comment 28, <http://www.unhchr.cr> (accessed 2 December 2017).

90 See, eg, art 24 of CRC.

91 See, eg, art 24 of CRC; art 23 of the African Youth Charter.

92 See, eg, arts 2(f) and 5(a) of CEDAW. See also Mwambene & Mawodza (n 55) 33.

## 4 Recent legal responses to child marriage and children's rights

### 4.1 Zimbabwe

In response to its obligations, Zimbabwe passed several Acts relevant to addressing child marriage. Principal among this legal framework is the 2013 Constitution.<sup>93</sup> Sub-sections 78(1) and (2) of the Constitution set the minimum age for marriage at 18 years, and prohibit forced marriage.<sup>94</sup> These sub-sections further require the state to take appropriate measures to ensure that no marriage is entered into without the free and full consent of the intended spouses.<sup>95</sup> More relevant to addressing cultural practices, such as *kuzvarira*, where a girl is forced to enter into a union with her sister's husband for the purpose of producing children, the Constitution requires the state to take measures to ensure that children are not pledged in marriage.<sup>96</sup>

Apart from the Constitution, the Customary Marriage Act (Cap 5:07), which regulates registered customary marriages in Zimbabwe, is also relevant.<sup>97</sup> Section 11 of the Act prohibits the pledging of girls in marriage. However, the Act does not stipulate the prescribed age of marriage. The Plan+18 Programme observes the inadequacy of this provision in addressing child marriage since puberty, according to custom, is a marriageable age.<sup>98</sup>

A more recent and celebrated attempt to address child marriage in Zimbabwe is found in the Constitutional Court case of *Mudzuru*.<sup>99</sup> In *Mudzuru* two young women, aged 18 and 19, brought the case to the Constitutional Court respectively, in terms of section 85(1) of the Constitution of Zimbabwe.<sup>100</sup> The two applicants advocated the protection of children's rights, particularly girl children who are

93 Constitution of the Republic of Zimbabwe Amendment 20 of 2013. It entered into force on 20 May 2013.

94 Sec 78(2) provides that '[n]o person may be compelled to enter into marriage against their will'. This is consistent with art 21 of the African Children's Charter and art 6 of the African Women's Protocol which sets 18 as the minimum age of marriage, and arts 10(1), 16(2) and 23 of CESC, CEDAW and ICCPR, which require the consent of the parties to the marriage.

95 Sec 26(a) of the Constitution.

96 Sec 26(b) of the Constitution.

97 It therefore is assumed that all unregistered customary marriages in Zimbabwe are regulated by traditional customary rules which, coupled with poverty, predispose girls to child marriage.

98 Plan International (n 18) 27.

99 *Loveness Mudzuru and Ruvimbo Tsopodzi v Minister of Justice, Legal and Parliamentary Affairs, Minister of Women Affairs, Gender and Community Development, Attorney-General of Zimbabwe* Application 79/14 CC 12/2015.

100 Sec 85(1) of the Constitution of the Republic of Zimbabwe Amendment states that '[a]ny of the following persons, namely, (a) any person acting in their own personal interest; (b) any person acting on behalf of another person who cannot act for themselves; (c) any person acting as a member, or in the interest of a group or class of persons; (d) any person acting in the public interest; (e) any

subjected to the challenges of child marriage. The Court had to decide whether the effect of section 78(1)<sup>101</sup> of the Zimbabwean Constitution is to set 18 years as the minimum age of marriage in Zimbabwe. In addition, the Court had to determine whether section 22(1) of the Marriage Act, which prohibited the marriage of a boy under the age of 18 and a girl under the age of 16 years, except with the written permission of the Minister of Justice,<sup>102</sup> and the Customary Marriages Act<sup>103</sup> with no predetermined age of marriage was constitutional.

The applicants argued that, on a broad and generous and purposive interpretation of section 78(1) as read with section 81(1) of the new Constitution, the age of 18 had become the minimum age for marriage in Zimbabwe.<sup>104</sup> They argued that section 78(1) of the Constitution could not be subjected to a strict, narrow and literal interpretation to determine its meaning if regard is had to the contents of similar provisions on marriage and family rights found in international human rights instruments from which section 78(1) derives inspiration.<sup>105</sup> Hence, the main argument by the applicants was that, since a 'child' now is defined by section 81(1) of the Constitution to mean a girl and a boy under the age of 18 years, no child has the capacity to enter into a valid marriage in Zimbabwe since the entry into force of sub-sections 78(1) and 81(1) of the new Constitution on 22 May 2013. They further argued that section 22(1) of the Marriage Act or any other law which authorises a girl under the age of 18 years to marry, infringed the fundamental right of the girl child to equal treatment before the law enshrined in section 81(1)(a) of the Constitution.<sup>106</sup> The argument was that section 22(1) of the Marriage Act exposed the girl child to the horrific consequences of early marriage, which are the very injuries against which the fundamental rights are intended to protect every child.<sup>107</sup>

The Constitutional Court ruled that section 78(1) of the Constitution sets 18 as the minimum age of marriage.<sup>108</sup> The Court declared section 22(1) of the Marriage Act, or any customary and religious practices authorising any child to be married before the age

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association acting in the interest of its members; is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed and the court may grant appropriate relief, including a declaration of rights and an award of compensation'.

101 Sec 78(1) of the Constitution of the Republic of Zimbabwe Amendment deals with marriage rights and states that '[e]very person who has attained the age of eighteen years has the right to found a family'.

102 Sec 22(1) of the Marriage Act [Chapter 5:11] states that a girl who has obtained the age of sixteen years is capable of contracting a valid marriage.

103 Marriage Act [Chapter 5:07].

104 *Mudzuru* (n 99) 3.

105 As above.

106 Sec 81(1)(a) of the Constitution provides that '[e]very child ... has the right to equal treatment before the law, including the right to be heard'.

107 *Mudzuru* (n 99) 4.

108 *Mudzuru* 1.

of 18, to be invalid to the extent of its inconsistency with the Constitution.<sup>109</sup> In addition to that, the Court also concluded that with effect from 20 January 2016, no person, male or female, may enter into any marriage, including one arising from religion or religious rites, before attaining the age of 18 years.<sup>110</sup> As the Court observed, this judgment seems to be

in line with the goals of social justice at the centre of international human rights standards requiring Zimbabwe to take appropriate legislative measures, including constitutional provisions, to modify or abolish existing laws, customs inconsistent with the rights of the child.<sup>111</sup>

The *Mudzuru* decision, just as the international legal standards on the protection of children's rights discussed above, addresses the tension between children's rights and customary practices that lead to child marriage by giving primacy to children's rights. The Constitutional Court further observed that section 78(1) of the Constitution was clear that it

permits of no exception for religion, customs or cultural practices that permits child marriage. When read together with section 81(1), section 78(1) has effectively reviewed local practices and customs on marriage.<sup>112</sup>

More importantly, as Sloth-Nielsen and Hove rightly observe,

the judgment sets an important standard for the other 47 state parties to the Charter in so far as it delineates the expectation for domestic statutes on marriage and child protection law. Further, it accords primacy to treaty obligations, which were voluntarily undertaken.<sup>113</sup>

However, the Constitutional Court's decision might be paper law, with no legal effect on child marriage in Zimbabwe. It did not prescribe measures to ensure that children are protected from child marriage. For example, in addition to outlawing child marriage, the Constitutional Court could have prescribed a reasonable time for Parliament to amend laws that allow child marriage to be implemented.<sup>114</sup>

## 4.2 South Africa

South Africa, by prescribing the marriageable age to be 18 years for both girls and boys under the Recognition of Customary Marriages Act,<sup>115</sup> arguably has outlawed all customary marriages of children

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109 *Mudzuru* 49.

110 *Mudzuru* 50.

111 *Mudzuru* 49.

112 As above.

113 J Sloth-Nielsen & K Hove '*Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs & 2 Others: A review*' (2015) 15 *African Human Rights Law Journal* 554 at 563.

114 *Mudzuru* (n 99) 55.

115 Sec 3(1) of the Recognition of Customary Marriages Act 120 of 1998.

under the age of 18 years.<sup>116</sup> However, the Recognition of Customary Marriages Act, read with the Marriage Act, allows persons below the age of 18 to get married provided they have the necessary consent.<sup>117</sup> This position sends conflicting messages in respect of efforts to end child marriages linked to customary practices in South Africa. In addition, statutory rape, namely, consensual sex with a child below the age of 16 years, assault, rape and kidnapping, all implicit in the modern-day practice of *ukuthwala*, are criminally sanctioned in terms of the Sexual Offences Act.<sup>118</sup>

More recently, the South African Law Reform Commission proposed the Prohibition of Forced Marriages and Child Marriages Bill, 2015 which seeks to outlaw and criminalise all forced and child marriages as a result of, among other factors, *ukuthwala*.<sup>119</sup> The Prohibition of Forced Marriages and Child Marriages Bill is a response to concerns expressed from the Gender Directorate.<sup>120</sup> The Gender Directorate argued that children affected by *ukuthwala*, resulting in their rights to personal safety and well-being being violated, are at risk of lifelong developmental burdens, including HIV infection and other physical, emotional and social problems.<sup>121</sup> The Directorate also stressed that South African values, beliefs and practices must be consistent with the Constitution, which specifically guarantees the rights of children.<sup>122</sup> Concern was particularly raised about the impact of *ukuthwala* on the girl child and the appropriateness and adequacy of current laws on *ukuthwala*, and whether the laws uphold the human rights of the girl child, taking into consideration the principle of the best interests of the child.<sup>123</sup>

With this end in view, the Law Reform Commission produced a report on *ukuthwala* which culminated in the Prohibition Bill.<sup>124</sup> As pointed out earlier, the Prohibition Bill is aimed at criminalising forced marriages and child marriages, including those as a result of *ukuthwala*. If the Prohibition Bill becomes law, it will be the first time that such child marriages will be criminalised in South Africa.<sup>125</sup> Besides criminalising forced marriages and child marriages, the Prohibition Bill will give effect to international law and the

116 Eg, sec 3(1) of the RCMA sets the marriageable age for both a man and woman at 18 years.

117 See, in particular, sec 3(a) of the Recognition of Customary Marriages Act and sec 25 of the Marriage Act.

118 In *Jezile v R* the appellant was convicted, among other charges, of rape which is an offence provided for in the Sexual Offences Act.

119 Contained in the South African Law Reform Commission Discussion Paper 132 (Project 138: The practice of *ukuthwala*).

120 The Gender Directorate is part of the Department of Justice and Constitutional Development.

121 South African Law Reform Commission (n 122).

122 As above.

123 South African Law Reform Commission (n 122) 1 para 1.1.

124 South African Law Reform Commission (n 122).

125 See, eg, the Trafficking Act regarding forced marriages.

constitutional values of human dignity. It will require that marriages are entered into freely and without any form of coercion, and will provide for the prosecution and penalties of persons who commit offences.<sup>126</sup> At the same time, the Prohibition Bill has a number of shortcomings in that it does not set out the marriageable age of 18 years without exceptions. The Prohibition Bill also does not repeal provisions that allow children to get married in both the Marriage Act and the Recognition of Customary Marriages Act. Finally, the Prohibition Bill does not amend provisions in the Children's Act that are vague in relation to the minimum age of marriage and the betrothal of children.

### 4.3 Malawi

In discussing Malawi's recent legal response to child marriage, the starting point is the constitutional amendment of 14 February 2017. Parliament voted to remove a constitutional provision allowing children to marry with the consent of their parents.<sup>127</sup> The protracted process to this constitutional amendment saw different stakeholders making several recommendations on the Malawi Law Commission's proposal to review the Malawian Constitution.<sup>128</sup> Of particular relevance in regard to addressing child marriage is the proposal that the age of childhood be raised from 16 to 18 years of age so as to harmonise the constitutional provision with international legal standards, including those of CRC.<sup>129</sup> The Malawi Law Commission in its submission accordingly recommended to the Ministry of Justice and Constitutional Affairs that the age of majority in section 23 of the Malawian Constitution be raised to 18 years.

Reverting to the current position, the celebrated constitutional amendment, setting the majority and marriageable age at 18, became law in April 2017.<sup>130</sup> At the domestic level this amendment has harmonised the Constitution which is the supreme law of the land, with the Marriage, Divorce and Family Relations Act, 2015 which categorically sets the minimum age of marriage at 18 years.<sup>131</sup> The constitutional amendment, therefore, closed the legal gap created by allowing child marriages in Malawi. In addition, Mwambene and Mawodza identify several other provisions in the Constitution that may be used to address child marriages linked to cultural practices.<sup>132</sup>

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126 See sec 2 of the Prohibition Bill.

127 Sec 22(6), read together with sec 23 of the Constitution allowed the marriages of persons below 18 years; see general discussions by Mwambene & Mawodza (n 55).

128 See, eg, the Ministry of Gender, Children and Community Development in 2004 Comprehensive Position Paper.

129 Sixth Periodic Report CEDAW, 2008.

130 Constitutional Amendment Act 36 of 2017.

131 Sec 14 as read with sec 2 of the Marriage, Divorce and Family Relations Act, 2015.

132 Mwambene & Mawodza (n 55).



However, seen as a position conflicting with the above, the Child Care, Protection and Justice Act, 2011, which is dedicated to the protection of children's rights in Malawi, defines a child as a person below the age of 16 years.<sup>133</sup> While the constitutional amendment constitutes a critical measure to reduce child marriages, there is a potential risk that the definition of the child in this Children's Act may continue to undermine any efforts to the protection of children's rights in the context of child marriages.

Apart from the Constitution, sections 80,<sup>134</sup> 81,<sup>135</sup> 82 and 83 of the Child Care, Protection and Justice Act (Children's Act)<sup>136</sup> are relevant in addressing child marriage in Malawi. Given the fact that there are a number of harmful practices<sup>137</sup> that infringe on children's rights, the Children's Act prohibits anyone from subjecting a 'child to a social or customary practice that is harmful to the health or general development of the child'.<sup>138</sup> For instance, forcing a child into marriage or forcing a child to be betrothed is specifically prohibited by section 81 of the Children's Act. Related to the above are some cultural practices where a child is pledged to obtain a debt (*kupimbira*),<sup>139</sup> mostly practised in the Karonga and Chitipa districts.<sup>140</sup> As previously observed, these provisions target harmful cultural practices that lead to child marriage and make it a criminal offence for anyone to contravene these provisions.<sup>141</sup>

In a similar vein, the Marriage, Divorce and Family Relations Act, 2015 also explicitly states that a marriage to someone who is below the age of 18 is punishable with imprisonment.<sup>142</sup> Furthermore, the Marriage Act, read with section 22 of the constitutional amendment, defines a child as any person below the age of 18 and fixes the marriageable age at 18 years.<sup>143</sup> Additional legal initiatives to address child marriage are to be found in the National Registration Act, 2009

133 Sec 2 Child Care, Protection and Justice Act, 2011.

134 Sec 80 provides that '[n]o person shall subject a child to a social or customary practice that is harmful to the health or general development of the child'.

135 Sec 81 provides that '[n]o person shall force a child into marriage; or force a child to be betrothed'.

136 The Child Care, Protection and Justice Children's Act, 2010, in force from 1 September 2011.

137 MHRC *Cultural practices and their impact on the enjoyment of human rights, particularly women and children* (2005) 18. See also L Mwambene 'Marriage under African customary law in the face of the Bill of Rights and international human rights standards in Malawi' (2011) 11 *African Human Rights Law Journal* 78.

138 Sec 80 Children's Act.

139 According to this custom, young girls are often held in perpetual bondage and are often subjected to abuse.

140 CEDAW report.

141 Mwambene & Mawodza (n 55) 29-30.

142 Marriage, Divorce and Family Relations Act, 2015.

143 Sec 14 of the Marriage, Divorce and Family Relations Act provides that '[s]ubject to section 22 of the Constitution, two persons of the opposite sex who are both not under the age of eighteen years, and are of sound mind, may enter into marriage with each other'.

which creates a legal framework for universal birth registration.<sup>144</sup> The National Registration Act has far-reaching consequences for child marriage in Malawi due to the existing low birth registration rate, estimated to be around 3 per cent.<sup>145</sup> Birth registration can reduce child marriage as it serves as proof of age of spouses intending to get married.

## 5 Analysis: Future considerations

The exploration of the above law reform initiatives reveals two main trends regarding how to address child marriage and protect children's rights. These include the use of international standards and the criminalisation of child marriages.

### 5.1 International standards

There is overwhelming evidence of the use of international standards in addressing child marriage by the selected countries.<sup>146</sup> This is illustrated by the finding of the Constitutional Court in the *Mudzuru* case that, by ratifying CRC and the African Children's Charter,

Zimbabwe expressed its commitment to take all appropriate measures, including legislative, to protect and enforce the rights of the child as enshrined in the relevant conventions to ensure that they are enjoyed in practice.<sup>147</sup>

More relevant to its decision of abolishing child marriages, the Court cited with approval article 21(2) of the African Children's Charter as follows:<sup>148</sup>

Article 21 imposes on state parties, including Zimbabwe, an obligation which they voluntarily undertook to take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child.

In addition, all three the selected countries have constitutionalised international standards for the protection of children's rights, which has had a considerable influence on law reform as well as on reasoning by the courts.<sup>149</sup> For example, Sloth-Nielsen and Hove observe that 'section 78(1), dealing with marriage rights, and section 81 on children's rights in Zimbabwe are mirrored on direct provisions of international human rights standards'.<sup>150</sup> Similar examples are to

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144 National Registration Act, 2009.

145 Baseline for Selected Core Child Protection Indicators, presentation 19-20 November 2012.

146 See, eg, the *Mudzuru* case (n 99), and the Law Commission's respective reports on Malawi and South Africa.

147 *Mudzuru* (n 99) 27.

148 *Mudzuru* 37.

149 Secs 78(1), 28 and 23 of the Zimbabwean, South African and Malawian Constitutions, respectively.

150 Sloth-Nielsen & Hove (n 109) 560-563.

be found in sections 22, as amended, dealing with marriage, and section 23 on children's rights in the Malawian Constitution,<sup>151</sup> as well as section 28 on children's rights in the South African Constitution.

More importantly, in addressing cultural practices that lead to child marriages, both Malawi and Zimbabwe have set the minimum age of marriage at 18 years for both boys and girls without exception.<sup>152</sup> This is obviously a welcome departure from the position in South Africa, CRC and CRC/CEDAW which, in exceptional cases, allow the marriage of a minor who is above 16 years of age.<sup>153</sup> Moreover, South Africa lays down different age groups for boys and girls in allowing child marriages.

Related to the age requirement, both parties to a marriage are required to give free and full consent, without providing room for parental consent.<sup>154</sup> The importance of not making room for parental consent, in the fight against child marriages linked to cultural practices, cannot be overemphasised. It is generally observed that many child marriages linked to culture require the approval or consent of the parent or guardian. The position adopted by South Africa of allowing minors to get married with the consent of their parents in the Recognition of Customary Marriages Act and the Marriage Act, therefore, is regrettable.<sup>155</sup> This has led to girls or women being married off to men they did not choose as long as the father's interests were met.<sup>156</sup> However, the fact that child marriage predominantly occurs in rural areas where there are inadequate means of enforcing the law, let alone establishing the extent of the problem,<sup>157</sup> ensures that the implementation of these laws remains a challenge.<sup>158</sup>

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151 Sec 23 of the Malawian Constitution provides: '(1) All children, regardless of the circumstances of their birth, are entitled to equal treatment before the law. (2) All children shall have the right to a given name and family name and the right to a nationality. (3) Children have the right to know, and to be raised by their parents. (4) Children are entitled to be protected from economic exploitation or any treatment, work or punishment that is, or likely to – (a) be hazardous; (b) interfere with their education; or (c) be harmful to their health or to their physical, mental or spiritual or social development. (5) For purposes of this section, children shall be persons under sixteen years of age.'

152 See the *Mudzuru* judgment in Zimbabwe; and the Constitutional Amendment in Malawi.

153 CEDAW/CRC Recommendation/General Comment, 2014.

154 Sec 3(1) of the South African Recognition of Customary Marriages Act and sec 20(1) of the Zimbabwe Marriage Act.

155 See general discussions by TW Bennett *Customary law in South Africa* (2004) 203-204.

156 Much was attributable to the custom of *lobolo* or bride price.

157 'Ending child marriage in Africa' <https://www.hrw.org/news/2015/12/09/ending-child-marriage-africa> (accessed 11 December 2017).

158 See discussions by L Mwambene & H Kruuse 'Form over function? The implementation of the Recognition of Customary Marriages Act, 1998' (2013) *Acta Juridica* 292.

In addition, the recent reforms in Zimbabwe and Malawi also comply with international standards by adopting compulsory birth and marriage registration.<sup>159</sup> As has been widely observed, the registration of both birth and marriage in the protection of children's rights has far-reaching consequences in the fight against child marriage.<sup>160</sup> It can raise the alarm in cases where parties to the marriage are below the age of 18 years. The registration of births and marriages, however, remains a challenge. For example, the birth registration rate in Malawi is extremely low. In South Africa, the 2011 Baseline report estimates that fewer than 1 per cent of children between 0 and 2 years of age have birth certificates. In addition, in the context of South Africa, Women Gender Studies recorded that few marriages are registered.<sup>161</sup>

## 5.2 Criminalisation of child marriages

The approach adopted by Malawi, in addition to legislating the minimum age of marriage at 18 years, has criminalised child marriages.<sup>162</sup> A similar approach is also seen in the Prohibition Bill in South Africa which, once it becomes law, seeks to criminalise child marriages. These trends, on the face of it, appear to give primacy to children's rights.<sup>163</sup> They are also in line with the African Children's Charter and the African Women's Protocol, which oblige state parties to discourage child marriages.<sup>164</sup> To this end, the criminalisation of child marriages is acceptable, not only as protection of children's rights, but also as sending out a clear message as to the true recognition of women's and children's rights, in particular their constitutional rights to human dignity and equality.<sup>165</sup> However, several observations may be made that suggest some practical challenges in the implementation of this approach.

First, child marriage victims generally are incapable of pursuing any case due to a lack of resources or knowledge. Therefore, they would rely on their parents who often fail them.<sup>166</sup> For example, it is reported that the *ukuthwala* victim in the South African case of *Jezile v R*<sup>167</sup> was returned by her own family members to the man

159 See, eg, the African Women's Protocol.

160 Mwambene & Mawodza (n 55).

161 See also discussions by Mwambene & Kruuse (n 161).

162 See, generally, the Prohibition Bill in the context of South Africa, and sec 83 of the Marriage Act (Malawi).

163 As provided for in international children's rights law, namely, CRC and the African Children's Charter.

164 Art 21(2) African Children's Charter.

165 See, eg, secs 10 and 9 of the South African Constitution, respectively.

166 Eg, in the South African case of *Jezile v R* (n 28), it is reported that the girl escaped from the village of the perpetrator and ran back to her family as she was not happy to be *twalaed*. Her family members took her back to the perpetrator.

167 In this case the accused, along with the complainant's uncle, arranged a customary marriage with the complainant, who was 14 years old, based on the *ukuthwala* custom in South Africa. The complainant attempted to escape twice,

who had abducted her after she had escaped from his 'matrimonial home'.<sup>168</sup> Reflecting on the approach taken by the Prohibition Bill to punish parents, Mwambene and Mgidlana enquire as to how one can expect victims to send their own parents or family to prison.<sup>169</sup> Therefore, it is suggested that criminalisation be coupled with measures that support child marriage victims to come forward, otherwise this might also be paper law.

In addition, some cultural and traditional practices may inhibit or act against the reforms that have taken place. For example, the Prohibition Bill seeks to outlaw any marriage that was concluded without the consent of the girl, a principle mirrored in international human rights standards.<sup>170</sup> This principle, however, provides a stark reminder of some of the more specific and practical realities relating to the lives of children affected by child marriage. As previously observed, *albeit* in another context, Karimakwenda reminds us that 'consent is not easy to determine, particularly in the context of child marriage linked to *ukuthwala*'.<sup>171</sup> Addressing child marriage linked to harmful cultural practices, it has been suggested, 'requires a nuanced understanding of the social and central systems that govern customary marriages in a traditional community'.<sup>172</sup>

In addition, a close examination of the reforms reveals that the focus is geared towards punishing the perpetrator, and does not necessarily ensure the safety of the victim.<sup>173</sup> This is problematic, as it would deter victims from coming forward to report such cases where their safety is not assured. In other words, such approaches would drive the cultural practices that lead to child marriage underground and frustrate all legal efforts to end child marriage in Southern Africa.

## 6 Conclusion and recommendations

Law reform to end child marriage, linked to practices embedded in culture, is considered a difficult task since it presents a potential conflict between children's rights and cultural rights. Zimbabwe,

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and she suffered assaults and rape by the accused person. Her third attempt was successful and she informed the police. At the trial, the court held that the practice of *ukuthwala* did not entail the rape of a victim. As such, the accused's convictions on both the trafficking and rape counts were maintained by the High Court on appeal.

168 See *Jezile v R* (n 28).

169 L Mwambene & R Mgidlana 'Challenges of criminalising *ukutwala* in South Africa' (forthcoming).

170 See, eg, art 16 of CEDAW; art 6 of the African Women's Protocol; and art 8 of the SADC Gender Protocol.

171 See generally discussions by N Karimakwenda 'Today it would be called rape: A historical and contextual examination of forced marriage and violence in the Eastern Cape' (2013) *Acta Juridica*, 339. See also Mwambene & Kruuse (n 8).

172 Mwambene & Kruuse (n 8).

173 See generally the Prohibition Bill 2015 and the Marriage, Divorce, and Family Relations Act, 2015.

South Africa and Malawi, therefore, are to be lauded for their various positive law reforms. These laws present the potential to be instruments to fight child marriage.

However, an examination of the process leading to these reforms indicates that there are many aspects central to children's experiences in places where child marriage is most prevalent that have not been addressed. A crucial, and the most obvious, issue is poverty.<sup>174</sup> It has been widely observed that poverty is behind most cultural practices such as *lobolo* (bride wealth), *ukuthwala*, *kupimbira*, and *kuvarira*.<sup>175</sup> If efforts to end child marriage are to be meaningful to the children affected, it appears obvious that the process of law reform needs to be coupled with practical ways of addressing factors that perpetuate harmful cultural practices linked to child marriage.

Some practical ways, as proposed by the Girls Not Brides consortium, include mobilising communities to be agents of change and, more importantly, empowering girls.<sup>176</sup> This bottoms-up approach, as championed by Channock, will ensure that 'change is grounded in peoples' reality and not just imposed on them'.<sup>177</sup> In addition, it is also obvious that, in the selected countries, the factors that lead to child marriage are not unique to the region. Therefore, much more can be learned from efforts of other countries, particularly in Northern Africa, where UNICEF has reported good progress in the fight against child marriage, a matter for discussion elsewhere.<sup>178</sup>

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174 Research in Zimbabwe, South Africa and Malawi revealed that in communities where the level of poverty was high, the prevalence of child marriage was also high.

175 It has been widely reported that poverty is behind most cultural practices, such as *lobolo* (bride wealth) (Zimbabwe, South Africa and Malawi); *ukuthwala* (Zimbabwe, South Africa and Malawi); *kupimbira* (Malawi); and *kuvarira* (Zimbabwe).

176 Girls Not Brides 'Theory for change' <https://www.girlsnotbrides.org/child-marriage-theory-of-change/> (accessed 20 December 2017).

177 See, generally, M Channock 'African constitutionalism from the bottom-up' <http://www.customcontested.co.za/wp-content/uploads/2015/04/Chanock-PublicLecture-2015.pdf> (accessed 20 December 2017).

178 UNICEF [https://data.unicef.org/wp-content/uploads/2015/11/UNICEF-Child-Marriage-Brochure-High-Single\\_246.pdf](https://data.unicef.org/wp-content/uploads/2015/11/UNICEF-Child-Marriage-Brochure-High-Single_246.pdf) (accessed 11 December 2017).

## ***Onuoha Kalu v The State* and flaws in Nigeria's death penalty jurisprudence**

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### **Summary**

*In Onuoha Kalu v The State, the Supreme Court of Nigeria affirmed that the death penalty violated neither the right to life nor human dignity under the Nigerian Constitution. Since the decision, the list of capital crimes has grown in Nigeria. In the last decade and more, not less than eight Nigerian states made kidnapping a capital offence, while 12 others adopted Shari'a criminal codes that extend capital punishment to sexual offences. Although executions have been rare, courts have continued to impose the mandatory death penalty, swelling the number of inmates on death row. These developments are unconstitutional and exploit two shortcomings: First, the Constitution's provision on penalties that violate human dignity – or the interpretation of the provision – is tenuous. Second, Nigerian courts have surrendered their autonomy to statutory prescripts that remove discretion from sentencing. The Kalu case is one of many decisions that expound a flawed death penalty jurisprudence in Nigeria. A review of the jurisprudence indeed is overdue. While the death penalty may be constitutional under Nigerian law, the basis of imposing the sentence in most cases is constitutionally flawed.*

**Key words:** death penalty; penal proportionality; right to human dignity; right to life

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## 1 Introduction

*Onuoha Kalu v The State*<sup>1</sup> is one of many judicial pronouncements that affirm the constitutionality of the death penalty in Nigeria. It no doubt is Nigeria's *locus classicus* on the subject. The appellant had appealed a death sentence that was imposed under section 319(1) of the Criminal Code of Lagos State in South-West Nigeria,<sup>2</sup> contending that the penalty contravened sections 30(1) and 31(1) of the Constitution,<sup>3</sup> which guarantee the rights to life and human dignity. Section 319(1) of the Criminal Code prescribes the death penalty for murder. The appellant argued that the penalty and its execution violated constitutional guarantees of life and human dignity.

The appeal potentially had watershed significance. Had it succeeded, a litany of Nigerian statutes that prescribe the death penalty for sundry offences would have been annulled. Prior to the appeal, debates had raged about the constitutionality of the penalty in Nigeria. It had become an issue of significant public interest, which the *Kalu* appeal was intended to resolve. The appeal's significance was not lost on the bench and bar in Nigeria. The latter weighed in with various positions that were supported by copious references to foreign jurisprudence, for which the Supreme Court of Nigeria was amply grateful.

The outcome, however, was hardly what the appellant wanted. Having applied its mind to relevant constitutional provisions and comparative jurisprudence, the Supreme Court concluded that the penalty violated neither the right to life nor human dignity as the Nigerian Constitution allowed the penalty. Although the decision became a *locus classicus*, it hardly puts the matter to rest as it was meant to. *Kalu* provides far less clarity on the subject than it was presumed to do. The Supreme Court's interpretation of the human dignity provision in the Nigerian Constitution could have been more insightful, and its engagement with comparative constitutional sources more discreet. Had the Court applied more rigour, it would have spotted textual transitions in constitutional provisions on human dignity in Nigeria, which left the human dignity clause fundamentally different from comparative human dignity clauses that it consulted in other national constitutions. Overlooking textual differences led the Court to misread how those clauses have been interpreted.

The Supreme Court's failure to recognise and weigh the probable consequences of textual differences makes *Kalu* a poor precedent for whether or when the death penalty violates the Constitution. However, the Court was hardly alone in this error: The parties apparently did not bring the differences and their implications to the Court's attention. This leaves wide open the question about the

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1 [1998] 13 NWLR 531.

2 Cap 31, Laws of Lagos State of Nigeria, 1973.

3 Constitution of the Federal Republic of Nigeria, 1979.



constitutionality of punishments that infringe human dignity in Nigeria. The article interrogates the question, starting with a brief outline of *Kalu's* legacy.

Before commencing the interrogation, however, it is necessary to delimit the scope of the article. The article seeks to contribute to developing the jurisprudence on the constitutionality of the death penalty in Nigeria, and to illustrate what needs to be reviewed to ensure compliance with international human rights standards that have been set for countries that have not abolished the penalty. Thus, much of the article focuses on the decisions of the Nigerian Supreme Court. While the article recognises that judicial decisions may sometimes reflect prevailing ideological or sociological leanings in a society, Nigerian courts, in their conservative tradition, adopt a literalist approach to interpreting death penalty prescripts. This has left little room for non-legal influences on their decisions to impose the death penalty. Even when the Nigerian Supreme Court had the opportunity in *Kalu and Joseph Amoshima v The State*<sup>4</sup> to interrogate the constitutionality of the death penalty in an evolving socio-legal context, its conservatism caused it to resist being persuaded to go with global trends that favour the abolition of the penalty. It resolved the constitutionality of the penalty by interpreting literally the constitutional qualification of the right to life.

This article aims to show that even within this conservatism, the Supreme Court in the above cases could have found within the Constitution restrictions on the use of the penalty which, when effectively applied, will instigate a departure from the indiscriminate manner that the death penalty is being utilised in Nigeria and limit its application to extreme cases, if at all. The logic of the article, simply stated, is that the constitutionality of the death penalty may be constructed in a manner that makes its use consistent with international guidelines that reserve the penalty for the most serious crimes – that is, in countries that have not abolished the penalty. This requirement is contained in General Comment 3 on Article 4 of African Charter on Human and Peoples' Rights of the African Commission on Human and Peoples' Rights (African Commission)<sup>5</sup> and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

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4 (2011) LPELR-SC.283/2009.

5 General Comment 3 on the African Charter on Human and Peoples' Rights: The right to life (art. 4). The General Comment was developed by the African Commission on Human and Peoples' Rights as an authoritative statement on the meaning and scope of the right to life under the African Charter.

## 2 The conundrums of *S v Kalu's* legacy

There have been several judicial and legislative developments since *Kalu* was decided: on the one hand, lawsuits that have attempted to relitigate the constitutionality of the death penalty, some of which floundered on the authority of *Kalu*. In one example, *Joseph Amoshima v The State*,<sup>6</sup> the appellant, relying on the separation of powers, sought a review of the constitutionality of the death penalty. The Supreme Court did not regard the challenge as anything novel. Relying on *Kalu*, the Court simply noted that the penalty 'is firmly entrenched in [Nigerian] law ...' Following *Kalu* and several other judicial pronouncements,<sup>7</sup> courts routinely impose the death penalty and rule themselves as being without a discretion to alter sentences when the penalty is mandatory.<sup>8</sup>

On the other hand, a disturbing number of statutes prescribe the death penalty in Nigeria. Some of these make the penalty mandatory.<sup>9</sup> Examples include the Robbery and Firearms (Special Provisions) Act,<sup>10</sup> arguably the most notorious of all the death penalty laws. Section 1(2) of the Act prescribes the mandatory death penalty for robbing with an offensive weapon. Several death sentences have been imposed under this mandatory law. In the last decade or two, more capital offences have been created. In February 2017 Lagos State became the eighth state to make kidnapping a capital offence. In 12 northern states that enforce Shari'a criminal law, sexual offences have become punishable by death.<sup>11</sup> The Terrorism Prevention Act 2011 as amended also reserves the penalty for serious terror-related offences.<sup>12</sup>

Mandatory penalties are fraught with problems. For one, they lack an internal scheme for differentiating offences of varying levels of gravity and culpability. Second, they violate the separation of powers. Third, they deprive courts of discretion in sentencing, making it practically impossible to fit the punishment with the crime. A few examples under the Robbery and Firearms Act help to illustrate these

6 (2011) LPELR-SC.283/2009.

7 See *Adeniji v State* (2000) 645 NWLR 356; *Okoro v State* (1998) 14 NWLR 584; *Akinyemi v State* (1999) 6 NWLR 465.

8 See *Tanko v The State* (2009) 1-2 SC (Pt 1) 198

9 See Death Penalty Database: Nigeria by Cornell Centre on the Death Penalty Worldwide [www.deathpenaltyworldwide.org/country-search-post.cfm?country=Nigeria](http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Nigeria) (accessed 21 October 2017).

10 Ch R11, Laws of the Federation of Nigeria 2004.

11 n 7. The states where kidnapping is a capital offence include Abia, Akwa Ibom, Anambra, Ebonyi, Edo, Enugu, Imo and Lagos states. See <https://lagosstate.gov.ng/blog/2017/02/01/ambode-okays-death-penalty-for-kidnappers/> (accessed 21 October 2017). States that enforce Shari'a criminal law include Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe and Zamfara.

12 See Terrorism (Prevention) Act 2011; Terrorism (Prevention) (Amendment) Act 2013.

problems. In the *Amoshima* case,<sup>13</sup> the appellant was sentenced to death for killing another during a robbery in which a firearm was used. Causing death during an armed robbery is an aggravating feature that places the crime among the worst types of crime for which the death penalty would most certainly be considered. Under the Act, however, the offender need not cause death to be liable to the death penalty. Being in possession of a firearm or offensive weapon during a robbery is a sufficiently aggravating element. Thus, in *Francis Odili v The State*<sup>14</sup> the appellant was sentenced to death although the victims were only lacerated. No lives were lost and the victims subsequently recovered from their injuries. In *Anthony Isibor v The State*<sup>15</sup> the appellant received the death sentence for robbery at gunpoint, although no actual physical violence occurred. The common thread connecting these crimes was the involvement of a lethal weapon. Beyond that, the *corpus delicti* and injuries varied considerably.

The indiscriminate imposition of the death penalty in the above cases suggests that the offenders were equally culpable, regardless of the presence or absence of injury or harm to the victims. This cannot be further from apt. As far as moral culpability goes, the crimes in the *Amoshima* and *Anthony Isibor* cases are hardly on the same pedestal. The one caused death while the other only brandished a gun without causing physical harm. Nevertheless, both suffered the same legal consequences because a mandatory death penalty law proscribes their conduct. For the sentient judge this ought to raise genuine concerns about penal proportionality – concerns with a constitutional basis. Mandatory penal prescripts rob courts of the discretion to make judgment calls on how blameworthiness should impact the severity of the sentence. The stark unfairness of such laws confronted the court in *Umoh Ekpo v The State*,<sup>16</sup> where the court said that it felt compelled to impose the death penalty despite observing that the sentence was disproportionate to the crime. The offender in this case – also a robbery case – was a relatively young offender. The element of aggravation was a pair of pliers, which the court found not to be inherently lethal.

These examples demonstrate how statutory punishments can run afoul of the important principle of individualising punishment through measures that reinforce penal proportionality. Underlying the Robbery and Firearms Act is a legislative presumption that all armed robberies are the same, and the perpetrators equally culpable and liable. Unfortunately, Nigerian courts have upheld this presumption. Underlying their compliance with the mandatory penal prescripts is the view that once a law has been duly enacted by parliament which

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13 *Amoshima* (n 6).

14 (1977) ANLR 49.

15 (2002) 2 SC (Pt II) 110.

16 LER [2014] CA/L/96/11. The value of the stolen items was N17 210 (US \$47,77).

prescribes a penalty, courts are duty-bound to enforce the penalty. This view precludes a judicial evaluation of the constitutionality or proportionality of statutory penal prescripts.

Applying the death penalty to every instance of armed robbery, regardless of culpability, is hardly conscionable. However, Nigerian courts do so unquestioningly, exposing a dogmatic – if not flawed – understanding of the separation of powers principle. In the *Amoshima* case, which was decided in 2014, the Supreme Court rejected a separation of powers argument that mandatory death penalty laws are an example of legislative overreach as they fetter judicial discretion. Citing its earlier decision in *Tanko v The State* that trial courts lacked the competence to exercise discretion where the only prescribed sentence is death, the Court held:<sup>17</sup>

The law is settled that the use of the word ‘shall’ in an enactment ... is usually interpreted to mean a mandatory provision which must be obeyed ... It is also settled law that where a statute prescribes a mandatory sentence ... the courts are without jurisdiction to impose anything less than the mandatory sentence as no discretion exists to be exercised in the matter. It is a duty imposed by law.

Consistent with this rather conservatively restrictive view of the doctrine of separation of powers, Nigerian courts generally do not subject statutory penalties to judicial review. In South Africa and Malawi, statutorily mandatory penalties have been held to invade judicial autonomy and deny offenders their fair trial rights. Where the penalties are grossly disproportionate, they have been held to violate human dignity.<sup>18</sup> Disproportionate sentences raise germane questions about the fairness of the criminal justice system. In the *Kalu* case, the question pertained to the relationship between human dignity and punishment. In the *Amoshima* case, it concerned the limits of legislative power to prescribe penalties and the autonomy of judges to allocate sentences. Unfortunately, neither case resolved these questions.

### 3 Punishment and the constitutional protection of human dignity in Nigeria

Central to the *Kalu* appeal was the meaning of the rights to life and human dignity under the Nigerian Constitution of 1979,<sup>19</sup> but the real battle raged over later. Section 31(1)(a) of the Constitution entitled each individual to respect for the dignity of his or her person, prohibiting torture or inhuman and degrading treatment. The 1979 Constitution was subsequently replaced by the 1999 Constitution,<sup>20</sup>

17 *Amoshima* (n 4) 12.

18 See sec 9.

19 Constitution of the Federal Republic of Nigeria, 1979.

20 Constitution of the Federal Republic of Nigeria, 1999.

which contains a similar human dignity provision. The right to life provisions in both Constitutions (sections 30(1) and 33(1) respectively) are also *in pari materia*. These sections affirm the right, but grant that life may be taken pursuant to a criminal conviction.

Prior to the 1979 Constitution, Nigeria had two successive Constitutions. The first, the independence Constitution of 1960,<sup>21</sup> guaranteed the right to human dignity in section 18(1), namely, that '[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment'. That Constitution was replaced in 1963 by a Republican Constitution.<sup>22</sup> Section 19(1) thereof reproduced section 18(1) of the 1960 Constitution word for word. Falling within the scope of prohibited acts under both provisions were acts of torture, or 'punishments' or 'other treatments' that met the 'inhuman' or 'degrading' epithets. In the 1979 Constitution, however, the human dignity clause took on a different phrase. 'Punishment' was removed from the clause so that it now reads as follows: 'Everyone is entitled to respect for the dignity of his person, and accordingly, no person shall be subjected to torture or to inhuman or degrading treatment.'

The reason for this textual change to the human dignity provision is not known,<sup>23</sup> but if the socio-political context of Nigeria in the late 1980s and 1990s had anything to do with it, then it may be suggested, anecdotally, that the character of the military administrations that decreed the Constitutions influenced the limited scope of the provision. The administrations were well-known for egregious human rights violations; the reckless disregard for human life and dignity; contempt for the rule of law; the repression of constitutional order; the ouster of judicial oversight; and a severe regime of punishment. It is in sync with the character of the administration that the Robbery and Firearms Act, for instance, with its severe penal prescripts, was enacted during military rule.<sup>24</sup> Similar influences were brought to bear on transitions to civil rule that were initiated by the military. One author wrote that the transitions had the 'abiding paradox of ... [being] implemented under severe repression of civil society'.<sup>25</sup> The culture of repression permeated law making during military rule and continued to shadow the Constitutions that were the products of military rule.<sup>26</sup>

21 Constitution of the Federation of Nigeria, 1960.

22 Constitution of the Federal Republic of Nigeria, 1963.

23 The author has not come across resources that discuss the change and the reasons for it.

24 See DO Aihe 'Fundamental human rights and the military regime in Nigeria: What did the courts say' (1971) 15 *Journal of African Law* 213.

25 CA Odinkalu 'The management of transition to civil rule by the military in Nigeria (1996-1996)' in K Amuwo, DC Bach & Y Lebeau (eds) *Nigeria during the Abacha years (1993-1998)* (2001) 57.

26 How the culture impacts crime and punishment in post-transition Nigeria's will be a subject deserving of a study.

## 4 Textual and contextual interpretation of constitutional provisions

In constitutional interpretation, words assume meanings that are best deciphered by reference to the history and context of the document. When provisions that define or curtail human rights become the subject of constitutional interpretation, text and context assume even greater significance. South African courts have often asserted this principle, with the South African Constitutional Court in *S v Makwanyane & Another*<sup>27</sup> being a classic example. The Court's jurisprudence on the constitutionality of the death penalty is highly celebrated by death penalty abolitionists and was consulted by the Nigerian Supreme Court in the *Kalu* case.

In *Makwanyane*, the socio-political context that gave birth to the South African Constitution became relevant to resolving whether the death penalty was constitutional or violated the rights to life and human dignity. In the view of the Constitutional Court, South Africa's socio-political context lends meaning to words of the Constitution and Bill of Rights.<sup>28</sup> As a document, the Constitution encapsulates the experiences, hopes and aspirations of the people, offering a framework that would guide South Africa away from a history of repression to embrace the new society that is based on a new culture of respect for human life and dignity, for the values embedded in the Constitution.<sup>29</sup> The South African Constitution is the outcome of a widely consultative process.

*Makwanyane* made a compelling point: To not imbue the interpretation of the Constitution or Bill of Rights with the historical and socio-political context is to overlook the political rationality that underpins the Constitution, and to lose the meaning and purpose of its provisions. Nigeria experienced its own years of brutal repression under military rule, but the processes leading to the adoption of the 1979 and the 1999 Constitutions were not consultative. Thus, what is enshrined in the Nigerian Constitution as founding values were never negotiated through democratic consultative processes, but transformed into *lex* by military fiat. Nigerians were not given an opportunity to have the society of their aspirations defined in both Constitutions. Doctored and decreed by military regimes, and with many non-justiciable rights, the Constitutions were hardly progressive, neither were the processes that gave birth to them democratic.<sup>30</sup>

27 (CCT3/85) [1995] ZACC 3.

28 Corresponding to Ch IV of Nigeria's 1979 and 1999 Constitutions.

29 *Makwanyane* (n 27) paras 8-10 & 218-224.

30 See FT Abioye 'Constitution-making, legitimacy and the rule of law: A comparative analysis' (2011) 44 *Comparative and International Law Journal of Southern Africa* 59; A Oladiran 'Democratising and legitimising constitution making in Nigeria: A focus on the 1999 Constitution of Nigeria' (2014) 4 *International Journal of Humanities and Social Science* 205.

Nigerian courts also recognise the importance of context in constitutional interpretation. In *Kalu*, the Supreme Court made reference to the way in which the South African Constitutional Court engaged with that context in the *Makwanyane* case. Of course, necessary distinctions must be drawn between *Makwanyane* and *Kalu*. *Makwanyane* concluded that the death penalty violated the right to life because section 9 of the 1993 Constitution of the Republic of South Africa (interim Constitution)<sup>31</sup> guaranteed an absolute right to life. Since section 9 did not recognise an exception to the right, the Constitutional Court was correct to conclude that the right was non-derogable. In *Kalu* the Nigerian Supreme Court came to a different conclusion based on the differently-worded right to life provision in the 1979 Constitution. Although section 30(1) of that Constitution guaranteed the right to life, it allowed judicial executions. Based on this provision, the Supreme Court rightly concluded that the right to life was not absolute in Nigeria. It was derogable.

Whereas text and context came to bear on interpretation in the *Makwanyane* case, *Kalu* was decided on the basis of a literal interpretation of a differently-worded protection of the right to life under the 1979 Constitution. However, even if the Supreme Court had taken context into consideration, its conclusion in *Kalu* could not have been different because the provision of the Constitution regarding the qualified nature of the right to life was quite lucid. This provision has been retained in the 1999 Constitution. What becomes rather befuddling with the *Kalu* case, however, is why the Supreme Court failed to notice that the provisions regarding human dignity in the Nigerian and South African Constitutions were textually different. As will be shown below, the Supreme Court could have come to a different conclusion had it recognised this difference.

Juxtaposing the human dignity clauses highlights the differences. Section 31(1)(a) of the 1979 Constitution provided:<sup>32</sup>

Every individual is entitled to respect for the dignity of his person, and accordingly –

- (a) no person shall be subjected to torture or to inhuman or degrading treatment.

Section 10 of South Africa's interim Constitution assured to individuals 'respect for and protection of [their] dignity'.<sup>33</sup> This provision essentially proclaimed a positive right to which individuals may lay a claim. A corresponding negative right is expressed in prohibitions against certain descriptions of punishment in section 11(2): 'No person shall be subjected to torture of any kind, whether physical,

31 200 of 1993. The interim Constitution was subsequently repealed by the Constitution of the Republic of South Africa, 1996. Sec 9 of the interim Constitution is now sec 11 in the 1996 Constitution.

32 The provision has been retained in sec 34(1)(a) of the 1999 Constitution.

33 Currently sec 10 of the 1996 Constitution.

mental or emotional, *nor shall any person be subjected to cruel, inhuman or degrading treatment or punishment*'.<sup>34</sup>

In other constitutions, the positive and corresponding negative rights are dealt with in the same section. For example, the Namibian and Zimbabwean Constitutions affirm human dignity and prohibit certain forms of punishment or treatment in single provisions. Similarly, section 54 of the Constitution of Hungary affirms human dignity while also enlisting prohibitions.<sup>35</sup>

The Constitutional Court's approach in *Makwanyane* was to read section 11(2) together with other rights, namely, the right to equality before the law and to equal protection of the law in section 8; the right to life in section 9 and human dignity in section 10; and to hold that the rights are consistent with human dignity. In other words, 'punishment must meet the requirements of sections 8, 9 and 10, and this was so whether [the] sections are treated as giving meaning to section 11(2) or as prescribing separate and independent standards with which all punishments must comply'.<sup>36</sup> An important principle of interpretation underlying this approach sets the interpretation of section 11(2) within the history and context of the Constitution's adoption. In the Court's view, the interpretation of the provision must aim to secure to 'individuals the full measure' of protection intended by the provision.

In sum, underpinning all rights guaranteed by the Bill of Rights is a basic consideration for human dignity, a consideration that draws deep on South Africa's experience with inequality under apartheid, which also impacted matters of punishment. Accordingly, sections 8, 9, 10 and 11(2) all impacted the constitutionality of the death penalty under South African law. The right to life, equality and respect for human dignity cannot give full protection if their interpretation and application are isolated from section 11(2).

There is a not so subtle textual difference in the constitutional provisions mentioned above and the human dignity clause in section 31(1)(a) of Nigeria's 1979 Constitution. The main distinguishing factor is the omission of the word 'punishment' from the prohibition of 'torture' and 'inhuman or degrading treatment' by section 31(1)(a). Could this mean that prohibitions of inhuman or degrading

34 Now sec 12(1)(e) (my emphasis).

35 The Constitutional Court referred to these provisions in the *Makwanyane* case. Art 8(1) of the Constitution of the Republic of Namibia provides that '[t]he dignity of all persons shall be inviolable'. Subsec (2)(b) provides that '[n]o persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. Sec 15(1) of the 1980 Constitution of Zimbabwe provided that '[n]o person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.' Sec 54 of the Constitution of Hungary provides that '... everyone has the inherent right to life and human dignity ... no one shall be subjected to torture or to cruel, inhuman or degrading punishment'.

36 *Makwanyane* (n 27) para 10.



punishments are excluded in section 31(1)(a)? How fatal could such an exclusion be? The discussion below explores these questions.

## 5 Interpreting 'cruel, inhuman or degrading treatment or punishment'

In an apparent departure from prior Constitutions, the 1979 and 1999 Nigerian Constitutions omit punishment from the list of prohibited acts that offend human dignity. Does the omission alter the scope of the intended human protections in the prior Constitutions? Does section 31(1)(a) of the 1979 Constitution (section 34(1)(a) of the 1999 Constitution) as currently framed prohibit inhuman or degrading punishment? The section bears repeating:

Every individual is entitled to respect for the dignity of his person, and accordingly

- (a) no person shall be subjected to torture or to inhuman or degrading treatment.

Current interpretations of the provision presume the elasticity of 'treatment' by importing criminal punishment into 'treatment'. According to these interpretations, therefore, section 31(1)(a) (now section 34(1)(a) in the 1999 Constitution) also prohibits inhuman or degrading punishment. A doctoral thesis<sup>37</sup> that examined the issue relied on the definition of torture in article 1 of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to suggest that 'treatment' in section 34(1)(a) of the 1999 Nigerian Constitution meant 'punishment'.<sup>38</sup>

This clearly is a wrong presumption, a conflation – rather than an interpretation – of two conceptually distinguishable words. It is a spontaneous and cognitively weak reaction to a *lacuna* in the Nigerian Constitution: It suggests that if the Constitution does not expressly prohibit 'inhuman or degrading punishment', an intention to do so must be presumed in the phrase 'torture or ... inhuman or degrading treatment'. After all, it is almost unthinkable that a constitution will fail to prohibit criminal punishments that are inhuman.

In *Ozoukwu v Ezeonu II*,<sup>39</sup> the Nigerian Court of Appeal attempted a definition of section 31(1)(1) of the 1979 Constitution, looking at the

37 LI Uzoukwu 'Constitutionalism, human rights and the judiciary in Nigeria' unpublished PhD thesis, University of South Africa, 2010 95-104.

38 Uzoukwu (n 37). The thesis presumes that 'torture', 'cruel', 'inhuman' and 'degrading treatment or punishment' in art 1 applies to judicial punishment. This is misleading because art 1 of CAT excludes 'pain or suffering arising only from, inherent in or incidental to lawful sanctions' from the meaning of torture.

39 (1991) 6 NWLR (Pt 200) 708.

key words – dignity, degrade, torture, inhuman treatment – severally.<sup>40</sup> Unfortunately the definition did not explain how its interpretation applied to judicial punishment. Nevertheless, the abovementioned thesis relied on the *Ozoukwu* definition to suggest that judicial punishment that is unduly excessive in length or severity, or disproportionate having regard to the seriousness of the offence, may amount to torture. Article 1 of CAT hardly lends itself to such interpretation. If anything, it excludes judicial punishment from the scope of CAT.<sup>41</sup>

Interpretations that substitute ‘treatment’ for ‘punishment’ conflate distinguishable concepts. Dealing with whether the death penalty violated human dignity in the *Makwanyane* case, the Constitutional Court sought guidance from precedents in textual interpretation, and in the principle laid out in *Minister of Home Affairs and the Minister of Education* (Appeal No 4 of 1978) *v Collins MacDonald Fisher and Eunice Carmeta Fisher*,<sup>42</sup> where the Privy Council ruled:

Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.

The Constitutional Court meticulously followed these principles in *Makwanyane*, differentiating the language of comparable human dignity clauses, but also drawing deep on South Africa’s history and political experience to identify the underlying purposes of the South African Constitution and Bill of Rights. The textual similarities that the Court observed between section 11(2) of South Africa’s interim Constitution and the Eighth Amendment to the Constitution of the United States – which prohibits ‘cruel and unusual punishment’ – bolstered the court as it dug deep into American jurisprudence on cruel and unusual punishments. In the end the Court found, as has been found by the US Supreme Court, that disproportionately excessive punishments violate the prohibition of cruel, inhuman and degrading punishment in section 11(2).

The Constitutional Court also consulted other jurisprudence, notably Zimbabwean and Namibian case law. Section 15(1) of the

40 *Ozoukwu v Ezeonu* (n 39), per Tobi JCA, as he then was, attempted to define the key words of the provision. However, the provision is not helpful as it does not explain how the words apply to criminal punishment.

41 The thesis cites authorities to show that punishment that offends sensibilities in a modern society, or is discriminatory or selectively enforced offends human dignity. That may well be, but CAT hardly is the normative basis for impugning such punishment. Besides, the inhuman prison conditions under which a judicial sentence is served must be differentiated from judicial sentences as they do not necessarily render the sentence unconstitutional.

42 [1979] UKPC 21.

1980 Constitution of Zimbabwe guarantees that '[n]o person shall be subjected to torture or to inhuman or degrading punishment or such other treatment'. Section 8(2)(b) of the Constitution of the Republic of Namibia is similar: 'No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.' In all of the above Constitutions, the reference to punishment is explicit.

The Zimbabwean and Namibian provisions came under judicial interpretation by the highest courts in both jurisdictions. The approach of the Supreme Court of Zimbabwe in *S v Ncube*<sup>43</sup> construed torture, inhuman or degrading punishment or such other treatment disjunctively, finding that section 15(1) of the Constitution of Zimbabwe 'places prohibitions against (i) torture; (ii) inhuman punishment; (iii) degrading punishment; (iv) inhuman treatment; and (v) degrading treatment' severally. Although the Court was careful to recognise that the circumstances under which an imposed sentence is served could come up for evaluation under 'treatment' in section 15(1), the import was nevertheless clear that the focus of 'punishment' in section 15(1) is judicial punishment. A judicial pronouncement of punishment must not be inhuman or degrading in its character so as to violate human dignity. The treatment that is meted out to a convicted offender while serving a judicial sentence is altogether a separate matter. In the Court's very unambiguous words, 'treatment has a different connotation from punishment'.<sup>44</sup>

The Namibian Supreme Court also followed a disjunctive approach in *Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State*.<sup>45</sup> According to the Court:

It seems clear that the words ... [torture or ... cruel, inhuman or degrading treatment or punishment] have to be read disjunctively. Thus read, the section [8(2)(b) of the Constitution of Namibia] seeks to protect citizens from seven different conditions [namely]: (a) torture; (b) cruel treatment; (c) cruel punishment; (d) inhuman treatment; (e) inhuman punishment; (f) degrading treatment; [and] (g) degrading punishment.

Basically, the concepts of treatment and punishment must be differentiated.

The Zimbabwean and Namibian precedents guided the South African Constitutional Court in *S v Williams*,<sup>46</sup> where deliberations pivoted to international jurisprudence on the subject. First, the Court found that jurisprudence associated prohibitions of cruel, inhuman or degrading treatment with prohibitions of torture. Second, the Court also resorted to definitions propounded by the European Commission on Human Rights, which described 'inhuman treatment' as treatment that 'causes severe suffering, mental or physical, which in the particular situation is unjustifiable', and viewed torture as 'an

43 See *S v Ncube*, *S v Ntshuma*, *S v Ndhlovu* 1988 (2) SA 702 (ZS) 715C-D.

44 As above.

45 1991 Nr 178 (Sc) 187 paras G-H.

46 1995 (3) SA 632 639 paras A-E & 640 para J-641 para D.

aggravated form of inhuman treatment'. To find a proper construction for 'inhuman or degrading punishments', however, the Court referred to the European Court's decision in *Tryer v The United Kingdom*,<sup>47</sup> where punishment was viewed as a judicial sentence or the immediate consequence thereof. These decisions, it must be said, are consistent with article 1 of CAT, which excludes 'pain or suffering arising only from, inherent in or incidental to lawful sanctions'.

The Nigerian Supreme Court's approach to interpreting section 31(1)(a) in *Kalu* was clearly not disjunctive. Apparently the Court's pronouncements and the legal arguments that were placed before it either did not pay attention to differences in the text of section 31(1)(a) and the various other human dignity provisions that were considered in the case, or they simply presumed that the text meant the same thing, thereby inadvertently foreclosing careful attention to the nuances that attend interpretations of foreign texts.

It may be useful to outline the various positions canvassed in *Kalu* as summarised by the Supreme Court. Arguing for the unconstitutionality of the death penalty, the appellant contended that the 'penalty as provided for in section 319(1) of the Criminal Code of Lagos State is inconsistent with ... section 31(1)(a), which expressly prohibit all forms of punishment that amount to torture, inhuman or degrading punishment'.<sup>48</sup> The appellant's inference of an express prohibition of inhuman or degrading punishment in section 31(1)(a) can be misleading, for nowhere in the provision is punishment mentioned. Apparently, the rebuttable presumption here is that 'treatment' equals 'punishment'.<sup>49</sup>

The gist of the submission by the state (respondent) was simple: The death penalty was provided for in the Constitution. Therefore, it cannot be intrinsically assailed or censured on account of the method of execution. The penalty and the method of execution are to be distinguished, presupposing that under Nigerian law only the method can be open to a constitutionality review. However, if the method of execution was objectionable, it may only be corrected by legislative amendment.

Like those of the respondent, the *amicus* briefs acknowledged that the right to life was not absolute under the Nigerian Constitution and that the preservation of the death penalty by the Constitution made it inconceivable that it would violate human dignity. It was thus not a contradiction that the Constitution protected the right to life and human dignity and at the same time allowed judicial execution. Only a constitutional amendment could change that. Until then, the death

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47 (1978) 2 ECHR 1.

48 *Kalu* (n 1) (my emphasis).

49 The appellant made a more tenable case when he linked the death row phenomenon with torture, inhuman and degrading treatment. However, the phenomenon, on its own, does not impact the constitutionality of a judicial sentence of death. The Court correctly rejected the argument.

penalty cannot be ruled as unconstitutional, or as torture, inhuman or degrading treatment.

These arguments demonstrate how the Supreme Court could have been led into conflating punishment with treatment. However, the Court could also have noticed the error on its own. Unfortunately, it did not: After consulting various foreign authorities, the Court concluded: '[T]he opinion that the *death penalty amounts to torture, inhuman and degrading treatment* and, therefore, intrinsically unconstitutional seems ... a minority view.'<sup>50</sup>

The Supreme Court extended its error of conflation into presuming textual similarity in section 17(1) of the Jamaican Constitution, which prohibits 'torture or ... inhuman or degrading punishment or other treatment'. However, the provisions cannot be more different: While section 17(1) expressly refers to 'punishment', this word is missing in the corresponding provision of the Nigerian Constitution. The difference is substantial, and the Supreme Court's failure to notice or acknowledge it diminishes the conclusiveness of its pronouncements on the death penalty and human dignity. While the Court may yet have found, as it rightly did, that the death penalty does not violate human dignity *per se*, its reasoning could have been more nuanced, and the finding itself qualified. In jurisdictions that have upheld the constitutionality of the death penalty, not every decision to impose the penalty is necessarily constitutional. In the United States of America and Malawi, for example, punishments that are grossly disproportionate to the crime have been held to be cruel or unusual, or inhuman or degrading, failing to pass the test of constitutionality. South African courts also uphold this principle, although not necessarily in connection with the death penalty.

As it is, the Supreme Court's findings in *Kalu* render the nature of protections guaranteed by section 31(1)(a) (now section 34(1)(a) in the 1999 Constitution) far from clear. It is not safe to presume that the human dignity provisions of the 1979 and 1999 Constitutions retain the same scope and meaning as the corresponding provisions in the 1960 and 1963 Constitutions.<sup>51</sup> The omission of 'punishment' in the later Constitutions is significant, potentially leaving these Constitutions ineffectual against punishments that are grossly disproportionate and in probable violation of human dignity in Nigeria.

<sup>50</sup> *Kalu* (n 1) (my emphasis).

<sup>51</sup> The author could not find judicial decisions or scholarly works from Nigeria on the subject.

## 6 Between human dignity and punishment: The proportionality test in a rights-based approach to sentencing

In *Furman v Georgia*<sup>52</sup> and *Gregg v Georgia*,<sup>53</sup> the United States Supreme Court reckoned that the preservation of human dignity underlies prohibitions against 'cruel and unusual punishments' under the United States Constitution. At issue in both cases was whether the death penalty violated the Eighth<sup>54</sup> and Fourteenth<sup>55</sup> Amendments of the US Constitution. In *Gregg v Georgia*, particularly, the Court adopted the view, relying on *Furman v Georgia* and many of its other decisions, that the recognition of the death penalty by the Fourteenth Amendment meant that the penalty was neither invariably in violation of the Constitution,<sup>56</sup> nor *ipso facto* a 'cruel and unusual punishment' within the meaning ascribed to those words by the Eighth Amendment.

For punishment to violate the Eighth Amendment, it must violate 'the constitutional concept of cruelty',<sup>57</sup> such as where the means of executing it employs 'unnecessary and wanton infliction of pain', or the punishment was 'grossly out of proportion to the severity of the crime'.<sup>58</sup> The *Gregg* case affirmed the principle that 'the punishment [of death in this case] is disproportionate in relation to the crime for which it is imposed'. As such, the Court has held the death penalty to be in violation of the Eighth Amendment when it was imposed for rape, and that imposing the penalty for such a non-lethal crime was grossly disproportionate and contrary to the due process guarantees of the Fourteenth Amendment.<sup>59</sup> In the *Furman* case, the Court held that 'punishment may be degrading simply by reason of its enormity'.

The Constitutional Court consulted these American precedents in *Makwanyane*, when it articulated the proportionality test under South African law. In the Court's view, the proportionality test must be evaluated in light of constitutional protections against cruel, inhuman or degrading punishments.<sup>60</sup> This approach rightly identifies punishment as a curtailment or limitation of rights that are

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52 408 US 238 (1972).

53 428 US 153 (1976).

54 The Eighth Amendment provides that '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'. See US Constitution online, <http://www.usconstitution.net/const.html> (accessed 21 October 2017).

55 Sec 1 of the Fourteenth Amendment provides that the state shall not deprive 'any person of life, liberty, or property, without due process of law'. See US Constitution online (n 54).

56 *Gregg v Georgia* (n 53) 170.

57 *Gregg v Georgia* 179.

58 *Gregg v Georgia* 52 170-183, but see particularly 170, 179 & 183.

59 *Coker v Georgia* 433 US 584 (1977).

60 Sec 11(2) of the interim Constitution, now sec 12(1)(e) of the 1996 Constitution.

guaranteed – also to the offender – by the Constitution. *Makwanyane* resolved that section 33(1) of the interim Constitution<sup>61</sup> required proportionality to be achieved between a crime and its punishment. Section 33(1) is the limitation clause of the Bill of Rights: It required that rights be limited only by law of general application ‘to the extent that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors ...’ The Constitutional Court viewed the provision as requiring a careful balancing of competing values in punishment – that is, the interests of society and of the offender, and the gravity of the crime – in light of the Constitution’s values. The balancing act made proportionality between crime and punishment a constitutional imperative.<sup>62</sup>

Thus, a penal measure must be justifiable in a constitutional order, and consistent with the prevailing values of society. The means for achieving the penal objective must not restrict the right of the offender beyond what is reasonably justifiable, and must be necessary and reasonably connected with the achievement of the objective. The degree to which the offender’s rights are restricted must be commensurate to the crime. In other words, the court must seek the least intrusive means available to it, if that meets the demands of justice.<sup>63</sup> The Constitution requires courts to approach punishment with this outlook, taking proportionality into account as an ingredient for determining whether punishment is cruel, inhuman or degrading. A penalty that unreasonably offends these protections presumably would be grossly disproportionate.<sup>64</sup>

The Nigerian equivalent of section 33(1) is section 45(1) of the 1999 Constitution (section 41(1) of the 1979 Constitution).<sup>65</sup> The texts are not similar, but like its South African equivalent, the Nigerian provision allows derogations from fundamental rights by laws that are ‘reasonably justifiable in a democratic society’, in the interests of defence, public safety, public order, public health, public morality and

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61 Sec 36(1) of the 1996 Constitution.

62 According to the Constitutional Court, ‘the limitation of constitutional rights ... involves the weighing up of competing values, and ultimately an assessment based on proportionality ... Proportionality calls for the balancing of different interests. In the balancing process, the relevant considerations are the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such society; the extent of the limitation, its efficacy and particularly, where the limitation is necessary, whether the desired ends can reasonably be achieved through other means less damaging to the right in question. In the process, regard must be had to the provisions of section 33(1), and the underlying values of the Constitution ...’

63 See *Makwanyane* (n 27) paras 103-104.

64 *Makwanyane* para 94.

65 Sec 45 of the 1999 Constitution of the Federal Republic of Nigeria.

to protect the rights and freedoms of other persons.<sup>66</sup> The meaning of the provision has been elucidated in cases that challenge the violation of fundamental rights,<sup>67</sup> but hardly in relation to statutorily prescribed penalties. In *Kalu*, the Supreme Court could have followed the Constitutional Court's lead in *Makwanyane* to resolve when the death penalty violated human dignity, but it did not. Had it done so, penal proportionality would have become a key issue, and the Court would have had to determine when the death penalty, although constitutionally permissible, would be grossly disproportionate and, therefore, unjustifiable. That, invariably, could also have turned the Court's attention to the very important question of separation of powers that emerged in the *Amoshima* case.

## 7 The *Amoshima* case: Parliamentary overreach in legislating punishment

According to section 36(12) of 1999 Constitution, punishments may only be imposed for crimes that are defined in written law, and for which penalties are also provided in written law. The provision enshrines the principle of legality in the Constitution, bringing it into the sphere of criminal law. However, section 45 of the 1999 Constitution (section 41 of the 1979 Constitution) establishes conditions that must be met by legislation that limit or derogate from the rights guaranteed by the Constitution. Such legislation must satisfy the test of reasonableness. In South African jurisprudence, the limitations clause imposes the reasonableness test on laws that prescribe criminal penalties. Nigerian courts generally also assert their power to review legislation or determine whether the exercise of legislative power conforms to the Constitution.<sup>68</sup> In relation to statutory penalties, however, the courts have been disinclined to exercise judicial review.

In the *Amoshima* case<sup>69</sup> the appellant requested the Supreme Court to review the constitutionality of the mandatory death penalty in section 1(2)(a) of the Robbery and Firearms (Special Provisions) Act (Act). The appellant's argument *inter alia* centred on the point that

66 The provision reads '[n]othing in sections 34, 35, 36, 37 and 38 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society (a) in the interest of defence, public safety, public order, public morality or public health; or (b) for the purpose of protecting the rights and freedom of other persons'.

67 *Anzaku v Governor of Nassarawa State* (2006) All FWLR (Pt 303) 308; *Osawe v Registrar of Trade Unions* (1985) 1 NWLR (Pt 4) 755; *Medical and Dental Practitioners Disciplinary Committee v Okwonkwo* (2001) FWLR (Pt 44) 542; *Chukwuma v COP* (2008) 8 NWLR (Pt 927) 278; *IGP v ANPP* (2007) 18 NWLR (Pt 1066) 457.

68 See *Independent Electoral Commission & Another v Musa & Others* (2003) AHRLR 192 (NgSC 2003) (INEC case), where the Supreme Court annulled provisions of an Electoral Act.

69 *Amoshima* (n 6).



the provision intruded on the constitutional powers of courts to adjudicate matters, thereby negating the principle of separation of powers enshrined in sections 4, 5 and 6 of the 1999 Constitution. In the appellant's view, the mandatory nature of the death penalty under the Act also trampled the constitutionally-derived powers of appellate courts to entertain appeals against death sentences which, in turn, violated the appellant's fair trial rights (namely, the right of appeal).

The limitations of legislation are key to comprehending the appellant's arguments. Generally, law makers aim to pass laws that are as comprehensive as possible, and will be guided by facts, circumstances and assumptions that they presume to be relevant to the subject matter. However, these are mutable, and not all the circumstances and changes can be foreseen. The language of legislation may also with time change in meaning. How these changes will impact human behaviour and law enforcement is often unpredictable. Law making shows sensitivity to these variables by seeking flexibility over avoidable rigidity, and in the recognition that regulatory authorities and courts will fill unanticipated gaps when they breathe life into otherwise insentient enactments.<sup>70</sup>

This is no less true for criminal statutes. Their inability to foresee or respond to the infinite and complicated 'variety of circumstances that attend the commission of crimes' has led some jurisdictions to prefer judicial discretion in sentencing over and above the rigid application of statutorily legislated penalties. This was clearly the attitude of the South African Supreme Court of Appeal in *S v Malgas*,<sup>71</sup> where the Court warned that applying statutory penalties indiscriminately would only create arbitrary and unfair consequences. Judicial discretion offers a rational alternative to such outcomes: Courts occupy a better position than legislatures to appraise the circumstances in which individual crimes are committed and to adapt sentences to meet the needs of justice in each case.<sup>72</sup>

Accordingly, South African courts assert that sentencing is 'pre-eminently a matter for the discretion of the trial court',<sup>73</sup> and have vigorously resisted mandatory penalties because they fetter sentencing discretion.<sup>74</sup> Judicial discretion is a *sine qua non* for individualising punishment, or for fitting punishment with the crime

70 See C Ilbert *The mechanics of law making* (1914) 109; Center on Law and Globalization 'How countries deal with incomplete law' [https://clg.portalmx.com/library/keytext.cfm?keytext\\_id=26](https://clg.portalmx.com/library/keytext.cfm?keytext_id=26) (accessed 3 November 2017).

71 2001 (1) SACR 469 (SCA).

72 Consistent with this view, South African courts have routinely resisted mandatory penalties.

73 See *R v Mapumulo & Other Appellants* 1920 AD 56, where South Africa's Appellate Division reasoned that the trial court was in a better position to appreciate the case, evaluate the circumstances of the crime and decide the measure of punishment. See *R v Freedman* 1921 AD 603; *S v Rabie* 1975 (4) SA 855 (A).

74 See D van Zyl Smit 'Sentencing and punishment' in SM Bishop & J Brickhill (eds) *Constitutional law of South Africa* 2 ed Revision Service 4 (2012) 49-11 to 49-17.

and offender. Discretion engenders a fair balancing of factors that speak to the justice of the matter. Mandatory penalties achieve the opposite; they strip courts of the ability to exercise judgment.<sup>75</sup> Of course, courts do not seek amorphous discretion, as that would engender contradictions or inconsistencies in sentencing. What they assert is a rational or structured utilisation of discretion, which permits courts to operate within a system of judicially and legislatively developed guidelines that ensure the judicious use of discretion.

Thus, when *Amoshima* challenged the Nigerian Supreme Court to determine whether the mandatory death penalty breached the separation of powers, it in fact was seeking a judicial determination regarding whether a court's discretion can be lawfully excluded in sentencing. However, closely associated with the separation of powers argument was whether an appellate court's powers to entertain appeals from death sentences – a power conferred by the Constitution – can be abrogated by statute. Stated differently, the second issue was whether a mandatory death penalty could abrogate the appellant's constitutional right of appeal against a death sentence, thereby infringing his right to a fair trial. These were substantial and relevant grounds for appeal, but the Court dismissed them as 'academic or hypothetical'. In its view, the fact that the appeal was being heard by the Court confirmed that the appellant was exercising his right of appeal. This rather tepid mischaracterisation of the substance and relevance of the appellant's arguments conflated the right to appeal a conviction with the right to appeal a sentence. These are two different things under the Nigerian Constitution. It will be useful to consider how the Supreme Court resolved the appeal.

### 7.1 Resolving the separation of powers argument

In the *Amoshima* case the Supreme Court had the following to say on the separation of powers and the mandatory death penalty:

[W]hereas it is the duty of the legislature to enact laws, that of the judiciary is to interpret the laws so made. The duty both to make and amend laws so made belongs exclusively, by Constitutional arrangement, to the legislature as provided under section 4 of the Constitution of the Federal Republic of Nigeria ... The death penalty may be said to be degrading of human beings, etc, but same cannot be said where the law recognises the existence and desires its enforcement by the law.

The Court held further:

It is settled law also that where a statute prescribes a mandatory sentence in clear terms as in the instant case, the courts are without jurisdiction to impose anything less than the mandatory sentence as no discretion exists to be exercised in the matter. It is a duty imposed by law.

These comments seem to suggest that courts cannot review how the legislature exercises its powers to enact a criminal statute. That is

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75 *S v Toms; S v Bruce* 1990 (2) SA 802 (A) 806H-807A.

hardly a correct interpretation of the doctrine of separation of powers. True, the authority of the legislature to enact laws is secured by the Constitution, but so is the court's authority to review whether the legislature has acted consistently with the Constitution. Section 4 of the 1999 Constitution, which defines the law-making powers of parliament, subjects that power to the jurisdiction of the courts.<sup>76</sup> Therefore, the Supreme Court erred in the *Amoshima* case when it claimed that there can be no escape routes where statutorily mandated penalties are involved.<sup>77</sup> The issue hardly concerned escape routes, but whether Parliament encroached judicial authority contrary to section 4(8) of the Constitution by mandating the death penalty.

In the South African case of *The Executive Council of Western Cape & Others v The President of the Republic of South Africa & Others*<sup>78</sup> the Constitutional Court, after reviewing several commonwealth decisions that recognised that legislative power must be exercised according to the Constitution, also noted the Privy Council's decisions in *Attorney-General for Australia v the Queen*<sup>79</sup> and *Liyanage v The Queen*,<sup>80</sup> which annulled legislation that encroached judicial power. Similarly, in *Godfrey Ngotho Mutiso v The Republic*,<sup>81</sup> the Kenyan Court of Appeal held that a law that has the effect of 'tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constitution'. This finding rendered all Kenyan statutory provisions that prescribe a mandatory death sentence inconsistent with the Constitution and void.

There is no reason why a similar fate would not befall laws that make the death penalty mandatory for certain offences in Nigeria, such as the Robbery and Firearms Act and new kidnapping laws, and so forth. Section 4(8) of the 1999 Constitution gives Nigerian courts the power to subject such laws to constitutional review. Such a review may be done on a separation of powers ground, but it may also be reasonableness review under section 45(1) of the Constitution. Unfortunately, it seems that judicial reviews of criminal statutes that prescribe mandatory penalties have not occurred in Nigeria. However, there is Malawian and South African jurisprudence on how the limitation clause applies to punishment, which places proportionality at the heart of resolving whether a penalty is a reasonable limitation of the offender's rights, having regard to his crime. Under South African jurisprudence,<sup>82</sup> for example, it has been held that the penalty must be evaluated in the context of what is a 'reasonable and justifiable

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76 Subsec (8).

77 *Amoshima* (n 6). Echoing the lead judgment, Fabiyi JSC held: '[W]here a mandatory sentence is provided ... same must be pronounced without reservation.'

78 [1995] ZACC 8.

79 (1957) 95 CLR 529.

80 1967 10 AC 259.

81 [2010] eKLR.

82 *Makwanyane* (n 27); *Williams* (n 46).

[limitation] in an open and democratic society that is based on human dignity, equality and freedom'. The evaluation must consider the nature of the right that is being limited, and the nature and extent of the limitation. Punishment could be disproportionate if it fails this test, and potentially cruel, inhuman or degrading.<sup>83</sup> Malawi's jurisprudence on sentencing (considered below) is similar.

## 7.2 When mandatory punishments violate access to justice rights

The appellant in the *Amoshima* case further argued that his right to a fair hearing, the full measure of which he sought to exercise by appealing his death sentence, had been infringed by the mandatory death penalty. It was a crucial point of law that the Supreme Court, unfortunately, also did not comprehend. The right of appeal is one of a cluster of access to justice rights guaranteed to offenders by sections 36(4) and 46(1) of the 1999 Constitution. They include the right of access to court and the right to a fair trial. Sections 233(2)(d) and 241(1)(e) of the Constitution also bring within the cluster the right to approach an appellate court. These provisions affirm a convicted offender's right to appeal a death sentence. On the basis of the provisions, a death sentence imposed under the Robbery and Firearms Act ought to be appealable.

Together, the constitutional provisions raise the pertinent issue of whether Acts of Parliament can foreclose appeals against mandatory sentences. The corollary of the Supreme Court's decision in the *Amoshima* case is that such appeals cannot be entertained. In the Court's view, when the word 'shall' is used in an enactment, obedience becomes mandatory, as the word connotes an explicit and legally mandatory command. According to this interpretation, although an offender may appeal his conviction for armed robbery under the Robbery and Firearms Act, he cannot do so against the consequential mandatory sentence. If his conviction is upheld, the death sentence automatically follows. It cannot be varied.

The High Court of Malawi has followed a fundamentally different – and correct – approach on the subject. In the Malawian *locus classicus* case of *Kafantayeni & Others v Attorney-General*,<sup>84</sup> the High Court was faced with questions similar to those considered by the Nigerian Supreme Court in *Amoshima*. Like the Nigerian Constitution, the Malawian Constitution preserves the death penalty. However, the appellant in *Kafantayeni* argued, *inter alia*, that section 210 of the Malawi Penal Code, which made the death sentence mandatory for murder, violated the prohibition of cruel, inhuman or degrading treatment or punishment by section 19(3) of the Malawian

83 *Makwanyane* (n 27).

84 Unreported, Constitutional Case 12 of 2005; the case can be accessed on JSTOR or (2007) 46 *International Legal Materials*.

Constitution. It also violated the right to fair trial under section 42(2)(f) by denying a discretion in sentencing.<sup>85</sup>

Having found that section 210 of the Penal Code<sup>86</sup> made the death penalty mandatory for the offence of murder and excluded judicial discretion in sentencing, the High Court then considered whether the penalty was inhuman or degrading. It drew considerably on the decision in *Reyes v the Queen*<sup>87</sup> where the Privy Council censured the mandatory death penalty for all murders, as it deprived the defendant of a chance to show why sentence should be mitigated, or deprived the courts of 'any consideration of the detailed facts of the particular case or the personal history and circumstances of the offender'. The Court viewed the imposition of the death sentence under such mandatory requirements as inhuman and degrading, and potentially 'wholly disproportionate to the defendant's criminal culpability'. In support of this view, the Privy Council cited the views of the Court of Appeal for Saint Lucia and Saint Vincent and Grenadines in *Newton Spence v The Queen* and *Peter Hughes v The Queen*,<sup>88</sup> where Byron CJ framed the issue as follows:

The issue here is whether it is inhuman to impose a sentence of death without considering mitigating circumstances of the commission of the offence and the offender; whether the dignity of humanity is ignored if this final and irrevocable sentence is imposed without the individual having any chance to mitigate; whether the lawful punishment of death should only be imposed after there is a judicial consideration of the mitigating factors relative to the offence itself and the offender.

Concurring, Saunders JA held:<sup>89</sup>

It is and has always been considered a vital precept of just penal laws that the punishment should fit the crime. If the death penalty is appropriate for the worst case of homicide, then it must surely be excessive punishment for the offender convicted of murder whose case is far removed from the worst case. It is my view that where punishment so excessive, so disproportionate must be imposed on such a person courts of law are justified in concluding that the law requiring the imposition of the same is inhuman. I am driven firmly to one conclusion. To the extent that the respective sections of the Criminal Codes of the two countries are interpreted as imposing the mandatory death penalty those sections are in violation of section 5 of the Constitution.

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85 The appellant also contended that sec 210 of the Penal Code amounted to an arbitrary deprivation of life because the death penalty was mandatory without regard to the circumstances of the crime, and that it violated the constitutional principle of separation of powers. However, the Court resolved the case on the two issues of the right to fair trial and the prohibition of cruel, inhuman and degrading treatment or punishment.

86 The section provides that '[a]ny person convicted of murder shall be sentenced to death'.

87 [2002] 2AC 235.

88 Unreported, 2 April 2001 (Criminal Appeals 20 of 1998 and 14 of 1997) para 30. The cases were consolidated.

89 *Spence and Hughes* (n 88) para 216.

Their Lordships' views interlaced protection for human dignity question with the right to fair trial in a manner that reinforces the interdependence of rights. Returning to the fair trial question in *Kafantayeni*, the Malawian High Court rightly concluded that a criminal trial does not terminate with a conviction but with sentencing. Thus, the fair trial rights that ensure due process at the pre-conviction phase of the trial also obligate compliance with due process at the sentencing phase. In the Court's words, 'the principle of "fair trial" requires fairness of the trial at all stages of the trial including sentencing'.<sup>90</sup>

In the Court's correct view also, fair trial rights during sentencing are protected by article 14(5) of the International Covenant on Civil and Political Rights (ICCPR) to which Malawi is a signatory, just like Nigeria. According to this article, 'everyone convicted of a crime *shall* have the right to his conviction and sentence being reviewed by a higher tribunal according to law'.<sup>91</sup> By making the death penalty mandatory for murder, section 210 of Malawi's Penal Code precluded appeals against sentence, violating the right to a fair trial. The Court found support for this conclusion in the case of *Edwards v The Bahamas*,<sup>92</sup> where the Inter-American Commission on Human Rights held that the mandatory death sentence violated fair trial because it is compulsory, automatic and precludes an appeal.

A very pertinent view on the right of access to justice for offenders was articulated in *Kafantayeni* and deserves a brief mention here. This right is guaranteed by section 41(2) of the Malawian Constitution and assures to all the right of 'access to any court of law or any other tribunal with jurisdiction for final settlement of legal disputes'. The provision enshrines the right of access to trial and appellate courts. The Malawian High Court's views on this provision as it impacts the death penalty are compelling:<sup>93</sup>

We affirm that issues of sentencing are legal issues for judicial determination and are therefore within the purview of section 41(2) of the Constitution; and the mandatory death sentence under section 210 of the Penal Code, by denying a person convicted of murder the right of access on the sentence to the final court of appeal, is in violation of section 41(2) of the Constitution. In regard to the death penalty, which is the ultimate punishment any person can suffer for committing a crime. Irrevocable as it is once carried out, we would reject any notion that any restriction or limitation on the guarantee under section 41(2) of the Constitution of the right of access to a court of final settlement of legal issues, denying a person to be heard in mitigation of sentence by such court, can be justified under [section 44] of the Constitution as being reasonable or necessary in a democratic society or to be in accord with international human rights standards.

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90 *Kafantayeni* (n 84).

91 My emphasis.

92 Inter-American Commission on Human Rights (7 March 2000) OEA/Ser L/V/II.106 Doc 3 rev 177.

93 *Kafantayeni* (n 84) 571.

Section 44(1) of the Malawian Constitution is the equivalent of section 45(1) of the 1999 Nigerian Constitution.

## **8 Sentencing under the Administration of Criminal Justice Act, 2015**

Among the interesting innovations of the new Administration of Criminal Justice Act are sections 310 and 311 of the Act which create a framework for sentencing hearings. These provisions allow criminal defendants to call witnesses (including expert witnesses), lead evidence and be cross-examined regarding factors that should mitigate sentence, while the prosecution may also tender evidence in aggravation. The provisions are a notable departure from previous sentencing law and practice in Nigeria, in which courts proceeded to sentence once a conviction had been reached, merely affording the defendant an opportunity for allocution before the sentence is pronounced. The allocution is not a sentencing hearing, as it only allows the defendant to plead for leniency.<sup>94</sup>

Allocutions are meaningless when the offence attracts a mandatory penalty. That said, it needs to be explored how mandatory penalties will be impacted by sections 310 and 311 of the Act. One interpretation, having regard to the obligatory language of the provisions and Part 1 of the Act,<sup>95</sup> is that the Act overrides all other laws on criminal procedure. Thus, courts may be compelled to follow the requirements of sections 310 and 311 even where mandatory penalties apply. However, the more compelling interpretation would be that statutory penalties are not a matter of procedure, and that where a penalty is by law mandatory, it does away with the need for a sentencing hearing. The problem with this interpretation, however, is that it would perpetrate the constitutional breaches illustrated above. This makes challenging the constitutionality of mandatory punishments the only way to ensure a judicious consideration of relevant factors under section 311 of the Act.

## **9 Conclusion**

Judicial pronouncements on the death penalty in Nigeria make one thing clear: If the death penalty were to be abolished, it will require constitutional amendment. Also requiring constitutional amendment is section 34 of the 1999 Constitution. As this article demonstrated,

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94 IKE Oraegbunam 'Critical reflections on some procedural issues of prosecution of capital crimes in Nigeria' (unpublished) [www.academia.edu](http://www.academia.edu) (accessed 21 October 2017).

95 Part 1 identifies the general purpose of the Act to be the regulation of criminal procedure. It also commands courts and criminal justice administrators to comply with the Act.

the provision is, at the least, ambivalent on inhuman and degrading punishments. However, constitutional amendments take time, and public attitudes on the death penalty may not in the foreseeable future favour the abolition of the death penalty. Meanwhile, the death penalty continues to be imposed, with more than 2 200 inmates currently on death row,<sup>96</sup> many of whom were sentenced under mandatory death penalty laws. In 2017 Nigeria imposed 621 death sentences, the highest globally.<sup>97</sup>

Even if Nigeria continues to retain the death penalty in the foreseeable future, its retention of the penalty must conform to regional and international principles applicable to death penalty retentionist countries. Particularly pertinent are the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission, which states that retentionist states shall reserve the death sentence for the most serious crimes and in accordance with the principle of legality, and that persons sentenced to death have the right to appeal the sentence. States shall take steps to ensure that such appeals become mandatory,<sup>98</sup> and that in no circumstances shall the death penalty be mandatory.<sup>99</sup>

The mandatory death penalty in Nigeria clearly is in conflict with these principles, and the increase in death penalty laws and death sentences raises pertinent concerns. The case ought to be made – if Nigeria remains a retentionist country for the foreseeable future – for a review of death penalty laws to ensure conformity with the principles. Unfortunately, however, law reform takes time in Nigeria, and criminal law making is not always predicated on a clear, consistent and holistic policy of reform. In one noteworthy development, in 2013, the National Assembly began to consider the Bill for an Act to Amend the Robbery and Firearms (Special Provisions) Act 2013, which proposed to restrict the death penalty to robberies that took human life.<sup>100</sup> Curiously, however, while the Bill was

96 ARA Shaban 'Nigerian judge wants death row executions carried out to ease prison congestion' *African News* 2 February 2017, <http://www.africanews.com/2017/02/02/nigerian-judge-wants-death-row-executions-carried-out-to-ease-prison-congestion/> (accessed 21 October 2017).

97 Amnesty International 'Amnesty International Global Report: Death Sentences and Executions 2016' (2017) <https://www.amnesty.org/download/Documents/ACT5057402017ENGLISH.PDF> (accessed 13 September 2018). See also Amnesty International 'The death penalty in 2017: Facts and figures' 12 April 2018, <https://www.amnesty.org/en/latest/news/2018/04/death-penalty-facts-and-figures-2017/> (accessed 13 September 2018).

98 African Commission on Human and Peoples' Rights 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial> (accessed 13 September 2018).

99 General Comment 3.

100 When the Bill is passed, life sentences will replace the death penalty where the crime involves no loss of life. The death penalty will be mandatory when homicide accompanies the robbery. This element may yet be challenged for excluding judges' discretion to individualise punishment based on an offender's culpability.



pending, the National Assembly commenced deliberations on another Bill to make hate crimes capital offences.<sup>101</sup>

This makes Nigerian courts the arena for realising the African Commission's Fair Trial Principles and raising the bar on the use of the death penalty. They must, like their contemporaries in Kenya, Malawi, South Africa and the United States, begin to ask: When would punishments be so disproportionate as to be inhuman and degrading? There is a serious constitutional imperative to do so. Nigeria may well have several offenders who have been wrongly sentenced under mandatory death penalty laws such as the Robbery and Firearms Act. The constitutionality of these sentences is questionable on account of the fair trial rights that are infringed by such laws. It would be against the values of the democratic society that Nigeria aspires to be.

The first measure in redressing these constitutional violations would be to freeze executions by a judicial order until sentences passed under mandatory death penalty laws have been reviewed. The prospects for a fresh and successful challenge on the constitutionality of section 1(2) of the Robbery and Firearms Act and other mandatory death penalty laws are high. But more must follow, and *Kafantayeni* sets a precedent. *Kafantayeni* instigated a review process by which convicts who were mandatorily sentenced to death in Malawi underwent resentencing. The process did not render the death penalty redundant in Malawi. Rather, it was meant to ensure that punishments reflect the offender's moral culpability, and that death sentences are only used as a maximum sentence for the worst cases of homicide.<sup>102</sup> As a result, Malawi can boast an emerging and interesting resentencing jurisprudence.

Malawi is hardly the only country that has taken this path. In *Spencer and Hughes*, the Court took the correct view that according convicts their fair trial rights in a resentencing process meant taking the parties through sentencing hearings where they could offer evidence in mitigation and aggravation to assist the court to achieve a proportionate sentence.<sup>103</sup>

The offender should have an opportunity to mitigate on the same terms as he currently has to defend, that is he should have the right to remain silent, to make an unsworn statement (where substantive law allows the same) or to give evidence on oath and be liable to cross-examination. He must also be allowed to call witnesses on his behalf, and to address the jury himself or by his counsel. The prosecution should have the right to adduce

101 AA Ibrahim 'Death for hate speech: CDHR, others kick as senator defends Bill' <https://punchng.com/death-for-hate-speech-chdr-others-kick-as-senator-defends-bill/> (accessed 13 September 2018); D Oyedele 'Hate penalty for hate speech' March 2018 <https://www.thisdaylive.com/index.php/2018/0/11/hate-penalty-for-hate-speech/amp/> (accessed 13 September 2018).

102 See E Gumboh 'Realising the promise of *Kafatayeni*: The emerging jurisprudence from the resentencing of death row inmates in Malawi' <http://gavel.africanlii.org/node/15> (accessed 13 September 2018).

103 *Spence and Hughes* (n 88) 23 para 58.

evidence on the factors relevant to the decision to be taken and also to address. A verdict against imposition of the death penalty would require the judge to impose a sentence of imprisonment in the discretion of the trial judge.

It is important to observe that the Court in *Hughes and Spencer* was also mindful of the many inmates whose fate on death row would be impacted in one way or another by its decision. Nevertheless, the Court, speaking *obiter*, was persuaded that a sentence review was the constitutionally-imperative path to follow. The justice of the matter demanded a determination of whether their offences were of a capital or non-capital nature.

This is the path that Nigeria should take. Of course, this may require developing new standards for differentiating offence gravity for offences that have hitherto been liable to the death penalty. This would require considerable effort but is nevertheless the right thing to do, constitutionally. Due process demands that sentences that have been imposed under mandatory death penalty laws ought to be reviewed. A review will redress the constitutional violations foisted by such laws. It will insert human dignity and proportionality into sentencing in Nigeria.

## The implications of Isaiah Berlin's radical conception of liberty for sexual minority rights protection in Nigeria

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### Summary

*In this article Isaiah Berlin's radical conception of liberty with an emphasis on negative liberty is highlighted. The author interrogates the discriminatory laws stifling the lives of Nigerian sexual minorities, such as the Same-Sex Marriage (Prohibition) Act of 2013, the Nigerian Penal Code, and the Nigerian Criminal Code. He argues that Berlin's radical view of freedom has positive implications for the protection of the human rights of LGBT persons in Nigeria. Siding with the universalist view of human rights against the relativist claims upon which the continued unjust subjugation of sexual minorities largely depends, the article proposes that the internalisation and institutionalisation of the ethical liberalism championed by Berlin will help foster social tolerance and the legal protection of sexual minorities in Nigeria.*

**Key words:** sexual minorities; liberty/freedom; human rights; universalism; relativism

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# 1 Introduction

The philosophy of human rights, which explicates a vision of a world where everyone is equal regardless of race, gender, disability, sexual orientation or any other criteria, belongs firmly in the liberal tradition. This tradition is the evolved project of religious, legal, and humanistic concerns rooted in Christianity and the juridical and ethical codes of the Greco-Roman world.<sup>1</sup> The theocentric perspective of law and morality, as for centuries represented in the concept of natural law, gave way to an anthropocentric view of humanity, law and morality with the coming of the Enlightenment and the momentous events of the French Revolution of 1789 and the Declaration of Independence of the United States of America in 1776. The universal human rights clause enshrined in the American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen was defended by such outstanding liberal thinkers as John Locke, JS Mill, JJ Rousseau and Immanuel Kant.

An outstanding liberal political thinkers of the twentieth century is Isaiah Berlin. Broadening the horizon of liberalism and at the same time recognising the value of pluralism, Berlin declared liberty (freedom) a supreme good in both the private and public spheres. Indeed, liberty for Berlin is the demand of radical individualism.<sup>2</sup> Neither the state nor community allegiances can interfere with this liberty of the individual. He delineated the spheres of public and private morality with his concept of positive and negative liberty, the former conceived in conservative terms and the latter as the very embodiment of radical freedom. This article highlights Berlin's radical individualism in relation to the sexual minority rights question in Nigeria while drawing on religious, cultural and legal issues that illuminate the conversation surrounding the anti-sexual minority rights stance of the Nigerian government and, indeed, of the majority of Nigerians. The main thrust of the article is to present Berlin's liberal perspective as a viable model for the de-stigmatisation of sexual minorities in Nigeria. Part 2 of the article is devoted to the definition of key terms. Part 3 presents Berlin's advocacy of radical autonomy and proposes that the embrace of Berlin's advocacy can lay the foundation of social change that favours the protection of sexual minority rights. Part 4 provides a survey of the predicament of sexual minorities in contemporary Nigeria. Part 5 contrasts the international model of rights recognition for sexual minorities with what obtains in Nigeria, and argues that Berlin's model of liberty can help move

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1 P Hayden (ed) *The philosophy of human rights* (2001) 3.

2 I Berlin *Freedom and its betrayal: Six enemies of human liberty* (2014) 5-6. In one of his most famous declarations on liberty, Berlin writes of radical liberty: 'This is the liberty which was preached by the great English and French liberal thinkers ... the right freely to shape one's life as one wishes, the production of circumstances in which men can develop their natures as variously and richly, and, if need be, as eccentrically, as possible.'

Nigeria in the direction of tolerance of sexual minorities. Part 6 expatiates on the Berlinian model and asserts the state's obligation to sexual minorities, while part 7 discusses the sexual minority question in the context of the conflict between universalism and cultural relativism against the backdrop of Berlinian liberalism.

## 2 Definition of key terms

### 2.1 Liberty and freedom

The terms 'liberty' and 'freedom' often are used interchangeably, as also they are employed in this article. Patterson distinguishes three aspects or dimensions of liberty, namely, the personal, sovereign and civic dimensions.<sup>3</sup> Personal liberty is the ability of the individual to act according to their desires while also respecting the right of others to act according to their desires.<sup>4</sup> Sovereign liberty is absolute to the extent that the individual acts according to their desires without regard to other individuals, while civic liberty is the ability of the individual to participate in political activities.<sup>5</sup> It is then evident that the absence of coercion is at the heart of the understanding of liberty or freedom. Kant understands freedom in terms of the individual's ability to make rational choices independent of external pressure.<sup>6</sup> Mill is of the opinion that the only reason to limit an individual's freedom is the harm the individual's actions can cause to other individuals.<sup>7</sup>

### 2.2 Sexual minorities

Sexual minorities '[a]re those despised and targeted by "mainstream" society because of their sexuality, victims of systematic denials of right because of their sexuality'.<sup>8</sup> They are stigmatised as they transgress gender roles, being non-conformists.<sup>9</sup> Self-identification, behaviour and attraction (romantic, sexual or emotional) determine people's categorisation as sexual minorities.<sup>10</sup> Sexual minorities may be gay (male same-sex attraction/homosexuality); lesbian (female same-sex attraction/homosexuality); bisexual (attraction to both sexes);

3 O Patterson *Freedom in the making of Western culture* (1991) 3-5.

4 Patterson (n 3) 4.

5 As above.

6 See generally I Kant *Groundwork for the metaphysics of morals* trans AW Wood (2002).

7 JS Mill *On liberty* (2003) 80-83.

8 J Donnelly *Universal human rights in theory and practice* (2003) 229.

9 As above.

10 See RC Savin-Williams & KM Cohen 'Developmental trajectories and milestones of lesbian, gay, and bisexual young people' (2015) 27 *International Review of Psychiatry* 357-366; S Winter 'Transpeople, transprejudice and pathologization: A seven-country factor analytic study' (2009) 21 *International Journal of Sexual Health* 107-113; JA Greenberg *Intersexuality and the law: Why sex matters* (2012) 101-102.

transgender (male or female identification with the opposite gender).<sup>11</sup>

### 3 Berlin's radical conception of human freedom

Berlin's usage of the term 'freedom' or liberty has its origin in the Enlightenment era in which thinkers such as Immanuel Kant and Jean-Jacques Rousseau formulated their theories of freedom. Kant viewed freedom as the individual's capacity to make rational choices as an autonomous being;<sup>12</sup> Rousseau affirmed human freedom as the inalienable right of all human beings not to be coerced by authority symbols such as the state.<sup>13</sup> Berlin agrees with the Enlightenment liberal tradition that emphasises individualism but points out that whereas thinkers such as Wilhem von Humboldt emphasised a 'negative' or radical kind of liberty, others, such as Rousseau, framed liberty in terms that encourage authoritarianism.<sup>14</sup> While criticising the pseudo-liberal spirit of anthropocentric eighteenth century thinkers such as Helvetius, Rousseau and Maistre, Berlin hails the notion of liberty proclaimed by English and French liberal thinkers such as Locke, Tom Paine, Wilhelm von Humboldt and Madame de Staël.<sup>15</sup> Berlin feels that his conception of liberty advances the liberal tradition of Locke, Paine and others who advocated strong individualism.

Berlin provides a detailed exposition of his notion of positive and negative liberty in his seminal essay 'Two concepts of liberty'<sup>16</sup> and the book *Freedom and its betrayal*.<sup>17</sup> Berlin draws a line between the private and public spheres and forbids the public sphere to encroach on the private sphere.<sup>18</sup> The latter is the domain of the individual which disallows interference from any authority, be it the state, the church or community. For Berlin, such interference leads to frustration and the restriction of personal liberty that is implied in frustration. Human beings are free to pursue their desires as completely as they wish, as long as they do not trespass on the private spheres of others. Berlin writes:<sup>19</sup>

The only barrier to this is formed by the need to protect other men in respect to the same rights, or else to protect the common security of them all, so that I am in this sense free if no institution or person interferes with me except for its or his own self-protection.

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11 Savin-Williams & Cohen (n 10).

12 Kant (n 6).

13 See, generally, JJ Rousseau *The social contract* trans M Cranston (1968).

14 Berlin (n 2) 5.

15 As above.

16 See generally I Berlin 'Two concepts of liberty' in H Hardy (ed) *Liberty* (2008).

17 See generally Berlin (n 2).

18 Berlin (n 2) 181-198.

19 Berlin (n 2) 6.

This is negative description of liberty, the doctrine that promotes the idea of unshackled agency. Negative liberty views coercion in whatever form as bad, 'in so far as it frustrates human desires ... although it may have to be applied to prevent other, greater evils, while non-interference, which is the opposite of coercion, is good as such, although it is not the only good'.<sup>20</sup> Positive liberty is another good. It seeks to discover limitations to negative liberty in the field of action. According to Berlin, positive liberty asks questions such as the following: 'What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?'<sup>21</sup> Positive liberty thus is conservative, pro-community, and restrictive. While negative and positive liberty are both types of freedom, the latter narrows the scope of the former in its emphasis on internal self-mastery or perfection at the expense of external independence from restrictive situations. For example, a man in Nigeria with gay tendencies who decides to subsume his sexual identity in the majority heterosexual prescription to achieve a sense of belonging panders to positive liberty. He seeks mastery over a self perceived to be in conflict with the self, preferred by the society. The same man is said to embrace negative liberty when he decides to be who he is, without society prescribing how he must live.

Berlin realises that positive liberty easily sacrifices the individual for the satisfaction of the collective. While playing down personal happiness, it emphasises moral perfection. He recognises the fact that all too often society can hide behind exaggerated claims of the public or collective good to invade the private sphere. Indeed, society can even go so far as to tell individuals that they do not know what is good for them and, therefore, should allow themselves to be guided for their own good.<sup>22</sup>

Berlin firmly rejects coercion, convinced that often it is premised on the notion of otherness. If A is different to or behaves differently from B and it is within the powers of B to exert pressure on A, B then tries to make A conform to B's standards. Given this danger, Berlin advocates the authenticity of the self, the willingness to confront external threats to individual freedom rather than to concentrate on the kind of internal self-mastery which led Immanuel Kant to a liberalism that all but eliminated the private pursuit of happiness.<sup>23</sup>

Berlin, of course, does not reject value pluralism in applauding negative liberty. There are other goods besides negative liberty,<sup>24</sup> for example the desire to belong and the yearning for community. Berlin has defended himself as a liberal pluralist committed to the liberal

20 Berlin (n 16) 175.

21 Berlin (n 16) 169.

22 Berlin (n 16) 179.

23 See I Kant *Fundamental principles of the metaphysics of ethics* trans TK Abbott (1946). In this book, Kant proposes a rigid perfectionist ethic that overlooks human emotions and desires.

24 G Crowder *Isaiah Berlin: Liberty and pluralism* (2004).

agenda.<sup>25</sup> Berlin's chief concern is to protect the private sphere which is the only sphere of comprehensive autonomy for the individual. It is within this private sphere that individuals can realise their aims and come to terms with the very notion of a purposeful life. Berlin insists that freedom is a privilege. This privilege ensures that one is not 'obliged to account for his activities to any man so far as this is compatible with the existence of organised society'.<sup>26</sup> Philip Pettit presents the Berlinian notion of negative liberty succinctly:<sup>27</sup>

He makes the *priori* assumption – an assumption expressive of how we conceptualise freedom – that you cannot make yourself free by accommodating yourself to restrictive constraints, only by challenging them ... if we are to be faithful to this assumption in looking after your freedom, we must try to ensure that the doors associated with your different options are all open.

The above expresses the kernel of radical liberty. In subsequent sections we show how this radical conception of individual liberty can spur Nigerians towards legal reforms of anti-homosexual conduct laws and a more welcoming attitude towards sexual minorities.

#### 4 Lesbian, gay, bisexual and transgender rights in Nigeria

As in most African countries, Nigeria does not accept sexual minority rights as fundamental human rights. The anti-lesbian, gay, bisexual and transgender (LGBT) stance of Nigeria follows in the wake of an emerging consensus that sexual minority rights are human rights. Ezekiel-Hart argues that sexual minority rights should be regarded as human rights since sexual minorities are human beings and '[s]exual orientation is an enduring emotional, romantic, or sexual attraction that one feels towards women, towards men, towards both or towards oneself'.<sup>28</sup> Chiroma, Kulliyah and Magashi, on the other hand, insist that the 1999 Constitution of the Federal Republic of Nigeria (as amended) does not recognise sexual orientation as a basis for human rights affirmation and that the anti-gay marriage laws of Nigeria, *a fortiori*, are valid.<sup>29</sup> At the global level sexual minority rights increasingly are being recognised and protected. There has been a steady progression in the tolerance and acceptance of sexual minorities since the landmark ruling by the European Court of Human Rights (European Court) in *Dudgeon v United Kingdom of Great Britain*

25 R Jahanbeglo *Conversations with Isaiah Berlin* (2000) 70.

26 I Berlin *Four essays on liberty* (1969) 1x.

27 P Pettit 'The instability of freedom as non-interference: The case of Isaiah Berlin' (2011) 121 *Ethics* 702.

28 J Ezekiel-Hart 'A discourse on alternative sexual orientation in schools and homes in Nigeria' (2014) 4 *African Journal of Education and Technology* 1.

29 M Chiroma, AL Kulliyah & AI Magashi 'Same-sex marriage versus human rights: The legality of the 'anti-gay and lesbian law' in Nigeria' (2015) 4 *International Law Research* 11-23.



and Northern Ireland<sup>30</sup> which struck down Northern Ireland's Anti-Buggery Offences Against the Person Act, 1861. On the African continent, affirmative actions have been recorded that support the claim that sexual minority rights are human rights. South Africa blazed the trail in Africa, with South African courts strongly affirming the constitutional guarantee of the rights of sexual minorities.<sup>31</sup> In Kenya and Uganda, sexual minorities had cause to celebrate rare judicial pronouncements affirming constitutional provisions that forbid discriminatory practices.<sup>32</sup> Instructively, the Ugandan Constitutional Court in 2014 struck down the much-impugned Anti-Homosexuality Act, 2014, which broadly restricted the rights of sexual minorities while prescribing harsh penalties for offenders.<sup>33</sup>

Nigeria inherited anti-sodomy laws introduced by the British in the colonial era. The Criminal Code of Southern Nigeria<sup>34</sup> and the Penal Code of Northern Nigeria<sup>35</sup> penalise homosexual acts. Nigeria's anti-LGBT stance culminated in the signing into law of the 2013 Same-Sex Marriage (Prohibition) Act (SSMPA) by President Goodluck Jonathan in January 2014. The SSMPA affirms the penalties contained in the Criminal Code and the Penal Code even as it introduces fresh penalties.<sup>36</sup> In addition, the SSMPA proscribes the registration of gay

30 ECHR (23 September 1981) Ser A 45. Other notable decisions taken by the European Court and international bodies such as the United Nations Human Rights Committee (UNHRC) that favoured sexual minorities include *Karner v Austria* Application 40016/89; *L and V v Austria* Application 39392/98; *Modinos v Cyprus* Application 15070/89; *Toonen v Australia* Communication 488/1992/UN Doc CCPR/C/50/D/488/1992/ (1994); *X v Colombia* Communication 1361/2005; *Young v Australia* Communication 941/2000 UN Doc CCPR/C/78/D/9411 2000 (2003). See sec 5 for a longer discussion.

31 See important legal victories such as *Farr v Mutual & Federal Insurance Company Ltd* (2000) (3) SA 684 (C); *Fourie & Another v Minister of Home Affairs & Others* (2005) (3) SA 429 (SCA); *Geldenhuys v National Director of Public Prosecution* (2008) ZACC 21; *J & B v Director-General, Department of Home Affairs* (2003) 5 BCLR 463 (CC); *Mark Gory v Kolver* (2007) (14) SA 97 (CC); *Minister of Home Affairs v Fourie* (2006) 1 SA 524 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) (1) SA 6 (CC); *National Coalition for Gay and Lesbian Equality & Others v Minister of House Affairs* (2000) (2) SA 1(CC); *Satchwell v The President of the Republic of South Africa* (2002) (16) SA ICC; *Suzanne du Toit & Another v The Minister for Welfare and Population Development* (2000) 10 BCL 1006 (CC).

32 See *Eric Gitari v Non-Government Organisations Co-Ordination Board & 4 Others* (2015) Petition 440 of 2013 Kenya Law Reports 2016; *Mukasa & Another v Attorney-General* (2008) AHRLR 248 (UgHC 2008).

33 See E Biryabarema 'Uganda court overturns anti-gay law that halted Western aid' Reuters 1 August 2014, <http://in.reuters.com/article/2014/08/01/uganda-homo-sexuals-idINL6NOQ731V20140801> (accessed 11 February 2015).

34 See secs 214 & 215. Sec 214 of the Criminal Code punishes homosexuality between two consenting adults with a 14-year prison term.

35 Sec 284. Under the Penal Code, the punishment for the offence of homosexuality is also a 14-year prison term. However, 12 other states in Northern Nigeria, namely; Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara, enacted the Shari'a Penal Code laws which penalise homosexuality with the death penalty. See D Ottosson *Homophobia: A world survey of laws prohibiting same-sex activity between consenting adults* (2008) 29.

36 See secs 1 & 2.

clubs, societies and gay-affiliated organisations.<sup>37</sup> The SSMPA also makes a public display of romantic affections a criminal act with a harsh punishment.<sup>38</sup> Venturing into a same-sex marriage or civil union attracts a 14-year prison term under the SSMPA.<sup>39</sup> At organisational and associational level, the Act forbids any form of fraternity on the part of the heterosexual public with homosexually-related activities.<sup>40</sup> By this provision it amounts to a crime for a heterosexual to be sympathetic to sexual minority causes. This ruling somewhat places sexual minority rights activism in Nigeria in a precarious situation.

The SSMPA received presidential endorsement despite seemingly being in conflict with the 1999 Nigerian Constitution, which explicitly guarantees the right to privacy.<sup>41</sup> The discriminatory provisions of the Act are in defiance of anti-discriminatory provisions of regional and international treaties such as the African Charter on Human and Peoples' Rights (African Charter),<sup>42</sup> the International Covenant on Civil and Political Rights (ICCPR)<sup>43</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>44</sup>

Similar to the situation in most African countries Nigeria is socially conservative.<sup>45</sup> When signed into law the SSMPA was supported by the overwhelming majority of Nigerians. For instance, in 2014,

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37 Sec 4(1) of the Act provides: 'The registration of gay clubs, societies and organisations, their sustenance, processions and meetings is prohibited.'

38 Sec 4(2) states: 'The public show of same-sex amorous relationships directly or indirectly is prohibited.'

39 Sec 5(1).

40 The SSMPA punishes the registration of homosexual clubs and allied matters with a ten-year prison term. Specifically, sec 5(2) of the Act states: 'A person who registers, operates or participates in gay clubs, societies and organisations, or directly or indirectly makes a public show of a same-sex amorous relationship in Nigeria commits an offence and is liable on conviction to a term of 10 years' imprisonment.' Sec 5(3) further widens the scope of prohibition imposed on heterosexual participation in same-sex affairs by extending this limit to marital solemnisation. It states: 'A person or group of persons who administers, witnesses, abets, or aids the solemnisation of a same-sex marriage or civil union, or supports the registration, operation and sustenance of gay clubs, societies, organisations, processions or meetings in Nigeria commits an offence and is liable on conviction to a term of 10 years' imprisonment'.

41 Sec 37.

42 Art 2 states: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex ...' The reference to 'sex' can be said to validly cover sexual orientation and the protection of the privacy of sexual minorities. Indeed, the landmark case of *Dudgeon v United Kingdom* was decided on the premise of the right to privacy. See ECHR (22 October 1981) Ser A 45. The ruling asserted that same-sex relations constitute an intimate part of private life.

43 See art 17.

44 See art 2(2).

45 Nigeria's social conservatism stems for the most part from the strong adherence to Christianity and Islam, both of which strongly champion traditional values. See MA Ojo 'Sexuality, marriage and piety among Charismatics in Nigeria' (1997) 27 *Religion* 65-79; see also J Onuche 'Same-sex marriage in Nigeria: A philosophical analysis' (2013) 3 *International Journal of Humanities and Social Science* 93.

according to a public opinion poll conducted by Gallup to measure the inclination of Nigerians towards the SSMPA, 87 per cent of respondents supported the criminalisation of homosexuality. Similarly, another survey by a NOI Poll in 2015 showed 87 per cent support for the SSMPA.<sup>46</sup> This is clear proof of the social conservatism of Nigerians. The Act was passed in the face of strong condemnation on the part of the international community, mostly Western nations, human rights groups and LGBT organisations. At the heart of the social conservatism that breeds homophobia is the African idea of marriage, life and continuity.<sup>47</sup> It is believed that one of the greatest catastrophes an individual can experience is an inability to procreate. Marriage, therefore, is an institution that ensures continuity and the reverse flow of life. For example, African cosmogony allows that a dead person can return to the world through their children or grandchildren.<sup>48</sup> Since marriage between people of the opposite sex alone produces offspring in the natural condition heterosexuality is privileged. Underlining this African conception of the marriage institution, Onuche defines marriage as a contract 'between a man and a woman, which aims primarily at the self-sustenance or continuity of the lineage'.<sup>49</sup> Marriage is regarded not only as a private project but, more importantly, as a community affair.<sup>50</sup>

So powerful is the heterosexist attitude of Nigerians that even rights activists shy away from the problem of discrimination against sexual minorities.<sup>51</sup> The fear of being stigmatised as promoters of conduct socially disapproved of compels many rights activists to avoid sexual minority rights advocacy while focusing on other aspects of human rights advocacy. Adibe highlights four dominant Nigerian perspectives that encompass both the rejectionist reaction and the push for sexual

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46 See Ngozi Okonjo-Iweala Polls 'Ngozi Okonjo-Iweala Polls' [www.noi-polls.com/documents/Perceptions\\_of\\_Nigerians\\_on\\_LGB\\_Rights\\_-\\_Poll\\_Report\\_Final\\_June2015..pdf](http://www.noi-polls.com/documents/Perceptions_of_Nigerians_on_LGB_Rights_-_Poll_Report_Final_June2015..pdf) (accessed 15 August 2017); compare F Endong & P Calvin 'Christian resistance to gay-proselytism in a secular Nigeria: Anathema or social heroism?' (2015) 8 *European Review of Applied Sociology* 10.

47 Onuche (n 45) 91-98.

48 Many African scholars agree that the concept of reincarnation is culturally rooted in Africa. Onyewuenyi, Majeed and Edet agree that Africans take reincarnation seriously while disagreeing on the specific form reincarnation takes. While Majeed and Edet think that the whole person is reincarnated in the new-born baby, Onyewuenyi believes that it is only the vital force or life essence of the dead that returns to the phenomenal world in the new-born baby. For the debate on reincarnation, see IC Onyewuenyi *African belief in reincarnation: A philosophical reappraisal* (1996); HM Majeed *Reincarnation: A question in the African philosophy of mind* (2017); M Edet 'Innocent Onyewuenyi's philosophical re-appraisal of the African belief in reincarnation: A conversational study' (2016) 5 *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* 75-99; A Ada 'Exploring the question of reincarnation in African philosophy within intracultural and intercultural contexts' (2017) 7 *Filosofia Theoretica: Journal of African Philosophy, Culture and Religions* 142-147.

49 Onuche (n 45) 91.

50 As above.

51 Onuche (n 45) 96.

minority rights, namely, the religious, nationalist, human rights and denialist perspectives.<sup>52</sup>

The religious perspective derives its force from the Judeo-Christian and Islamic traditions which mostly are interpreted as forbidding homosexuality.<sup>53</sup> The nationalist perspective<sup>54</sup> considers the international clamour for the defence of the rights of homosexual men and women to be a form of Western imperialism that should be resisted through an appeal to nationalist sentiments. The uncompromising stance of Europe and America when the Nigerian Senate passed the anti-homosexual marriage Bill in 2011 indeed irritated many Nigerians.<sup>55</sup> The denial perspective gives rise to the mantra that homosexuality is alien to Africa and must, therefore, be a lifestyle imported from the decadent West.<sup>56</sup>

These perspectives are hollow as they fail to grasp the universal dimension of human rights and emerging scientific evidence for the genetic basis of homosexual behaviour.<sup>57</sup> Wilson and Rahman speculate that about 5 per cent of men and 1 per cent of woman worldwide are born gay.<sup>58</sup> Religion plays a substantial role in the social lives of Nigerians. Therefore, it is no wonder that many Nigerians reject homosexuality on the basis of their religious convictions. When the homosexuality issue flared up in the Anglican community after the American Episcopal Church had ordained a gay bishop in 2003, the Church of Nigeria reacted furiously by threatening to break away from the Church of England. Nigeria is estimated to represent approximately 25 per cent of the world's Anglican population.<sup>59</sup> However, Punt has pointed out that unbiased

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52 J Adibe 'The politics of same-sex marriage in Nigeria' (2012) 1 *Journal of African Union Studies* 102.

53 As above.

54 Adibe (n 52) 102-103.

55 Adibe (n 52) 104.

56 This notion has been largely discredited by recent research that confirms that homosexuality in Africa predated the advent of colonialism. This confirmation supports the stance that homosexuality is a fact of human existence, not a phenomenon unique to one race or continent. Ajibade and Ojoade's study of Yoruba oral literature and proverbs shows that homosexuality existed in Yorubaland long before the coming of the British colonial masters. Gaudio's study of the Hausa people of Northern Nigeria not only confirms the existence of homosexuality in precolonial times, but also its tolerance by society. See GO Ajibade 'Same-sex relationships in Yoruba culture and orature' (2013) 60 *Journal of Homosexuality* 965; JO Ojoade 'African sexual proverbs: Some Yoruba examples' (1983) 94 *Folklore* 201-213; RP Gaudio *Allah made us: Sexual outlaws in an Islamic African city* (2009).

57 See G Wilson & Q Rahman *Born gay: The psychobiology of sex orientation* (2005) 84. Prenatal sex hormones influence sexuality. Auditory oto-acoustic emissions (OAE) research has shown that the cochlea in lesbian women is male-patterned while the OAE of gay men is similar to that of heterosexual men although the brains of gay persons show evidence of higher masculinisation levels. This argues for the biological basis of sexual orientation.

58 Wilson & Rahman (n 57) 23.

59 J Anderson 'Conservative Christianity, the global south and the battle over sexual orientation' (2011) 32 *Third World Quarterly* 1590.

interpretation of the Bible is very rare,<sup>60</sup> implying that the Bible does not lend support to homophobia given that the gospel of Christ is a gospel of love and not hate.

The nationalist and denial perspectives of the majority of Nigerians is incompatible with the human rights perspective which insists that sexual minority rights are fundamental human rights by virtue of the gay or lesbian person being a human being with rights to privacy and family life. Resolution 275 of the African Commission on Human and Peoples' Rights (African Commission) condemns the violation of the human rights of sexual minorities by both state and non-state actors, and calls on African governments to take actions that guarantee the rights of sexual minorities in line with the human rights provisions of the African Charter. The denial perspective in particular fails to come to terms with the fact that there have always been homosexuals in Africa, as Igwe argues using the Igbo tribes as a case study.<sup>61</sup>

From the foregoing, there is no doubt that the overwhelming majority of Nigerians oppose sexual minority rights. But on what grounds do they base their opposition? The appeal is basically to religious and cultural sentiments which, in this matter of sexual minority rights, completely ignore the 'other' side, the personal stories of homosexual men and women who suffer for doing no wrong. The LGBT question eminently is a human rights question. Nigerian Christians cite the condemnation of homosexuality in the Bible to justify homophobia. The Old Testament prescribes the death penalty for homosexuality, while the New Testament merely forbids it.<sup>62</sup> In very strong language, Obasola notes that 'the culture of homosexuality, which is a form of sexual perversity, has enveloped the world'.<sup>63</sup> He finds justification for such a blatant anti-gay stance in biblical condemnation of homosexuality, citing the story of the destruction of the cities of Sodom and Gomorrah by God over the inhabitants' indulgence in homosexual practices. Indeed, Muslims also cite the story of Sodom and Gomorrah to justify their anti-LGBT stance. In the Qu'ran, Surat Al-Anbiya, verse 74-75, reminds Muslims how Allah saved Lot from the people of Sodom and Gomorrah who practised abomination (homosexuality). Opponents of sexual minority rights in Nigeria, such as Obasola, also contend that homosexuality is incompatible with African traditional culture,<sup>64</sup> in spite of the growing

60 J Punt 'The Bible in the gay debate in South Africa: Towards an ethics of interpretation' (2006) 93 *Scriptural* 423.

61 See Onuche (n 45) 93.

62 See Leviticus 20:18 and Romans 1:26-27; 1 Tim 1-10 (New Living Translation, Holy Bible).

63 K Obasola 'An ethical perspective of homosexuality among the African people' (2013) 1 *European Journal of Business and Social Sciences* 76.

64 Obasola (n 63) 83.

body of research that confirms the existence of homosexuals in pre-colonial Nigeria, and in Africa in general.<sup>65</sup>

## 5 Towards greater protection of LGBT rights in Nigeria: The international model in light of Berlin's theory of negative liberty

The chief pillar of Berlin's conception of negative liberty is respect for the sphere he calls the 'private'. Indeed, Berlin considers the affairs of men and women in their privacy sacred and not to be interfered with by authority, whether this authority is represented by the state, the church, the community or even a peer group. For Berlin, respect for privacy is part of one's fundamental human rights, as pointed out earlier. It is instructive that the process of the decriminalisation of consensual homosexual relations in the West and other parts of the world started with particular reference to the sanctity of the private sphere.<sup>66</sup>

Legal reforms and interventions drew inspiration from treaties such as ICCPR and the European Convention of Human Rights (European Convention). The first notable case on sexual minority rights decided at the European Court of Human Rights (European Court), which became a benchmark for similar interventions, is *Dudgeon v United Kingdom*.<sup>67</sup> Under the cover of the false use of the Drugs Act of 1971 the police invaded Dudgeon's house and found a diary that recorded homosexual activities. Dudgeon was questioned but not charged. Dudgeon then approached the European Court with the claim that the existence of the Northern Ireland buggery law, which prescribed sentences as great as life imprisonment for the act of homosexuality and ten years' imprisonment for an attempt, even though rarely enforced, unjustifiably interfered with his privacy. Dudgeon claimed that such interference violated article 8 of the European Convention. Dudgeon was victorious. The Court found that a 'reasonable case of discrimination and interference with privacy could be sustained even for a law that a state did not directly enforce'.<sup>68</sup>

65 See K Essien & S Aderinto "'Cutting the head of the roaring monster": Homosexuality and repression in Africa' (2009) 30 *African Study Monographs* 125. Essien and Aderinto note: 'The continent of Africa is vast, and likewise, African culture is not monolithic but diverse. If Africa is home to thousands of ethnic groups and nationalities, then one should also expect variations in African sexual experience (both heterosexual and homosexual).'

66 S Lee *Law and morals: Warnock, Gillick, and beyond* (1986) 26. At a time when the international gay lobby was still very weak, the Wolfenden Committee recommended the decriminalisation of private gay relations on the grounds that the law has no duty to regulate the private sphere. This is a position consistent with negative liberty.

67 *Dudgeon* (n 30).

68 M Hollander 'Gay rights in Uganda: Seeking to overturn Uganda's anti-sodomy laws' (2009) 50 *Virginia Journal of International Law* 241.

*Toonen v Australia*<sup>69</sup> is a similar case that came before the Human Rights Committee of ICCPR. The Australian challenged sections 122(a), 122(c), and 123 of the Tasmanian Criminal Code which criminalised consensual adult same-sex relations. As was the case with the Northern Ireland law, the Tasmanian laws were not actively enforced. Toonen claimed that the discriminatory laws subjected the LGBT community of Tasmania to constant ridicule and harassment from the larger community. He insisted that the Tasmanian laws violated article 17 of ICCPR, to which the Human Rights Committee agreed.<sup>70</sup>

*Modinos v Cyprus*<sup>71</sup> also involved discriminatory laws that were not enforced but the existence of which caused gay persons such as Modinos constant apprehension. The European Court upheld the petition of Modinos. In *Lawrence v Texas*<sup>72</sup> two petitioners who were taken unawares by the police while engaging in consensual sex successfully challenged the Texas law punishing homosexual relations with a maximum fine of \$500.<sup>73</sup>

In South Africa, during the apartheid era, the Immorality Act 5 of 1927 criminalised sodomy in South Africa. The Act was repealed and replaced by the Sexual Offences Act 23 of 1957 which also criminalised male homosexual relations,<sup>74</sup> prescribing a maximum fine of R4 000 or two years' imprisonment or both<sup>75</sup> for an infringement, and prohibiting relations between adult men and boys below the age of 19 years.<sup>76</sup> Female same-sex acts were later prohibited under the Act, and specifically relations between women and girls below the age of 19 years.<sup>77</sup> Given its experience with discrimination, it is not surprising that the discriminatory anti-gay laws of South Africa not only were discarded but the 1996 Constitution outlawed discrimination in post-apartheid South Africa on the grounds of sexual orientation.<sup>78</sup> Legal interventions since the adoption of the 1996 Constitution have ensured that sexual minorities in South Africa enjoy many rights unknown to LGBT communities in Nigeria and other countries. Such court pronouncements include the

69 Communication 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).

70 *Toonen* (n 69) paras 1, 2 & 8.

71 ECHR (22 April 1993) Ser A 259. For an extensive discussion on decided cases of the ECtHR on sexual orientation protection, see M Flaherty & J Fisher 'Sexual orientation, gender identity and international human rights law: Contextualising the Yogyakarta Principles' (2008) 8 *Human Rights Law Review* 214-222.

72 539 US 558, 572-573, 576 (2003).

73 For a detailed analysis of the *Texas* case, see MP Allen 'The underappreciated first amendment importance of *Lawrence v Texas*' (2008) 65 *Washington and Lee Law Review* 1046.

74 Secs 20(A)(1) & 20(A)(2).

75 Sec 22(g).

76 Sec 14(1)(b).

77 Sec 14(3)(b).

78 See sec 9(3) of the Constitution of the Republic of South African, 1996.

affirmation of the rights of gay persons to marriage equality;<sup>79</sup> the right to a family;<sup>80</sup> rights to joint adoption of children;<sup>81</sup> and the right not to be discriminated against in places of employment,<sup>82</sup> among others.<sup>83</sup>

While anti-sodomy laws remain in force in Kenya, it is hoped that the 2010 Constitution opens up space for the eventual repeal of these discriminatory laws.<sup>84</sup> In Uganda, the Constitutional Court overturned the harsh anti-gay Bill signed into law by President Yoweri Museveni on 1 August 2014. Judge Steven Kavuma cited the failure of parliament to form a quorum when it voted to pass the anti-gay Bill which was later signed into law in February 2014.<sup>85</sup>

So far there has been no serious challenge in Nigerian courts seeking to overturn the SSMPA.<sup>86</sup> This static situation could change at any time as local sexual minority rights movements draw inspiration from positive developments elsewhere. The message of the Yogyakarta Principles is clear with regard to the application of international human rights law to issues concerning the violation of sexual minority rights. The Principles declare that '[a]ll human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full

79 *Fourie v Minister of Home Affairs; Lesbian and Gay Equality Project V Minister of Home Affairs* 2006 (1) SA 524 (CC). The Constitutional Court judgment overruled opposition to the Civil Union Act 17 of 2006 of the ANC-dominated parliament. The Act, however, seeks to assuage the feelings of those opposed to gay marriage. It lifts the legal burden off marriage officers who may not be comfortable with the solemnisation of gay marriages due to their conscience.

80 See *National Coalition for Gay and Lesbian Equality & Others V Minister of Home Affairs* 2000 (2) SA 1 (CC).

81 *Du Toit V Minister of Welfare and Population Development* 2003 (2) SA 198 (CC).

82 *Langemeat v Minister of Safety and Security* 1998 (3) SA 312 (T).

83 Jivan gives an erudite account of the legal reform in homosexuality laws of South Africa. See generally U Jivan 'From individual protection to recognition of relationships: Same-sex couples and South African experience of sexual orientation reform' (2007) 11 *Law, Democracy and Development* 26; also see H de Ru 'A historical perspective on the recognition of same-sex unions in South Africa' (2013) 19 *Fundamina* 234.

84 See CE Finerty 'Being gay in Kenya: The implications of Kenya's new Constitution for its anti-sodomy laws' (2012) 45 *Cornell International Law Journal* 458. Finerty is of the opinion that '[t]he combination of heightened awareness of LGBT human rights in the international community; greater constitutional protections and domestic incorporation of international law under Kenya's new Constitution; and sympathetic justices on the Kenya Supreme Court has created a crucial opportunity for Kenya's anti-sodomy laws to be repealed'.

85 See Biryabarema (n 33).

86 In the case of *Joseph Teriah Ebah v Federal Government of Nigeria* Suit FHC/ABJ/CS/197/2014, Judge Abdul Kafarati dismissed Mr Ebah's challenge to the constitutionality of the SSMPA on the ground that he (Ebah) lacked *locus standi*, being married and not having suffered any personal injury from the implementation of the anti-gay marriage law. For a detailed discussion of this case, see AC Onuora-Oguno 'Protecting same-sex rights in Nigeria: Case note on *Teriah Joseph Ebah v Federal Republic of Nigeria*' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 238-244.



enjoyment of all human rights.<sup>87</sup> The Yogyakarta Principles further enjoin states to entrench the core tenets of universality and the inviolability of human rights in their various national constitutions and other domestic human rights legislation, including amending laws that are inconsistent with the enjoyment of rights.<sup>88</sup>

The internationalisation of the sexual minority rights movement has created awareness about LGBT issues in Nigeria although social conservatism remains strongly rooted in society. We agree with Ebobrah that legislative intervention by way of initial decriminalisation of consensual adult gay relations and the subsequent repeal of discriminatory laws are the fastest route to provide succour for sexual minorities in Africa. Ebobrah sees this project as a type of Africanisation of human rights, by which he means Africans taking the legal initiative to repeal sodomy laws put in place by the colonial masters.<sup>89</sup> Such a bold step will require courageous judges. Sixty years ago few Europeans looking into the future would have predicted the almost comprehensive rights sexual minorities enjoy in Europe today.<sup>90</sup>

Berlin has given us negative liberty as the insistence on respect for the individual and the way they choose to live their lives without interference by the state or society. The celebration of this liberty

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87 See sec 1.

88 Sec 1(A).

89 ST Ebobrah 'Africanising human rights in the 21st century: Gay rights, African values and the dilemma of the African legislator' (2012) 1 *International Human Rights Law Review* 125-126. There has recently been some progress at the level of the African Commission which adopted Resolution 275 at its 55th ordinary session held in Luanda, Angola, from 28 April to 12 May 2014. The African Commission itself is the regulatory framework established by the African Charter on Human and Peoples' Rights, which entered into force on 21 October 1986. The Preamble to the African Charter states that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspiration of the African people'. The adoption of Resolution 275 indicates how seriously the African Commission views sexual minority rights protection. The Resolution strongly condemned state and non-state actors involved in the persecution of sexual minorities and invited African governments to prioritise sexual minority rights protection. However, the African Commission's work suffered a setback with the revocation of the observer status granted the Coalition of African Lesbians (CAL) on 25 April 2015 in a move seen as the African Commission bowing to pressure by the Executive Council of the African Union. See K Kiunguyu 'Africa: Coalition of African Lesbians' observer status revoked by the African Commission on Human and Peoples' Rights' *AllAfrica* 4 September 2018 <https://allafrica.com/stories/201809050051.html> (accessed 10 September 2018).

90 See P Johnson 'Homosexuality and the African Charter on Human and Peoples' Rights: What can be learned from the history of the European Convention on Human Rights?' (2013) 40 *Journal of Law and Society* 251-255. Johnson eruditely observes that the discriminatory laws criminalising consensual male homosexuality in Europe between 1950 to 1980 (even in the operational era of the European Convention) held sway. He further asserts that for 25 years, the European Commission on Human Rights turned down any claim relating to the criminalisation of homosexual sex, that such criminalisation does not violate the rights guaranteed under the European Convention. According to Johnson, this scenario of despondency that existed before the ground-breaking case of *Dudgeon* is similar in every aspect to the plight of LGBTs in contemporary Africa.

means the emancipation of sexual minorities in Nigeria. The embrace of the Berlinian model of liberalism can have a far-reaching impact on LGBT rights in Nigeria and place the country in the category of nations that fought for and won rights recognition for sexual minorities. We have seen in this section the progress made at the international level where international law norms now favour tolerance and acceptance of sexual minorities. Yet, these norms will have no significant impact in Nigeria if they are not applied by the executive working together with the legislature and the judiciary. The promulgation of multiple anti-LGBT laws, the signing into law of the anti-homosexual marriage Bill in 2014, the reluctance of the judiciary to intervene on the side of sexual minorities, and the overwhelming support for the SSMPA and popular antipathy towards homosexuality clearly show that the problem fundamentally is one of attitude. For judges to begin to muster courage to entertain legal challenges to the plethora of anti-gay laws in Nigeria, a sense of a real national momentum towards greater acceptance of sexual minorities would have to exist. We argue that the social attitudinal change necessary for a less hostile LGBT environment in Nigeria to emerge can be effected with the internalisation of Berlin's negative liberty perspective.

While it is true that the general human rights of citizens in contemporary Nigeria are routinely violated,<sup>91</sup> to the extent that it may be argued that the predicament of sexual minorities is not exceptional, we note the difference in the rights violations suffered by citizens at the hands of government agencies and security forces and those suffered by sexual minorities. Sexual minorities suffer double jeopardy as they are victims of the general rights violations and the rights violations stemming from the social rejection of their sexual orientation.

## 6 Radicalising the Nigerian LGBT question using Berlin's negative liberty as yardstick

In understanding the rights relationship between sexual minorities in Nigeria and the Nigerian state (together with the overwhelming majority being in opposition to LGBT rights), one has to start with Blackburn's analysis of moral rights upon which legal rights depend for ultimate validation. While explicating the question of rights, Blackburn made four distinctions, namely, claim-right; liberty-right; power-right; and immunity-right. The claim-right and liberty-right confer on the right holder freedom from outside interference with regard to a specific privilege or benefit, while the power-right and

91 See V Ojatorotu & F Allen 'From "authoritarian rule" to "democracy" in Nigeria: Citizens' welfare a myth or reality' (2009) 1 *Journal of Alternative Perspectives in the Social Sciences* 152; JA Dada 'Human rights under the Nigerian Constitution: Issues and problems' (2012) 2 *International Journal of Humanities and Social Sciences* 33.

immunity-right justify the rights holder's claim to non-interference by an external party.<sup>92</sup> In applying this analysis to the Nigerian situation, it becomes clear that in enacting the SSMPA the Nigerian state has violated the privileges of LGBT persons and subverted their claim-right. The immunity right of LGBT persons, therefore, secures to them the right to sue the Nigerian state. If the state is liable for the denial of the liberty-rights of LGBT persons, we can radicalise Berlin's negative liberty further in defence of the thesis that sexual minority rights are fundamental human rights.

Berlin is advocating radical or negative liberty as the one bulwark against the invasion of the private sphere by authoritarian forces. For Berlin true liberty cannot be separated from 'the right freely to shape one's life as one wishes, the production of circumstances in which men can develop their natures as variously and richly, and, if need be, as eccentrically as possible'.<sup>93</sup> It is instructive that Berlin is ready to endorse 'rebellion' on the part of the oppressed if this is the only way for them to secure their right-claim. Of course, 'rebellion' here does not mean recourse to violence; it means the willingness to stand up and defend one's right even in the face of oppression. LGBT persons in Nigeria should be free to shape their lives as they deem fit. Berlin even supports 'eccentricity' on the part of the individual as long as his expression of eccentric conduct does not pose a danger to others.<sup>94</sup> But, then, homosexuality can hardly be categorised as eccentric behaviour. Homosexual men and women are as psychologically and physiologically normal as heterosexual men and women.<sup>95</sup> Homosexual men and women happen to have only a nature different from that of the heterosexual majority. It is the inalienable right of sexual minorities to 'develop their natures as variously and richly' as possible without fear of being assaulted, stigmatised, or even killed.

The story of the Nigerian Ethan Regal (not his real name), which was carried in *The News* magazine on 20 November 2014, illustrates the plight of the gay Nigerian. About being gay, Regal writes:<sup>96</sup>

When I was a young boy in Lagos, Nigeria, I had a mysterious, unexplainable tingling sensation whenever I saw an attractive guy. The stories I heard regarding romance involved a boy and girl. So I thought to myself: Maybe I'm a girl deep down. That seemed like the only explanation for my attraction. I kept thinking that maybe God made a mistake ... I

92 S Blackburn *Oxford dictionary of philosophy* (2005) 319.

93 Berlin (n 2) 5-6.

94 Berlin (n 2) 6.

95 In the 20th century, it was widely believed that homosexuality was a trait of mental disorder. See GM Hereck 'Sexual orientation differences as deficits: Sciences and stigma in the history of American psychology' (2010) 5 *Perspectives on Psychological Sciences* 693-699. More recent studies, however, have shown that a biological basis of homosexuality exists; see eg Academy of Science of South Africa *Diversity in human sexuality: Implications for policy in Africa* (2015) 14.

96 'Living in Nigeria as a gay man: One person's story' *The News* 20 November 2014 <http://thenewsnigeria.com.ng/2014/11/201living-in-nigeria-as-a-gay-man-one-persons-story/> (accessed 8 February 2015).

never had issues with my body. I wasn't interested in getting rid of my penis or growing breasts. I just thought that in order to be with a boy I had to be a girl.

Regal laments the forced invisibility of sexual minorities in Nigeria and the overwhelming homophobia. As a boarding student he was physically and emotionally bullied for being 'feminine'. He has lived with the fear of possible rejection by his family since the age of nine when it began to dawn on him that he might be different from other males. He expresses the frustration of most homosexual people in Nigeria at the scarcity of willing partners. Even when meeting other gay men online he is always mindful of his security.

Regal's fears are not mitigated by the horrific videos of gay men being brutalised that he comes across online from time to time. He talks with considerable emotion about two young men who were beaten to death with planks and sticks.<sup>97</sup> Crowds had gathered to watch the unfolding spectacle without as much as raising a voice of protest. From all indications the crowd approved of the murder. Confronted by an overwhelmingly homophobic society and threatened with painful death at the hands of homophobic men who pose as homosexual to lure gay men into death traps, Regal is contemplating living a sexless life. But to live a sexless life is nothing more than living in denial. He concludes:<sup>98</sup>

I have argued with some homophobic Nigerians and from what I noticed they hate gays because they were told to hate us by their religion ... they have zero clue what it is like to be gay, which from my perspective gives them a better reason not to judge. Besides isn't it a sin to judge? ... I know I'm not safe, none of us are ... do we want to spend our lives sexless? If we get into a relationship do we want it to be hidden forever? Most of us want to have kids. How do we get there? That's why I'm speaking up.

Evidently, sexual minorities in Nigeria experience many difficulties. They are compelled by their hostile environment to live in denial. Gay men even marry heterosexual women just to please society while leading secret lives. The case of Adeniyi Raji made headlines when the British Home Office moved to deport him back to Nigeria in June 2018. Raji narrated how he had to marry a heterosexual woman to escape societal pressure and how his clandestine homosexual lifestyle was discovered by his wife.<sup>99</sup> Raji later fled to Britain when his life was threatened following the publication of his name and pictures in the national newspapers. In the case of Kenny Badmus, a well-known Nigerian brand expert, his wife thought that God would change his sexual orientation. Badmus's sexual orientation did not change and

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97 As above.

98 As above.

99 See O Bowcott 'Gay asylum seeker faces deportation from UK to Nigeria' *The Guardian* 11 June 2018 <https://www.theguardian.com/world/2018/jun/11/gay-asylum-seeker-faces-deportation-from-uk-to-nigeria> (accessed 10 September 2018).

the marriage eventually failed.<sup>100</sup> Those courageous enough openly to declare their sexual orientation are victimised or forced to move to Europe or America where the LGBT environment is far more welcoming.<sup>101</sup>

In the first drafts of his seminal essay 'Two concepts of liberty' Berlin notes:<sup>102</sup>

I am said to be free to the degree to which no human being interferes with my activity. This is the classical sense of liberty in which the great English philosophers, Hobbes, Locke, Bentham, Paine, and indeed Mill, used it.

Since sexual minorities in Nigeria cannot live according to their 'nature', it is reasonable to say that they are in a state of bondage and require liberation. The liberation of sexual minorities in Nigeria will cost the heterosexual majority nothing, a fact Regal alludes to in his story. It simply means moving society towards greater equality for all. In such a society value pluralism, which Berlin endorses, will not be denied since granting sexual minorities their rights to live according to their nature will not require any special privileging that may be detrimental to the heterosexual majority. The rights of sexual minorities are just as valid as the rights of heterosexual persons.

Scholars such as Jason Ferrell have argued that Berlin's negative liberty seeks to emerge as the absolute good to the exclusion of other non-libertarian goods such as a sense of community. Whereas Berlin favours greater rights for the individual, he pretends to be committed to value pluralism. To Ferrell 'this is an especially notable problem given Berlin's inability to defend his own liberal beliefs'.<sup>103</sup> The implication for sexual minority rights protection in Nigeria is the highlighting of the struggle between the universalist view of human rights and the relativist view which is discussed in detail in the next section. The universalist view embraces sexual minority rights as human rights that should be vigorously enforced. The relativist view asserts that cultural nuances must determine the reactions of communities to the sexual minorities issue. The former leans towards libertarian absolutism while the latter favours pluralism. Consequently, the cultural relativist sees nothing wrong with Europe and America embracing a sexual minority rights regime while Africa rejects it.

Even if it is accepted that Berlin's preference for negative liberty clashes with his willingness to acknowledge value pluralism, as Ferrell asserts, there is no doubt that Berlin genuinely envisages an open

100 See D Ogbече 'I lost contract with FG after my ex-wife revealed I was gay – Nigerian homosexual Kenny Badmus' *Daily Post* 8 December 2015 [www.dailypost.ng/2016/12/08/lost-contract-fg-ex-wife-revealed-gay-nigerian-homosexual-kenny-badmus](http://www.dailypost.ng/2016/12/08/lost-contract-fg-ex-wife-revealed-gay-nigerian-homosexual-kenny-badmus) (accessed 10 September 2018).

101 The well-known Nigerian sexual minority rights activist and blog writer Bisi Alimi has migrated to Europe to live a life of dignity. See 'Bisi Alimi' *Wikipedia* [http://en.wikipedia.org/wiki/Bisi\\_Alimi](http://en.wikipedia.org/wiki/Bisi_Alimi) (accessed 8 February 2015).

102 Berlin (n 2) 181-182.

103 J Ferrell 'Isaiah Berlin: Liberalism and pluralism in theory and practice' (2009) 8 *Contemporary Political Theory* 296.

society where people with divergent standpoints can be sympathetic enough to enter their different worlds and work for the progress of society. Berlin notes with his characteristic eloquence: 'If I am a man or woman with sufficient imagination ... I can enter into a value system which is not my own, but which is nevertheless something I can conceive of men pursuing.'<sup>104</sup> However, this tension in Berlin does not affect the harmonious relationship between sexual minority rights defence and negative liberty. As noted earlier, the claim-right of sexual minorities, which grants them immunity from wrongful interference by the state and community, does not advocate a special privileging in a value-plural environment; this claim-right rather seeks equal treatment of sexual minorities and heterosexual persons alike, freedom from discrimination in matters related to a free expression of love and access to health services, and the workplace. The SSMPA consolidates the discriminatory provisions in the legal codes of Nigeria and makes discrimination against sexual minorities a major goal of the state.

The negative conception of liberty has goals that are human, unlike the positive conception which focuses attention on self-mastery and loses sight of the external threat to the private sphere. Berlin's commitment to negative or radical liberty is unequivocal. While praising Mill's libertarian leanings, he yet finds cause to criticise Mill for elevating the demands of self-mastery over the need for unconstrained living. He writes as follows about the questions of the essence of liberty:<sup>105</sup>

Two aspects of it may be noted. The first is that, amongst the defenders of 'negative' liberty – the liberty confuses two distinct ideals. One is that all coercion, in so far as it frustrates human desires, is bad as such ... and liberty, which is the opposite of coercion is good as such (although it is not the only good). The other is that men should seek to develop a certain type of character of which Mill approved – original, imaginative, independent, non-conforming to the point of eccentricity.

Berlin's contention is that as soon as the liberal defender of human rights begins to emphasise matters such as originality and independence, the more urgent matter of resistance to coercion and other forms of interference is relegated to the background. He believes that even a totalitarian environment can produce men of originality and independence but that only an open society can guarantee freedom from coercion. The concentration on internal constraints at the expense of external constraints emboldens authority at all levels to deny people their rights by extolling the virtues of community. This is the kind of repressive thinking behind the enactment of the anti-gay law. It insists on sexual minorities giving up their claim-right for full membership of the community. This full

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104 I Berlin 'My intellectual path' in H Hardy (ed) *The power of ideas* (2000) 12.

105 Berlin (n 2) 190.

membership is precisely what negative liberty understands as interference. Enlarging the horizon of human rights, Berlin asserts:<sup>106</sup>

Liberty consists in the preservation of an area within which human personality is to have the fullest possible play. Unless a man can pursue ends because they are his ends, make acts of choice which, even if they lead to disaster, are nevertheless felt by him as his acts, the pursuit of goals which are, at any rate for him, absolute in that they are not means to other ends, but that alone which makes all other acts worth doing, which gives him life such values as it has in his own eyes ... that is liberty.

It is the radical liberty which stands between the individual and authority. Berlin adds:<sup>107</sup>

Every plea for civil liberty, for individual rights, for the preservation of individual variety and spontaneity against the encroachment of public authority, or the leveling tendency of custom or organised propaganda, stems from this central conception.

Berlin's emphasis on the preservation of 'individual variety' and 'spontaneity' recalls the pain of Regal who cannot understand why society will not let them be, especially in light of the fact that homosexuality has a biological basis.<sup>108</sup> The attempt to legalise 'normality' with the enactment of anti-gay laws is a dubious one. As Regal notes, homophobic individuals have no justification to decide that homosexuality is in itself wrong. Human conduct, as experience proves, cannot conform to one particular pattern. Nature permits variety in all spheres of life; homosexuality may be a minority conduct-type but it is a conduct-type all the same. As long as sexual minorities are not breaking the law, the Nigerian state should allow them live with regard to their own type of spontaneity.

Indeed, negative liberty has imposed on the state the duty to protect its sexual minorities because they have made a valid claim to non-interference in their private sphere. While sexual minorities are immune from any valid counter-claim by the state, the latter is liable, having failed to protect a vulnerable minority. The capacity of custom and tradition to destroy variety and spontaneity brings us to the question of how far cultural relativism can go in denying sexual minority rights in Africa, in general, and in Nigeria, in particular. Is homosexuality really a Western phenomenon? Are human rights universal? What is the relationship between human rights and sexual minority rights? These are some of the issues we propose to discuss in the next section.

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106 Berlin (n 16) 190.

107 As above.

108 See Wilson & Rahman (n 57). The book discusses homosexual biological determinism in some detail.

## 7 The universalist and relativist argument

The twenty-first century has witnessed the most rapid spread of ideas and attitudes. This phenomenon is closely linked to economic globalisation. Nigeria, as other African countries, has been heavily influenced by socio-political developments in other parts of the world, especially in the West. In the face of increasing acceptance of sexual minority rights in the West and the subsequent push for radical equality, African countries such as Nigeria and Uganda reacted by tightening their anti-gay laws.<sup>109</sup> The increasing internationalisation of the sexual minority-rights movement gained traction with the gradual conviction on the part of sexual minority-rights activists that discrimination on the basis of sexual orientation is as morally indefensible as discrimination on grounds of race and sex. Indeed, the United Nations (UN) became a battleground between universalists and cultural relativists. An attempt by some nations led by the European Union (EU) to obtain a statement condemning violence and discrimination on the basis of sexual orientation led to the adoption of a rival non-binding statement supported by many African and Arab countries.<sup>110</sup> The rival non-binding statement had difficulties with the terms 'sexual orientation' and 'gender identity'. Nevertheless, the pro-gay lobby achieved victory on 28 December 2010 when, by a vote of 93 to 55, with 27 abstentions, the UN General Assembly bi-annual resolution condemned violence and discrimination targeted at minority groups, including sexual minorities.<sup>111</sup>

Just as groups lobbying for sexual minority rights in the West have extended their reach to Africa, so have conservative pro-traditional family groups in the West.<sup>112</sup> This development brought to the fore the question of the universality of sexual minority rights. The question has become even more urgent given that most Africans believe that the gay sub-culture is a Western imposition on Africa. However, the African continent is still divided as to this contention.<sup>113</sup>

On the other hand, cultural relativism is a type of relativism concerned with variations in particularist customs and practices, as well as belief systems, across geographical borders and linguistic groups.<sup>114</sup> According to Teson, cultural relativism is the view that, with respect to human rights, local customs in their religious, political, and legal aspects determine the applicability of human rights.<sup>115</sup>

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109 While Nigeria successfully enacted the SSMPA, Uganda's attempt ultimately failed as its anti-gay law was successfully challenged in the Constitutional Court. See Biryabarema (n 33).

110 Anderson (n 59) 1600.

111 Anderson 1598.

112 Anderson 1597.

113 See generally S Tamale (ed) *African sexualities: A reader* (2011).

114 FR Teson 'International human rights and relativism' (1985) 25 *Virginia Journal of International Law* 869-870.

115 FR Teson 'International human rights and cultural relativism' in Hayden (n 1) 380.



Donnelly concurs, adding that cultural relativism constantly threatens to become absolute.<sup>116</sup> Absolute cultural relativism rejects standards that account for similarities and differences among diverse peoples.

On the other hand, the universalist viewpoint appropriates objective moral standards and promotes these standards as 'having a special kind of importance [and] urgency ... that makes them more than disparate or simply subjective demands'.<sup>117</sup> Recognising the fact that human rights may be circumscribed and relativised by cultural peculiarities, out of which the notion of rationality itself partly grows, Donnelly distinguishes conceptual universality from substantive universality and other forms of non-conceptual, empirically applicable, universality.<sup>118</sup> Conceptual universality is empty, more or less, as it merely asserts *a priori* that human beings by virtue of their humanity have certain inalienable rights. Conceptual universality is too general to grapple with the problems people face in their everyday lives. For Donnelly, conceptual universality requires substantive universality to ground it in reality.<sup>119</sup> Other types of non-conceptual universality includes anthropological universality; functional universality; international legal universality; overlapping consensus universality; and ontological universality.<sup>120</sup>

For the purpose of this article, international legal universality is the most relevant in view of its implications for the protection of human rights and, therefore, sexual minority rights, in different parts of the world.

Teson supports the relative universality thesis of Donnelly but rejects the claim of cultural relativism on the premise that relativism promotes discrimination. He acknowledges the tension that may arise between national sovereignty and international human rights law when governments point to local customs to justify their undermining of international law. Teson certainly supports international legal universality as a type of relative universality which seeks an agreement between local peculiarities and the necessity for a universal standard in measuring human dignity. For Teson, the place of birth and the cultural environment of a person are not to be given priority in determining their moral worth.<sup>121</sup> For instance, the human rights of a Third World-woman are just as admissible as those of a woman from the First World. He concludes that '[i]f the initial conditions are not morally distinguishable, the requirements of universalisability fully

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116 J. Donnelly 'The relative universality of human rights' (2007) 29 *Human Rights Quarterly* 294.

117 E. Kamenka 'Human rights: Peoples' rights' in J. Crawford (ed) *The rights of peoples* (1988) 127.

118 Donnelly (n 116) 282.

119 As above.

120 Donnelly (n 116) 282-293.

121 Teson (n 115) 387.

apply to statements about individual rights, even when the agents are immersed in different cultural environments.<sup>122</sup>

Taylor believes that the term 'human dignity', which justifies scholars such as Donnelly and Teson in their shift to universalist dogmatism, has been faulted by Onuma who regards the term as Western-specific rather than universal in the true sense. Quoting Onuma, Taylor shows a preference for a universal understanding in terms of the pursuit of spiritual and material well-being.<sup>123</sup> It is worth noting that neither Taylor nor Donnelly disputes the validity of the term 'universal'. Taylor is anxious only to avoid the African charge of Western cultural imposition masquerading as the universal value. He points out that while Africans and other non-Western groups are willing to support some universal values, they remain wary of the very atomistic conception of the human person in Western societies which 'seems to give pride of place to autonomous individuals, determined to demand their rights, even (indeed especially) in the face of widespread social consensus'.<sup>124</sup>

Donnelly is not altogether mindful of the point raised by Taylor as he notes that Western states sometimes pressure non-Western states to tow particular lines, a step he considers counter-productive.<sup>125</sup> Still, he points out that the human rights defence bent in the West was not a cultural outgrowth. For him, human rights ideas and practices arose 'from the social, economic, and political transformations of modernity'.<sup>126</sup> Consequently, Donnelly has no problem making sexual minority rights a category of human rights.<sup>127</sup>

Kant argued that the state as an entity regulated by law is founded on three rational principles which are decisive for the nature of the universality of human rights. The first principle is the liberty of every member of society as a man. The second relates to the equality of every member of society with every other as a subject. The third postulates the independence of every member of the commonwealth as a citizen.<sup>128</sup> This argument is consistent with the assertion of negative liberty, when Berlin writes that '[t]he desire not to be impinged upon, not to be dictated to, to be free from the arbitrary deprivation of rights and liberties, has been a mark of high civilisation both on the part of individuals and communities'.<sup>129</sup> This is the desire 'to be left alone, to live one's life as one chooses, the very sense of privacy, of the area of personal relationships as sacred in its own rights; the belief that it is more worthy of a human being to go to the

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122 As above.

123 C Taylor 'A world consensus of human rights?' in Hayden (n 1) 410.

124 Taylor (n 123) 414.

125 Donnelly (n 116) 291.

126 Donnelly (n 116) 287.

127 J Donnelly 'Non-discrimination and sexual orientation: Making a place for sexual minorities in the global human rights' in Hayden (n 1) 547.

128 See Hayden (n 1) 111.

129 Berlin (n 16) 192.

bad in his own way than to the good under the control of a benevolent authority'.<sup>130</sup>

This radical conception of freedom obviously allows that sexual minorities are humans, free and equal citizens of the state and, therefore, free to live as they choose as long as they do not cause harm to others. The very fact that there are sexual minorities in Africa, just as they are to be found in the West and other parts of the world, is empirical evidence that homosexuality is not a phenomenon imported into Africa by the West. Igwe and others have supplied evidence showing that there were homosexuals in Africa even before the coming of European colonisers.<sup>131</sup> Africa's uncompromising anti-gay stance has been traced to colonial era anti-sodomy laws. The British and, to a lesser extent, the French and German colonial authorities made sodomy a punishable offence. About the discriminatory laws of the colonial powers, Human Rights Watch observed that colonial legislators and jurists introduced the laws without recourse to the socio-cultural and ethno-religious peculiarities of the colonised societies.<sup>132</sup>

These discriminatory laws of the British Empire owed their origin to section 377 of the Indian Penal Code which criminalises 'carnal intercourse against the order of nature with any man, woman or animal', and punishes infringements with imprisonment of up to life.<sup>133</sup> This version of the law became entrenched in African countries such as Nigeria, Ghana, Botswana, Lesotho, Malawi, The Gambia, Mauritius, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Uganda, Tanzania, Zambia and Zimbabwe.<sup>134</sup>

Indeed, it is ironic that the anti-LGBT laws being championed in Africa today by Africans are a direct heritage of colonialism which in its time oppressed the African people. The ample evidence in favour of the presence of homosexual persons all over the world completely discredits the hypothesis of homosexuality being a phenomenon alien to Africa. If Africans are humans, like European and Americans, if being human means the capacity to enjoy fundamental rights, then sexual minorities in Nigeria, in particular, and Africa, in general, are entitled to a minimum of rights that fall under 'sexual minority rights'.

The challenge now facing Nigeria is the challenge of legal reforms towards decriminalisation and an attitudinal change in society. Mercifully, sexual minority rights activism in Nigeria can always refer to the international template to find its bearing. The path of reform and decriminalisation followed by countries in the West and in South

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130 As above.

131 See Onuche (n 45) 93. See also WN Eskridge 'A history of same-sex marriage' (1993) 79 *Virginia Law Review* 1419-1420.

132 Human Rights Watch 'This alien legacy' 17 December 2008 <http://www.hrw.org/en/reports/2008/12/17/alien-legacy?Print=> (accessed 22 December 2008).

133 As above.

134 As above.

Africa presents an international template as one that can lead to the protection of sexual minority rights in Nigeria.

## 8 Conclusion

The evaluation of the human rights regime in the West is inextricably linked to the emergence of a liberal philo-legal tradition. This philo-legal tradition in part is a secularised Judeo-Christian discourse and in part a modernisation of the juridical and moral norms of ancient Rome.<sup>135</sup> Isaiah Berlin is a key thinker in the Western liberal tradition. His distinction between positive and negative liberty and his subsequent preference for negative liberty is a radical endorsement of the fundamental human rights to privacy, the very basis of the legal victories in Europe that ushered in the era of interventional sexual minority rights.

In this article I show how Berlin's radical conception of liberty has positive implications for the protection of sexual minority rights with the emphasis on the sanctity of the private sphere and, therefore, freedom from coercive interference. It is suggested that the internationalisation of sexual minority rights can influence a move towards legal reforms and decriminalisation of colonial era anti-gay laws in Nigeria in spite of the prevailing social conservatism. Fortunately there is an existing international template which Nigeria can follow on the way to granting sexual minorities their right to privacy. Donnelly reports Waaldijk as identifying the pattern in the European success story of gay liberation as commencing from decriminalisation of sex between adults of the same sex and the equalisation of ages of consent, the introduction of anti-discrimination legislation, the introduction of legal partnership to legal recognition of gay parenthood.<sup>136</sup> This same pattern of liberation is possible in Nigeria. However, this possibility can be hastened and transformed into actuality if a liberal environment exists which nurtures the people's sense of tolerance and fairness. The article argues that the Berlinian model of liberalism can create precisely the conditions that bring about a tolerant attitude. Such a tolerant attitude not only motivate the wider population to abandon the stigmatisation of sexual minorities, but also will influence the work of politicians and judges, with positive implications for sexual minority rights protection.

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135 Hayden (n 1) 3.

136 Donnelly (n 127) 566.

## The concept of surrogacy in Nigeria: Issues, prospects and challenges

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### Summary

*The journey from girlhood to womanhood in Africa begins with betrothal to marriage. This journey is not complete and the place of an African woman is not secure in her matrimonial home until such time as she is able to procreate. As such, reproduction is an essential aspect of the African family system. The inability of an African woman to fall pregnant within months of marriage is usually seen as a cause for anxiety and if this condition continues for some years, the woman is tagged barren and treated as a woman with a disability, seeing that the inability to conceive is seen as such. In most cases the husband's family mount pressure on the husband to either marry an additional wife or another wife in order to produce a child. This leads many women to make desperate decisions which may not necessarily be legally recognised, including the practice of buying babies. The article examines the legal framework for surrogacy in Nigeria. It adopts a comparative method and compares the legal frameworks governing surrogacy in Nigeria and South Africa. It concludes that there is a lacuna regarding surrogacy in the laws of Nigeria which allows for abuse during the surrogacy, and makes policy recommendations to provide the legal architecture to protect stakeholders in surrogate agreements in Nigeria.*

**Key words:** Africa; 'baby factories'; infertility; Nigeria; surrogacy

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# 1 Introduction

Over the past few decades the practice of surrogacy has attracted attention internationally with ongoing efforts in international legal documents to ensure best practices in surrogacy. Countries approach the subject of surrogacy from different perspectives with some countries entirely prohibiting surrogacy,<sup>1</sup> while other countries permit surrogacy to the extent that it is not to be commercialised.<sup>2</sup> Some countries<sup>3</sup> are regarded as surrogacy-friendly as they expressly allow surrogacy, while other countries have no clear regulation of surrogacy.<sup>4</sup>

Nigeria is a multi-cultural African society which places a high value on marriage and procreation. Therefore, having a child in marriage is seen as security in the marriage and widely celebrated as the pride of womanhood and a sign of fertility.<sup>5</sup> Research has shown that infertility is common in sub-Saharan Africa due to several factors, including sexually-transmitted infections (STIs) among men and women.<sup>6</sup> The inadequate treatment of STIs and other infections may lead to complications and tubal damage resulting in infertility later in life.<sup>7</sup> Some options exist, such as reproductive medicine, adoption and surrogacy to mitigate the psychological effects of infertility. However, the social stigma associated with these options prevents many Nigerians from accessing these available legal means of having children.<sup>8</sup> The social stigma contributes to the thriving business of 'baby factories' in Nigeria, where women choose to buy babies and present them as their biological children.<sup>9</sup>

The article analyses family law in Nigeria to uncover legislative gaps in relation to surrogacy. Much is happening around the world in terms of developing laws and policies to meet the demands of citizens. Conversely, little attention is paid to the need to develop the

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1 In France by arts 16-17 of the French Civil Code; in Switzerland by art 4 of *Bundesgesetz über die medizinisch unterstützte Fortpflanzung* 1998.

2 In England by the Surrogacy Arrangements Act 1985; in Hong Kong by Human Reproductive Technology Ordinance 2000; in South Africa by ch 19 of the Children's Act 38 of 2005.

3 In Greece by Law 3305/2005 – Enforcement of Medically Assisted Reproduction; in Israel by Embryo Carrying Agreements Law 1996; in Russia by arts 51-52 of the Family Code of Russia and art 16 of the Law on Acts on Civil Status.

4 In Nigeria based on practice guidelines of the Association of Fertility and Reproductive Health (AFRH) of Nigeria.

5 OJ Umeora, UN Nzerem & JN Eze 'What drives grand multiparous women in rural Nigeria to seek treatment for infertility' (2013) 12 *African Journal of Medical and Health Sciences* 15.

6 As above.

7 OA Makinde et al 'Baby factories in Nigeria: Starting the discussion toward a national prevention policy' (2017) 18 *Trauma, Violence and Abuse* 98.

8 OJ Umeora et al 'Surrogacy in Nigeria: Legal, ethical, social, cultural, psychological and religious musings' (2014) 13 *African Journal of Medical and Health Sciences* 105 106.

9 Makinde et al (n 7) 99.

Nigerian family law to accommodate the demands of the modern family in terms of developments such as complex families, surrogacy and artificial insemination. The article identifies several ways in which surrogacy is practised in Nigeria, including the consequences of and burden on the parties involved. These are blackmail, a refusal to hand over a baby after payment has been received and the rights of the parties involved in surrogacy.

The article compares the legal frameworks of Nigeria and South Africa. A justification for the choice of these jurisdictions lies in the fact that both are developing countries on the African continent. Furthermore, South Africa has a legislative framework governing surrogacy while none exists in Nigeria. The article will make recommendations for the need for regulatory policy formulation to protect the rights of parties to surrogate agreements in Nigeria. The article is divided into eight parts. Part 1 is the introduction; part 2 examines the concept and nature of surrogacy; part 3 examines the international legal framework for the regulation of surrogacy. Efforts made at the international level to regulate surrogacy is considered in this section. Part 4 analyses the regulatory framework of surrogacy in South Africa, while part 5 discusses the framework for surrogacy in Nigeria. Part 6 investigates the challenges associated with surrogacy in Nigeria. This section identifies the abuses related to surrogate agreements and practices in Nigeria. Part 7 discusses the practical solutions to solve the identified challenges of surrogacy in Nigeria, while part 8 concludes the article.

## 2 Surrogacy

Surrogate parenthood has its roots in biblical times with the relationship between Jacob, Rachael, Leah, Bilhah and Zipah and the four sons born among them.<sup>10</sup> In the late 1970s the first recorded case<sup>11</sup> of assisted reproduction through surrogacy was contested in the English courts and this development has led to several debates on surrogacy as a means of reproduction.<sup>12</sup> Umeora defines surrogacy as a situation where a woman (third party) carries a pregnancy for the commissioning parents and hands the child over to the commissioning parents after its delivery.<sup>13</sup> A surrogate mother is a woman who, based on an agreement before pregnancy, carries a child and relinquishes all rights to and over the child to another person after giving birth to the child.<sup>14</sup>

10 Genesis 16: 1-16 and Genesis 30: 1-13.

11 *A v C* (1978) 8 Fam Law 170 [1985] FLR 445.

12 K Horsey & S Sheldon 'Still hazy after all these years: The law regulating surrogacy' (2012) 20 *Medical Law Review* 67 68.

13 Umeora et al (n 8) 106.

14 R Blauwhoff & L Frohn 'International commercial surrogacy arrangements: The interest of the child as a concern of both human rights and private international

Surrogacy could be either genetic (partial) or gestational (full).<sup>15</sup> It is genetic where the male parent impregnates the surrogate mother through artificial insemination or sexual intercourse,<sup>16</sup> while surrogacy is gestational where the male parent fertilises an egg from the female parent and the fertilised egg is placed in the womb of the surrogate mother to grow and be delivered (*in vitro* fertilisation).<sup>17</sup> Surrogacy agreements can be either commercial or non-commercial (altruistic), and it could be agreed within a jurisdiction or internationally (across borders).<sup>18</sup>

The debate around the acceptability of surrogacy in many communities centres on the exploitation of those women who serve as surrogate mothers and the commercialisation of babies.<sup>19</sup> Different countries adopted different approaches to the regulation of surrogacy. Some countries expressly prohibited surrogacy;<sup>20</sup> some permit and regulate only non-commercial surrogacy; some countries allow all forms of surrogacy; while other countries leave surrogacy completely unregulated.<sup>21</sup> In societies where surrogacy is allowed the consent of the surrogate mother is a yardstick to determine ethical compliance.<sup>22</sup> The argument is that surrogacy should be considered in the same way as any other form of labour and regulation should be in form of protection against exploitation.<sup>23</sup> However, it has been noted that a woman has a right to privacy and reproductive autonomy under international human rights law and, as such, attempts to limit these rights must be reasonably justified.<sup>24</sup> Nigeria is among the last category of countries where surrogacy is left unregulated.

### 3 International framework for surrogacy

There is no specific international framework to regulate surrogacy, thus countries adopt suitable laws to regulate surrogate practice in their various jurisdictions. Disparities in the regulation of surrogacy

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law' in C Paulussen et al (eds) *Fundamental rights in international and European law* (2016) 215.

15 HV MacLachlan 'Surrogate motherhood: Beyond the Warnock and the Brazier reports' (2005) 11 *Human Reproduction and Genetic Ethics* 3.

16 Blauwhoff & Frohn (n 14) 215.

17 MacLachlan (n 15) 3.

18 Blauwhoff & Frohn (n 14) 216.

19 DR Bromham 'Surrogacy: Ethical, legal and social aspects' (1995) 12 *Journal of Assisted Reproduction and Genetics* 509 510.

20 Such as France and Switzerland (n 2).

21 A Finkelstein et al 'Surrogacy law and policy in the US: A national conversation informed by global law making' (2016) *Report of the Columbia Law School Sexuality and Gender Law Clinic* 11.

22 Finkelstein (n 21) 25.

23 As above.

24 J Tobin 'To prohibit or permit: What is the (human) rights response to the practice of international commercial surrogacy?' (2014) 63 *International and Comparative Law Quarterly* 317 344.



create conflict in cases of international surrogacy, but in such cases arguments have been in favour of the best interests of the child.<sup>25</sup> The best interests standard may be traced to Anglo-American family law which is persistently applied problematically.<sup>26</sup> The standard of best interests emerged from the American adoption framework that aims to establish an institution to ameliorate the condition of neglected and dependent children.<sup>27</sup> By the twentieth century, the concept of the best interests of the child had attained a permanent position in family law and started to gain international recognition.<sup>28</sup>

The best interests of the child is a fundamental principle that underpins the practice of intercountry adoption. Both the Convention on the Rights of the Child (CRC)<sup>29</sup> and the African Charter on the Rights and Welfare of the Child (African Children's Charter)<sup>30</sup> embody the best interests principle as a paramount consideration in all matters relating to children.<sup>31</sup> Similarly, the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Hague Convention) of 1993 requires the best interests of the child in concluding that intercountry adoption is appropriate for a child.<sup>32</sup> The courts have also supported the requirement of the best interests principle in every surrogacy arrangement dispute.<sup>33</sup> However, neither these instruments nor the court in *Labassee v France* gave a definition of the term 'best interests of a child'. However, the Guide to Good Practice on the Implementation of the Hague Convention (Guide)<sup>34</sup> attributes the lack of definition of the term in the Convention to the fact that the requirements to meet the best interests of the child in individual cases vary and the factors to be considered should not be limited.<sup>35</sup> The Guide stipulates that the term should be construed to mean the 'real' or 'true' interests of the child.<sup>36</sup> This attempt at defining the best interests of a child only succeeded in rephrasing the

25 F Boukrouna, S Chardenoux & C Paillassou 'International surrogacy agreements: A need for judicial cooperation?' (2015) <http://www.ejtn.eu> (accessed 10 June 2017).

26 LM Kohm 'Tracing the foundations of the best interests of the child standard in American jurisprudence' (2008) 11 *Journal of Law and Family Studies* 337-347.

27 SG Post 'Adoption theologically considered' (1997) 25 *Journal of Religious Ethics* 149-151.

28 Kohm (n 26) 350.

29 OHCHR 'Convention on the Rights of the Child' <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (accessed 19 October 2018).

30 African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49 (1990) <http://www.achpr.org/instruments/child/> (accessed 19 October 2018).

31 Art 3 of CRC and art 4 of the African Children's Charter.

32 Para 4, arts 1(a), 4(b), 16(d), 21(1) & 24 of the Hague Convention.

33 *Labassee v France* Application 65941/11 Council of Europe: European Court of Human Rights, 26 June 2014; *Menesson v France* Application 65192/11, Council of Europe: European Court of Human Rights, 26 June 2014.

34 Hague Conference on Private International Law (HCCH) *The implementation and operation of the 1993 Hague Intercountry Adoption Convention: Guide to good practice No 1* (2008).

35 HCCH (n 34) 15.

36 As above.

term by using synonyms without any actual clarification on the meaning of the term. Thus, there is no agreement on the applicable yardsticks to arrive at the best interest of the child.<sup>37</sup> As a result of this, there are varied perceptions regarding what amounts to the best interests of the child,<sup>38</sup> and this has called for a more specific approach to regulate international surrogacy.

### 3.1 Efforts at international regulation

The Hague Convention provides a platform to regulate cross-border surrogacy using the perspective of intercountry adoption. Scholars have postulated that the regulatory procedure of the Hague Convention on adoption should be adapted to suit the demands of cross-border surrogacy arrangements.<sup>39</sup> However, since the Hague Convention seeks to expressly regulate intercountry adoption and not international surrogacy, there is advocacy for the development of a new private international law instrument to expressly regulate surrogacy arrangements.<sup>40</sup> Justification for this advocacy lies in the impact of international surrogacy on the operation of the Hague Convention, thus necessitating the need to review private international questions as they affect international surrogacy agreements.<sup>41</sup> Given the cultural differences between different nations, the private international law regime seems appropriate. Based on this it was concluded at the 2010 special commission meeting on the practical operation of the Hague Convention that the use of the Hague Convention for international cases of surrogacy is inappropriate and that further research should be carried out on questions of international surrogacy.<sup>42</sup>

Reports have been presented on the issues surrounding the status of children, international surrogacy agreements and legal parentage in cases of surrogacy. In February 2016 experts on parentage and surrogacy met in The Hague where the need to consider uniformly applicable law rules was considered. No definite conclusion could be

37 N Cantwell *The best interests of the child in intercountry adoption* (2014) Innocenti Insights UNICEF Office of Research 5.

38 As above.

39 C Thomale 'State of play of cross-border surrogacy arrangements: Is there a case for regulatory intervention by the EU?' Paper presented at the European Parliament's Policy Hub 'Cross-border surrogacy arrangements: A need for EU action?' 16 June 2016.

40 H Baker 'A possible future instrument on international surrogacy arrangements: Are there lessons to be learnt from the 1993 Hague Inter-Country Adoption Convention?' in K Trimmings & P Beaumont (eds) *International surrogacy arrangements: Legal regulation at the international level* (2013) 364.

41 HCCH 'Surrogacy – 2010 and Prior' <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/surrogacy-2010-and-prior> (accessed 13 March 2017).

42 HCCH 'Conclusions and Recommendations of the 2010 Special Commission on the Practical Operation of the 1993 Hague Intercountry Adoption Convention' (2010) <https://assets.hcch.net/docs/2ed33240-387f-4270-a418-d7de4ca0e464.pdf> (accessed 13 March 2017).

reached due to the complexity of surrogacy and the diverse approaches of different states.<sup>43</sup> This is due to the fact that there are some states whose private international law requires the application of internal substantive law while some require the application of foreign law.<sup>44</sup>

The Experts' Group again met from 31 January to 3 February 2017 where the group was of the opinion that legal questions arising from legal parentage should be left to state law, including states' private international law rules, to the exclusion of matters covered by other Hague Conventions.<sup>45</sup> The group called for additional rules and safety in international surrogacy agreements and considered the minimum standards and recognition conditions.<sup>46</sup> The urgency of developing a binding multilateral instrument was identified, and the Experts' Group concluded on the need for further discussion on the modality of such an instrument.<sup>47</sup> The Group explored and supported the idea of an Optional Protocol specific to international surrogacy agreements and recommended that work should continue on the development of a private international law instrument.<sup>48</sup>

## 4 Framework for surrogacy in South Africa

In South Africa surrogacy is legally recognised and regulated by Chapter 19 of the Children's Act.<sup>49</sup> The Children's Act takes cognisance of *in vitro* fertilisation, and section 1 of the Act defines a surrogate agreement as

an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.<sup>50</sup>

For a surrogate agreement to be valid in South Africa, such an agreement must be in writing and signed by the parties and the surrogate mother and at least one of the commissioning parents must

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43 HCCH 'Report of the February 2016 Meeting of the Experts' Group on Parentage/Surrogacy' (2016) <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (accessed 20 October 2018).

44 HCCH (n 43) para 10.

45 HCCH 'Report of the Experts' Group on the Parentage/Surrogacy Project' (2017) paras 22-23 <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (accessed 20 October 2018).

46 HCCH (n 45) paras 27-30.

47 HCCH (n 45) para 38.

48 HCCH 'Report of the Experts' Group on the Parentage/Surrogacy Project' Meeting of 6-9 February 2018) paras 46-48 <https://assets.hcch.net/docs/0510f196-073a-4a29-a2a1-2742c95312a2.pdf> (accessed 20 October 2018).

49 Act 38 of 2005.

50 Sec 1 Children's Act 38 of 2005.

be domiciled in South Africa at the time of entering into the agreement. Such agreement must be confirmed by the High Court.<sup>51</sup> Where the commissioning party or the surrogate mother is married or in a permanent relationship, the Court may require the consent of the spouses or partners.<sup>52</sup> The gametes of at least one of the commissioning parents is required by law<sup>53</sup> and artificial fertilisation of the surrogate mother can only be carried out within 18 months of the confirmation of the surrogate motherhood agreement by the Court.<sup>54</sup> This points to the fact that only gestational surrogacy is permitted in South Africa. Furthermore, commercial surrogacy is expressly prohibited by section 301 of the Children's Act, and the only compensation that a surrogate mother may claim is limited to the direct expenses of artificial insemination; pregnancy; the birth of the child; loss of earnings suffered by the surrogate mother as a result of surrogacy; and insurance associated with the pregnancy.<sup>55</sup> The permissible payments in respect of a surrogate agreement was confirmed in *Ex Parte HP & Others*.<sup>56</sup> A violation of this requirement attracts a fine or imprisonment of a maximum of 10 years or both fine and imprisonment.<sup>57</sup>

The rights of a surrogate mother in South Africa are protected, to the extent that a surrogate mother has the right to terminate the surrogate motherhood agreement within six months of giving birth to the child by filing for a notice in court.<sup>58</sup> Where the court finds that the surrogate mother has voluntarily terminated the agreement, the court must terminate the agreement and the surrogate mother incurs no liability to the commissioning parents.<sup>59</sup> The surrogate mother also has a right to terminate the pregnancy before delivery but she must inform the commissioning parents, and such termination ends the surrogacy agreement with the surrogate mother incurring no liability to the commissioning parents.<sup>60</sup> Where a surrogate mother who terminates a surrogate agreement does not have a spouse, the commissioning father will share the parental responsibilities with the surrogate mother.<sup>61</sup> This position has been criticised as contradicting the termination of the commissioning parents' rights by assigning responsibilities to the commissioning father.<sup>62</sup>

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51 Sec 292 Children's Act; A Louw 'Chapter 19: Surrogate motherhood (ss 292-303)' in CJ Davel & A Skelton (eds) *Commentary on Children's Act* (2018) 8.

52 Sec 293 Children's Act.

53 Sec 294 Children's Act.

54 Sec 296 Children's Act.

55 Sec 301(2) Children's Act.

56 2017 (4) SA 528 (GP).

57 Sec 305(6) Children's Act.

58 Sec 398(1) Children's Act.

59 Sec 298 Children's Act.

60 Sec 300 Children's Act.

61 Sec 299 Children's Act.

62 Louw (n 51) 29.

As far as the legal status of the child is concerned, a child born out of a surrogate agreement acquires the legal status of the child of the commissioning parent(s) from the moment of birth.<sup>63</sup> The Act protects the rights of the commissioning parents by placing an obligation on the surrogate mother to hand over the child to the commissioning parents within a reasonable time after the birth of the child.<sup>64</sup> Thus, this section of the law gives full parental responsibility to the commissioning parents. However, this provision is subject to sections 298 and 299 of the Children's Act, as mentioned earlier.

Although the essence of the law regulating surrogacy in South Africa appears to give infertile couples or parents a chance at having their own child, the law seems to protect the rights of the surrogate mother and the child born of the surrogate agreement. There appears to be no equal protection of the rights of the commissioning parents. Moreover, the law does not provide for any compensation for the commissioning parents in a situation where the surrogate mother chooses to terminate the agreement but chooses to continue the pregnancy.<sup>65</sup> It is important to protect the rights of the commissioning parents to the extent that they are not made vulnerable by the surrogate mother. The commissioning parents deserve the right to be free from the trauma of being outrightly denied the child at the absolute decision of the surrogate mother. There may be a need to review the law to balance the reproductive rights of the surrogate mother *vis-à-vis* the contractual rights of the commissioning parents.

## 5 Framework for surrogacy in Nigeria

While surrogacy is not expressly prohibited in Nigeria, it also is not legally acknowledged. As such, if a person engages in surrogate motherhood or enters into a surrogate contract in Nigeria, such a person cannot be said to have committed a crime. The underlying problem, however, is in terms of legally defining the legal parentage of the child as well as the contractual rights and duties of parties to the surrogate agreement. Presently there is no judicial pronouncement on this form of contract in Nigeria, but if a dispute arises out of a surrogate agreement and such dispute is presented before a Nigerian court, deciding such a case could prove problematic. There is a likelihood of a biased judgment based on cultural sentiments. The bias is likely to arise from socio-cultural

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63 Sec 297(1) Children's Act.

64 As above.

65 The law is silent on the rights of the commissioning parents to recover any incurred cost relating to the pregnancy.

influences which view conception through artificial means unacceptable.<sup>66</sup>

With no legislative measures to regulate surrogacy in Nigeria, most artificial reproductive technology clinics in Nigeria base their operations on the Human Fertilisation and Embryology Authority Guidelines of the United Kingdom.<sup>67</sup> However, the Nigerian Law Reform Commission has recommended that any child born to a woman as a result of artificial insemination or implantation of an embryo in the body of a woman while she is in a marriage must be regarded as a child of the husband.<sup>68</sup> The Commission further recommends that where a child is born under a surrogacy agreement, the commissioning parents should formally adopt the child, even if the child is the biological child of the commissioning parents.<sup>69</sup> The rationale behind this is to prevent the surrogate mother from returning to claim the child.<sup>70</sup> A Bill for the establishment of a Nigerian Assisted Reproduction Authority was presented before the National Assembly in 2012 and was read for the second time on 2 May 2012.<sup>71</sup> This Bill, however, was not passed into law as it did not enjoy the support of the majority of the legislature.

Subsequently, in 2014, the National Health Act<sup>72</sup> was enacted. Section 10 prohibits assisted reproductive technology by providing:

- (1) A person shall not:
  - (a) manipulate any genetic material, including genetic material of human gametes, zygotes or embryos; or
  - (b) engage in any activity including nuclear transfer or embryo splitting for the purpose of the cloning of human being;
  - (c) import or export human zygotes or embryos.
- (2) A person who contravenes or fails to comply with the provision of this section commits an offence and is liable on conviction to imprisonment for a minimum of five years with no option of a fine.

It may be deduced from section 10(1)(a) that assisted reproductive technology (ART) is prohibited. One cannot but wonder why several assisted reproductive technology practices, such as zygote intra-fallopian transfer (*in vitro* fertilisation) and gamete intra-allopien transfers, are widely practised in major hospitals in Nigeria, including the national hospital, without any medical practitioner having been

66 AS Jegede & AS Fayemiwo 'Cultural and ethical challenges of assisted reproductive technologies in the management of infertility among the Yoruba of South-Western Nigeria' (2010) 14 *African Journal of Reproductive Health* 115 121.

67 JO Fadare & AA Adeniyi 'Ethical issues in newer assisted reproductive technologies: A view from Nigeria' (2015) 18 *Nigerian Journal of Clinical Practice* S57 S59.

68 Law Reform Commission 'Reform of Nigerian family law' III, 15.

69 Law Reform Commission (n 68) 16.

70 M Attah *Family welfare law in Nigeria* (2016) 215.

71 House of Representatives 'Votes and proceedings' (2 May 2012) 97 <http://nass.gov.ng/document/download/5555> (accessed 20 June 2017).

72 National Health Act 8 of 2014.

penalised so far. However, it is worth noting that there is a pending Bill before the Nigerian Parliament to amend the National Health Act in order to regulate assisted birth technology, to encourage the safe and ethical practice of assisted reproductive technology services.<sup>73</sup> The Bill aimed at effecting this amendment was introduced to Parliament on 8 June 2016. If passed into law, the Federal Ministry of Health will have the duty of developing policies for ART and will accredit and regulate the practice of ART.<sup>74</sup> The training of medical personnel as well as research on assisted reproduction are stressed in the Bill. Also, reference is made to the potential vulnerabilities and health risks of potential surrogate mothers.<sup>75</sup> Clause 60 of the Bill purports to establish a regulatory body to be known as the National Registry of Assisted Reproductive Technology Clinics and Banks in Nigeria. The national registry is to be the central database of assisted reproductive technology data in Nigeria.

The patients, surrogates and donors are required to undergo medical tests that may endanger any party to the assisted reproductive technology procedure or the child.<sup>76</sup> ART clinics are under an obligation to provide counselling to the commissioning couple on the choices available to them and the likely consequences of the procedure, and here the international procedure such as *in vitro* fertilisation is recognised.<sup>77</sup> Surrogacy is not to be considered for any commissioning mother who is able to carry a pregnancy to term, thus a commissioning mother must provide a medical report to attest to her inability to carry a pregnancy to term.<sup>78</sup>

The written consent of all parties involved in ART must be obtained by the clinic for every stage of the assisted reproduction process.<sup>79</sup> Such consent may be withdrawn by any of the parties at any time before the human embryo or gametes are transferred to the uterus of the woman who is to carry the pregnancy.<sup>80</sup> All clinics registered for ART will maintain records at all times of the parties and the procedure.<sup>81</sup>

The sale of gametes outside Nigeria is expressly prohibited except where a party chooses to transfer his or her gamete outside the country, and the sale of zygotes and embryos in Nigeria is expressly prohibited.<sup>82</sup> The option of all forms of assisted reproductive

73 A Bill for an Act to amend the National Health Act to Provide for the Regulation of Assisted Birth Technology, for Safe and Ethical Practice of Assisted Reproductive Technology Services and for other Related Matters (2016) HB 16.05.610 C 3203 <http://www.placbillstrack.org/> (accessed 23 June 2017).

74 National Health Act (Amendment) Bill 2016 clause 50(1).

75 National Health Act (Amendment) Bill 2016 clause 59(2)(e)(ii).

76 National Health Act (Amendment) Bill 2016 clause 68.

77 National Health Act (Amendment) Bill 2016 clause 68(6).

78 Bill to amend the National Health Act 2016 (n 73) clause 68(10).

79 National Health Act (Amendment) Bill 2016 clause 69.

80 National Health Act (Amendment) Bill 2016 clause 69(4).

81 National Health Act (Amendment) Bill 2016 clause 70.

82 National Health Act (Amendment) Bill 2016 clause 74.

technology, except surrogacy, is available to married infertile couples.<sup>83</sup> This provision appears absurd. It is clear that the draftsman was not careful in the choice of words as surrogacy is the only logical solution to having a biological child by a married infertile couple, in light of the state of technology in Nigeria today. This provision appears to contradict clause 68(10) of the Bill which permits surrogacy for a woman who is unable to carry pregnancy to term or who may endanger her health by carrying a pregnancy to term. If this statute is passed in this way, the courts will be saddled with the responsibility of interpreting this provision to reflect the intention of the drafters.

As far as the rights of the parties to assisted reproduction are concerned, a gamete donor has the right to decide the extent of information to be released and to whom, except otherwise ordered by the court.<sup>84</sup> The gamete donor must obtain the written consent of his or her spouse where married, although the rationale for this clause is not provided. One may wonder if this clause is not a breach of privacy and reproductive rights. Where a spouse chooses to donate a gamete without the knowledge of the other spouse, there should not be an impediment to this decision. Such a donor shall relinquish rights over the child or children that may be conceived using his gamete and, to this end, the identity of the recipient is not made known to the donor.<sup>85</sup>

Inasmuch as the Bill to amend the National Health Act is comprehensive in terms of procedure to regulate and ensure minimum standards in ART in Nigeria, little effort was made in the Bill to enumerate and guarantee the rights of the parties involved. There is a need to take greater effort from the human rights perspective to secure the rights of the parties to assisted reproduction as well as the child born of the procedure.

In this respect, a member of the Nigerian Parliament sponsored another Bill for an Act to provide for a National Framework for the Regulation and Supervision of Reproductive Technology and Matters Connected Therewith.<sup>86</sup> This Bill was presented to the upper legislature (Senate) for a first reading<sup>87</sup> on 3 November 2016 and scaled through the second reading in October 2017. The Assisted Reproductive Technology (Regulation) Bill (ART Bill) seeks to regulate ART in Nigeria. As the National Health (Amendment) Bill, the ART Bill also establishes an advisory body saddled with the responsibility of regulating and prescribing standards for assisted reproduction.<sup>88</sup>

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83 National Health Act (Amendment) Bill 2016 clause 75(1).

84 National Health Act (Amendment) Bill 2016 clause 76(2).

85 National Health Act (Amendment) Bill 2016 clause 76.

86 Assisted Reproductive Technology (Regulation) Bill 2016 (ART Bill).

87 Senate of the Federal Republic of Nigeria 'Order Paper' (3 November 2016) 49 <http://nass.gov.ng/document/download/8294> (accessed 20 June 2017).

88 ART Bill (n 86) clause 3.



However, unlike the National Health (Amendment) Bill, chapter VII of the ART Bill specifically spells out the rights and duties of patients, donors, surrogates and children of assisted reproduction. Clause 32 of the ART Bill makes ART available to all persons, including single persons as well as married and unmarried couples. Informed consent is a prerequisite where ART is sought by couples, and a parent of a minor seeking ART will be entitled to have access to information regarding the donor, the surrogate mother and the welfare of the child to the extent permitted by law.<sup>89</sup>

Similar to the provisions of the National Health (Amendment) Bill, is the right of a gamete donor to determine the extent of information he chooses to release and his duty to relinquish all parental rights over the child that may be conceived from his gamete.<sup>90</sup> By virtue of clause 34, commissioning parents and the surrogate mother must enter into a written agreement which is legally enforceable.<sup>91</sup> All pregnancy-related expenses; insurance and post-natal expenses in relation to the pregnancy resulting from ART of a surrogate mother shall be borne by the commissioning parents.<sup>92</sup> Of importance is the fact that the Bill allows a surrogate mother to accept monetary compensation from the commissioning parents for being a surrogate,<sup>93</sup> and that a surrogate mother must relinquish all parental rights over the child.<sup>94</sup> This clearly is different from the South African situation where commercial surrogacy is prohibited. The proposal for commercial surrogacy in Nigeria may be based on the fact that there currently is clear evidence of commercial surrogacy,<sup>95</sup> and a bid to enact a law to prohibit this may hinder the successful support to enact the ART Bill.

To be eligible to be a surrogate mother, a woman must be between 21 and 45 years of age and no woman may act as surrogate for more than three times in her life-time.<sup>96</sup> Likewise, no surrogate shall more than three times undergo embryo transplant for the same couple. If the embryo transplant fails, the surrogate may agree on a fresh financial agreement to undergo another transplant provided it is not in excess of the limit of three.<sup>97</sup> A surrogate should be tested for all diseases that may endanger the child, and declare in a prescribed format that she is a surrogate and as such register for all medical

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89 ART Bill clauses 32(2) and (3).

90 ART Bill clause 33.

91 Although the Bill does not make provision for any approval body before such an agreement can become effective.

92 ART Bill (n 86) clause 34(2).

93 ART Bill clause 34(3).

94 ART Bill clause 34(4).

95 E Ebhomele 'Nigerian ladies paid to get pregnant for childless couples' *PM News* 28 March 2013 <https://www.pmnewsnigeria.com/2013/03/28/nigerian-ladies-paid-to-get-pregnant-for-childless-couples/> (accessed 11 September 2018).

96 ART Bill (n 86) clause 34(5).

97 ART Bill clause 34(9).

procedures relating to the child.<sup>98</sup> A surrogate may be obtained through a semen bank or by placing advertisements which must not be discriminatory in nature. ART clinics are prohibited from placing advertisements for clients to be surrogates.<sup>99</sup>

According to the Bill, the commissioning parents are legally bound to accept custody of the child, irrespective of any disability that the child or children may have, and the child should be registered in the name of the commissioning parents. A refusal to take custody of the child amounts to a crime.<sup>100</sup> Clause 34(17) requires the commissioning parents to issue a certificate stating that the surrogate acted in that capacity for them. Commissioning parents may employ the services of only one surrogate at a time.<sup>101</sup>

Clause 34(19) of the Bill seeks to allow cross-border surrogacy on condition that the commissioning parent(s) outside Nigeria must employ the services of a local guardian who should take care of the surrogate mother during and after pregnancy. Such commissioning parent(s) undertake to accept custody of the child.

Marriage will be a determining factor in the status of a child born through ART. A child born to a married couple through ART is presumed the legitimate child of the couple.<sup>102</sup> A child born to an unmarried couple through ART, with the consent of the couple, is the legitimate child of both parties.<sup>103</sup> A child born to a single woman through ART is the legitimate child of that woman and a child born to a man through ART is the legitimate child of that man.<sup>104</sup> On attaining the age of 18 years, a child born through ART has the right to apply for any information except the identity of his or her genetic parent(s) or surrogate mother.<sup>105</sup> Personal information, however, may be released in the case of a medical emergency which requires physical testing of the genetic parent(s) or surrogate mother.<sup>106</sup> Such information may only be released with the prior informed consent of the genetic parent(s) or surrogate mother.

If the ART Bill passes through Parliament it will be a significant achievement in the history of assistive reproduction in Nigeria. The ART Bill has gone a step further to supplement the provisions of the proposed National Health (Amendment) Bill by providing detailed rights and obligations of parties to the procedure.

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98 ART Bill clause 34(8).

99 ART Bill clause 34(7).

100 ART Bill clauses 34(10) & (11).

101 ART Bill clause 34(20).

102 ART Bill clause 35(1).

103 ART Bill clause 35(2).

104 ART Bill clause 35(3).

105 ART Bill clause 36(1).

106 ART Bill clause 36(3).

In the absence of any legal and regulatory framework for surrogacy in Nigeria, the Human Fertilisation and Embryology Act<sup>107</sup> of the United Kingdom is the basis of regulation of ART procedures in most ART clinics in Nigeria. The use of this law is premised on the fact that Nigeria, as a commonwealth country, has the roots of her common law in the United Kingdom. Section 45 of the Nigerian Interpretation Act<sup>108</sup> allows statutes of general application that were in force in England on or before 1 January 1900 to be directly in force in Nigeria, so that where there is a *lacuna* in Nigerian law, English law may be applied. However, since there is no existing law in England before 1900 which could be applied directly to resolve disputes related to surrogacy in Nigeria, the refusal by a fertility clinic to follow the guidelines of the Human Fertilisation and Embryology Act cannot be said to be in contravention of any law. Such a law will only serve as persuasive authority and will not be binding in Nigeria.

## 6 Challenges of surrogacy in Nigeria

There are several ethical, cultural, social and legal issues surrounding surrogacy in Nigeria. Surrogacy is not a topic discussed publicly in Nigeria due to the cultural and social perceptions surrounding infertility.<sup>109</sup> However, according to *PM News*, young ladies across Nigeria advertise their availability as surrogate mothers by registering on the internet<sup>110</sup> and providing their full details and states of residence in Nigeria.<sup>111</sup> Similarly, agencies in Nigeria advertise on the internet to match surrogate mothers with commissioning parents.<sup>112</sup>

The legal question surrounding the surrogacy agreement in Nigeria centres on the legal parentage of the child and the surrogacy agreement itself. While several countries have taken positions on surrogacy, by prohibiting, allowing without commercial value or fully allowing it with commercial value, Nigeria is yet to take a legal standpoint on the issue.<sup>113</sup> Thus, the lack of acknowledgment of the practice of surrogacy in Nigeria has led to a lack of regulation of the practice which leaves surrogate mothers vulnerable to exploitation and commissioning parents vulnerable to blackmail.

Concerns have been expressed over abuse related to surrogacy in Nigeria. One Motunrayo Joel was reported to have posed as a young woman interested in selling her ova, and she recounted how several

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107 Human Fertilisation and Embryology Act 2008 sec 59.

108 Interpretation Act Cap 123 Laws of Federation of Nigeria 2014.

109 Umeora et al (n 5) 106.

110 [www.surrogatefinder.com](http://www.surrogatefinder.com) (accessed 26 June 2017).

111 Ebhomele (n 95).

112 n 110.

113 Umeora et al (n 8) 107.

fertility clinics in Nigeria harvested ova and paid the donors.<sup>114</sup> She reported the high rate at which Nigerian ladies sell their eggs at various fertility clinics. Her report revealed that these women were not properly counselled on the health risks involved in donating eggs, especially in cases of recurrent donation.<sup>115</sup> Cases of quack doctors carrying out surrogacy and other *in vitro* fertilisation procedures have also been reported and are a cause for concern by the genuine fertility practitioners.<sup>116</sup>

The increase in 'baby factories' has been linked to surrogacy and this has heightened the level of stigma attached to surrogacy as an option for becoming a parent.<sup>117</sup> It has been established that the prevalence of baby factories persisting in Nigeria fulfils two needs: first, the conviction of teenage girls to give up their unwanted babies for financial gain and to avoid social stigma; and, second, the need for infertile couples to fulfil social obligations by having a baby.<sup>118</sup> Some of the babies from these baby factories are trafficked for the purpose of international adoption or used for sacrifice at shrines.<sup>119</sup>

The increased patronage of baby factories by infertile couples could be attributed to the social stigma publicly associated with adoption and surrogacy in Nigeria.<sup>120</sup> The BBC reported that a common strategy for an infertile woman is to pretend to be pregnant or be fooled into believing she is pregnant, and then buying a baby from one of these baby factories.<sup>121</sup> Makinde et al<sup>122</sup> contend that the rapid increase in baby factory operations in Nigeria is a threat to the social acceptance of surrogacy in the country as many might be confused as to the difference between baby factories and surrogacy.<sup>123</sup> It appears that in the case of Nigerian baby factories, while some females give their free consent, others, especially teenage

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114 M Joel 'Ovum trading: Inside Nigeria's multi-million naira human egg business' *Punch* 9 August 2015 <https://punchng.com/ovum-trading-inside-nigerias-multi-million-naira-human-egg-business/> (accessed 10 October 2018).

115 As above.

116 C Obinna 'Without regulation, IVF treatment is unsustainable' *Vanguard* 6 October 2014 <https://www.vanguardngr.com/2014/10/without-regulation-ivf-treatment-unsustainable/> (accessed 10 October 2018).

117 OBA van den Akker *Surrogate motherhood families* (2017) 218.

118 OA Makinde et al 'Baby factories taint surrogacy in Nigeria' (2015) *Reproductive BioMedicine Online* 1 doi: 10.1016/j.rbmo.2015.10.001.

119 Makinde et al (n 118) 2.

120 OA Ojelabi, P Osamor & BE Owumi 'Policies and practices of child adoption in Nigeria: A review paper' (2015) 6 *Mediterranean Journal of Social Sciences* 75 77.

121 'Judge raises Nigeria baby selling scam concerns' BBC News 25 October 2012 <http://www.bbc.com/news/uk-england-london-20082389> (accessed 20 June 2017).

122 Makinde et al (n 118) 3.

123 R Omokri 'Reno Omokri breaks silence, wants "baby factories" allowed' *Premium Times* 9 August 2015 <http://www.premiumtimesng.com/news/headlines/188066-reno-omokri-breaks-silence-wants-baby-factories-allowed.html> (accessed 29 June 2017).

girls, are coerced or forced against their wishes to be surrogate mothers.<sup>124</sup>

Omokri, however, cautioned that the criticism of surrogate mothers as being 'baby factories' by the media in Nigeria is not acceptable and should be seen as an unwelcome development.<sup>125</sup> Omokri fails to differentiate between surrogacy-like baby factories presenting themselves as surrogate motherhood clinics.<sup>126</sup> These threats to the development of surrogacy is a cause for concern which has led practitioners to call on government to regulate ART in Nigeria.<sup>127</sup>

These practices of baby selling, as reported across Nigeria, contravene the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and pornography<sup>128</sup> which Nigeria signed in 2000 and ratified in 2010. The Optional Protocol expressly prohibits the sale of children for consideration and enjoins state parties to criminalise the sale of children for sexual exploitation, the transfer of the child's organs or engagement in forced labour.<sup>129</sup> While Nigeria has laws<sup>130</sup> in place to comply with the Protocol, one cannot but support the enforcement mechanisms to ensure that the act of baby selling is curbed in Nigeria.

With the shift of surrogate motherhood to developing countries where surrogacy is poorly or hardly regulated,<sup>131</sup> poverty may make women vulnerable to exploitation by entering into surrogate agreements. The incentive of earning with one agreement what a woman in a developing country may never earn in years appears too tempting to many poor women in developing countries to resist.<sup>132</sup> In Nigeria surrogacy is not regulated, and there have been reports of young ladies either submitting themselves to or being coerced into an arrangement similar to surrogate motherhood. In view of this, it is necessary to have laws and policies that will protect the rights of

124 Makinde *et al* (n 118) 4.

125 Omokri (n 123).

126 OA Makinde 'Infant trafficking and baby factories: A new tale of child abuse in Nigeria' 2016 (25) *Child Abuse Review* 433.

127 Makinde (n 126) 433; H Umoru 'Senate moves to approve birth via in-vitro fertilisation' *Vanguard* 25 October 2017 <https://www.vanguardngr.com/2017/10/senate-moves-approve-birth-via-vitro-fertilization/> (accessed 10 October 2018); A Onyenucheyia 'Fresh concerns over IVF babies' *The Guardian* 4 October 2018 <https://guardian.ng/features/health/fresh-concerns-over-ivf-babies/> (accessed 10 October 2018).

128 United Nations 'Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Pornography' (2000) A/RES/54/263 25 May 2000 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx> (accessed 16 June 2017).

129 Art 3 Optional Protocol to CRC on the Sale of Children.

130 Such as the Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004; the Child's Rights Act 26 of 2003; the Violence Against Persons Act 2015; and so forth.

131 M Goodwin 'Reproducing hierarchy in commercial intimacy' (2013) 88 *Indiana Law Journal* 1290 1293.

132 As above.

parties to surrogate agreements as well as prescribing standards for the practice.

Before a surrogacy agreement is concluded, there should be a counselling session with both the surrogate mother and the commissioning parents where all parties are educated on their rights and responsibilities. A surrogate mother has the right to be fully aware of the restrictive conditions that may accompany the pregnancy, by having to refrain from certain habits such as drinking and smoking. She has the right to be aware of possible physical, emotional and hormonal changes likely to occur during pregnancy.<sup>133</sup>

The child born of a surrogate agreement is in a peculiar situation which makes his or her existence centred on a contractual formation, be it oral or written, entered into before his or her conception, although it has been argued that marriage and family are within the purview of public institutions and part of a contractual agreement with the state.<sup>134</sup> Depending on the kind of surrogacy, the child may or may not have a genetic connection with the surrogate mother. Such a child may be faced with custody, identity or legal parentage disputes<sup>135</sup> of which the child is unaware. In Nigeria, where only two parents are recognised as parents to a child,<sup>136</sup> a child born of full surrogacy is likely to face the challenge of determining the status of his or her parents, especially where all three parents involved decide to claim parentage of the child. As such, the best interests of such a child are paramount.<sup>137</sup> Since a child could be genetically or gestationally related to the surrogate parent(s), it follows that such a child has the right to lay claim to the identity of the commissioning parents, the genetic parents as well as the surrogate parent on the strength of articles 7(1) and 8 of the CRC.<sup>138</sup>

## 7 Surrogacy in Nigeria: The way forward

Considering the multi-cultural diversity of Nigeria as a country, it is important to ensure that any law or policy on surrogacy takes cognisance of the nature of the country. Catholics see surrogacy as an immoral act which violates the child's dignity, while the Protestants

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133 Blauwhoff & Frohn (n 14) 228-229.

134 KM Swift 'Parenting agreements, the potential power of contract, and the limits of family law' (2007) 34 *Florida State University Review* 913 919-920.

135 Finkelstein (n 21) 18.

136 The Matrimonial Causes Act 18 of 1970 on custody and maintenance of a child refers to either the father or mother of a child. There is no law in Nigeria that recognises the possibility of a third parent in the concept of surrogacy, except adoptive or foster parents.

137 Finkelstein (n 21) 18.

138 Art 7(1) gives a child the right to know and be cared for by his or her parents, while art 8 enjoins state parties to respect the right of a child to preserve his or her identity, including family relations, without interference.

display a liberal attitude towards surrogacy.<sup>139</sup> On the cumulative strength of Quran 23: 5-7,<sup>140</sup> 70: 29-31<sup>141</sup> and 16: 72<sup>142</sup> on the preservation of chastity, the prohibition of inseminating one's semen into the womb of a woman who is not one's wife, gestational surrogacy, is prohibited in Islam.<sup>143</sup>

Traditional culture in Nigeria places a high value on natural conception, and rejects Western notions of surrogacy. This situation recognises the Western notion of surrogacy as a risk to destabilising family lineages which are regarded highly in Nigerian society.<sup>144</sup> In traditional Nigerian society, the husband of an infertile wife has a choice to marry another wife and the wife of an infertile husband may choose to divorce the husband or stay with him and have children by a close relative.<sup>145</sup> The situation is similar to that which obtains in the Zulu culture of South Africa, where the husband of an infertile wife has the right to approach the wife's family to demand a substitute who could be a sister or relative of the wife.<sup>146</sup> A refusal to give a substitute has been described as a breach of the marriage contract in Zulu culture, and entitles the husband to a refund of the part of the bride price paid.<sup>147</sup>

A lesson could be learnt from the provisions of the Children's Act in South Africa to enact an appropriate law to regulate surrogacy in Nigeria. Nigeria already is on the right path with the National Health (Amendment) Bill 2016 and the Assistive Reproductive Technology Bill 2016. However, to avoid duplicity and a conflict in the laws, the two Bills should be harmonised with the National Health Act. ART should be recognised and efforts should be made by medical practitioners to ensure that the Bills are adopted. The ART Bill, if passed into law, will be a model for African countries. The Bill should be commended in that it goes a step further than South African law by comprehensively recognising the rights of donors, surrogate mothers, commissioning parents and the child.

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139 Umeora et al (n 8) 105.

140 'And they who guard their private parts except from their wives or those their right hand possess, for indeed they will not be blamed, but whoever seeks beyond that then those are the transgressors.'

141 'And those who preserve their chastity, save with their wives and those whom their right hand possess, for thus they are not blameworthy but those who seeketh more than that, those are they who are transgressors.'

142 'And Allah hath given you wives of your own kind, and hath given you from your wives, sons and grandsons, and hath made provision of good things for you.'

143 T Al-Mubarak 'Surrogacy and Islam: Between permissibility and prohibition' (2014) *Islam and Civilisational Renewal* 277 279.

144 FT Christiana 'Surrogate motherhood: A philosophical discourse' (2013) 4 *Journal of Emerging Trends in Educational Research and Policy Studies* 575.

145 CS Sanders 'Surrogate motherhood and reproductive technologies: An African-American perspective' (1992) 25 *Creighton Law Review* 1708.

146 FM Mahlobogwane 'Surrogate motherhood arrangements in South Africa: Changing societal norms?' (2013) 2 *Speculum Juris* 45.

147 TW Bennett *Customary Law in South Africa* (2008) 355.

## 8 Conclusion

Nigeria is a multi-cultural and multi-religious society with a vast population. In times of increased infertility among married couples, desperate legal and illegal measures have been taken to parent a child, including the buying and selling of babies. Surrogacy is practised but left unregulated in Nigeria, making room for a series of child crimes and abuses. An analysis of the gap in the legal framework of surrogacy and artificial reproductive technology in Nigeria calls for attention and an urgent solution. While there is a dire need to regulate surrogacy in Nigeria, cognisance must be taken of the ethnical, religious and cultural values of the country. The rights of commissioning parents, surrogate mothers and unborn children must be protected by prospective laws, with priority given to the best interests of the child. Regulatory and enforcement institutions must be put in place to ensure that acceptable minimum standards are adhered to in the practice of surrogacy.

While surrogacy is a way of bringing solace to infertile couples who desire to have a biological child, like every aspect of life, surrogacy practices are accompanied by challenges. If properly regulated to protect the best interests of the child and to protect the rights of the surrogate mother and commissioning parents, surrogacy could mean an end to several illegal practices in Nigeria, such as the menace of baby factories and illegal adoption practices.



## Cultural values as a source of law: Emerging trends of ubuntu jurisprudence in South Africa

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### Summary

*From time immemorial the cultural value which epitomises togetherness and 'caring for each other' in a community has been a way of life in various African communities, including that of South Africa. According to this value one is his or her brother's or sister's keeper. This philosophy, which developed into a way of life, was expressed before the period of Enlightenment in Europe, considered as foregrounding a human rights discourse. In other words, a human rights discourse in the form of caring for one another was a lived reality and experience in Africa in terms of the ubuntu philosophy. The aim of this article is to examine the emerging trends of the ubuntu jurisprudence in South Africa. The South African model is chosen for a case study for several reasons. The country peacefully transited the apartheid era to democracy, arguably under the guidance of ubuntu. The ubuntu philosophy possibly is part of a South African jurisprudence. Unlike Western philosophy expressed in abstract terms and focused on individualism, the uniqueness of ubuntu rests upon the need to secure social equilibrium, compassion, humaneness and a strong consideration of the other's humanity.*

**Key words:** *ubuntu; cultural values; jurisprudence; South Africa*

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# 1 Introduction

The concept of human rights in the period of the Enlightenment (in Europe and America) was characterised by individualism and the application of rights to abstract subjects.<sup>1</sup> Prior to the Enlightenment, many parts of the world, including Africa, had civilisations in which caring for each other was a common feature. In Africa, and South Africa in particular, such a philosophy of caring for one another is known as 'ubuntu' in the Sotho and Zulu languages, in which the following are notable: *motho ke motho ka batho ba bang* (Sesotho intonation) and *umuntu ngumuntu ngabantu* (Isi-Zulu intonation), which literally mean that a person is a person only through others.<sup>2</sup> The notion of ubuntu is an expression of a harmonious African community way of life in which one's happiness is linked to the group's happiness. It epitomises a legal notion as reflecting a lived experience and is responsive to context.<sup>3</sup> According to Cornell and Van Marle, 'ubuntu in a profound sense, and whatever else it may be, implies an interactive ethic, or an ontic orientation in which who and how we can be as human beings is always being shaped in our interaction with each other'.<sup>4</sup> The philosophy of ubuntu is embedded in the African human rights system in the African Charter on Human and Peoples' Rights (African Charter) which provides for peoples' rights, or collective rights,<sup>5</sup> and also ensures that everyone has a duty towards the community,<sup>6</sup> as well as individual rights.

Although the current 'global' human rights architecture is informed by Enlightenment ideas, ancient African values may still be significant in decoding some national legal systems. Echoing Mazrui, Mbigi writes: 'Africa can never go back completely to its pre-colonial starting point but there may be a case for re-establishing contacts with familiar landmarks of modernisation under indigenous impetus'.<sup>7</sup> It is against this backdrop that this article explores the value of ubuntu in South African law. South Africa is chosen as a case study as its Constitution is considered a model<sup>8</sup> and, in addition, the country achieved the miracle of peaceful transition from the apartheid era to democracy and its jurisprudence has made significant strides in transforming society into an egalitarian one.<sup>9</sup> The article seeks to understand the

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1 MB Ramose *African philosophy through ubuntu* (2005) 83-84.

2 L Mbigi & J Maree *Ubuntu: The spirit of African transformation management* (1995) 1-7.

3 Ramose (n 1).

4 D Cornell & K van Marle 'Exploring ubuntu: Tentative reflections' (2005) 5 *African Human Rights Law Journal* 205.

5 In the title of the African Charter.

6 Arts 27-29 African Charter.

7 Mbigi & Maree (n 2) 5.

8 JC Mubangizi *The protection of human rights in South Africa: A legal and practical guide* (2004) 71.

9 M Langford 'Domestic adjudication and economic, social and cultural rights: A socio-legal review' (2009) *Sur International Journal on Human Rights* 90.

role of ubuntu as a source of law in this development. To be specific, in terms of contribution, it seeks to explore whether there is an emerging ubuntu jurisprudence in South Africa and, if so, what the trends of such jurisprudence are and to what extent they differ from traditional Western approaches. To answer these questions, the article will examine decisions of the courts to unveil the place of ubuntu and to explain the specificity of ubuntu jurisprudence.

The article is divided into four parts including this introduction. The second part unpacks the concept of ubuntu by engaging with theorists' views as well as its role in the Truth and Reconciliation Commission (TRC). The third part examines the value of ubuntu in South African law and its emerging trends. In this part the article explores the ubuntu jurisprudence in the South African legal landscape and unveils its distinctiveness. The fourth and final part summarises the article in the form of concluding remarks.

## 2 Unpacking ubuntu

Although the word 'ubuntu' is regularly spoken of in Southern Africa, it is not simple to define as it has numerous meanings in different contexts. The reason why it is difficult to provide a clear definition of ubuntu in scholarly texts can be that it is rather challenging to transpose its meaning directly into English or other Western languages.<sup>10</sup> For the purpose of this article, given the context, ubuntu may be interpreted to mean

a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where [people have to rely on each other to survive].<sup>11</sup>

The above definition places a specific emphasis on notions of social harmony, love, togetherness and tolerance. For Ramose, ubuntu is the essence of African philosophy. He writes:<sup>12</sup>

Ubuntu is the root of African philosophy. The being of an African in the universe is inseparably anchored upon ubuntu. Similarly, the African tree of knowledge stems from ubuntu with which it is connected indivisibly. Ubuntu then is the wellspring flowing with African ontology and epistemology. If these latter are the bases of philosophy, then African philosophy has long been established through ubuntu. Our point of departure is that ubuntu may be seen as the basis of African philosophy. Apart from a linguistic analysis of ubuntu, a persuasive philosophical argument can be made that there is a 'family atmosphere', that is, a kind of

10 Y Mokgoro 'Ubuntu and the law in South Africa' Paper delivered at the first Colloquium Constitution and Law held at Potchefstroom, South Africa, on 31 October 1997, <http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/98v1mokg.pdf> (accessed 18 January 2018).

11 Mokgoro (n 10) 2.

12 Ramose (n 1) 35.

philosophical affinity and kinship among and between the indigenous people of Africa. No doubt there will be variations within this broad philosophical 'family atmosphere'. But the blood circulating through the 'family' members is the same in its basics. In this sense, ubuntu is the basis of African philosophy.

This vigorous theorisation of ubuntu defines the nature of relationships among Africans. It highlights the significance of being humane in Africa. It shows how humanism encompasses a strong consideration of the other through whom one defines oneself. This emphasis differs from a cultural interpretation in which, in the words of Shutte,

the self [is] something private, hidden within our bodies', in African settings 'the self is outside the body, present and open to all. [It] is the result of the expression of all the forces acting upon us. It is not a thing, but the sum total of all the interacting forces. So we must learn to see ourselves as outside, in our appearance, in our acts and relationships, and in the environment around us.<sup>13</sup>

In this context, the existence of individuals is defined by the interplay between one another.<sup>14</sup> Zwart<sup>15</sup> observes that ubuntu symbolises the need to secure 'collective survival, rather than pursuing individual self-interest, and therefore relies on cooperation, interdependence, and collective responsibility'.

Ramose and others describe ubuntu as an exclusively African way of being. The legal scholar Cornell, however, links ubuntu to human dignity in line with the transformative attributes<sup>16</sup> of the South African Constitution, which seeks to move society away from the wrongs of the past and build an egalitarian society. In Cornell's approach to ubuntu, it is important to forgive the wrongs of the past and live together as one human family where respect for dignity is essential.

This approach is criticised for being false ubuntu, as echoing the 'nation building' or rainbow nation agenda which followed the end of apartheid. Under this agenda the interim Constitution's objective was to provide

a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex ... These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.<sup>17</sup>

13 A Shutte *Ubuntu: An ethic for a new South Africa* (2001) 22-23.

14 Shutte (n 13) 23.

15 T Zwart 'Using local culture to further the implementation of international human rights: The receptor approach' (2012) 34 *Human Rights Quarterly* 555.

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

17 Constitution of the Republic of South Africa 200 of 1993; epilogue after sec 251 (my emphasis).

The consequence could have been a mere amnesty for the perpetrators of apartheid; it was not ubuntu that insists on reparation. Nevertheless, the epilogue above led to the adoption of the policy to establish the TRC,<sup>18</sup> and informed the decision of the courts to grant amnesty to the perpetrators in the AZAPO case.<sup>19</sup> Scholars such as Ramose, reject this as a misinterpretation of ubuntu.<sup>20</sup> Ramose is of the view that the implementers of apartheid strategically relied on ubuntu to avoid taking responsibility for their crimes. They tapped into the African philosophy of humanness to shield themselves against having to repair the wrongs of the past. In this register ubuntu, which is loaded with the notions of patience, kindness and communal cohesion, and cultural uniqueness and interpretive challenges are undermined to make room to advance the notion of a joint and manageable project to be completed under the notion of 'nation building'.<sup>21</sup> In this context, ubuntu is not a precise cultural tradition, but is the result of false and 'bloodless historiography', to quote Ramose.<sup>22</sup>

Furthermore, in the misinterpretation of ubuntu for a specific agenda, there was reliance on a prescription as if wrongdoings of the past were no longer relevant because they occurred a long time ago. This approach ignores the fact that under African law, prescription does not matter, as time cannot delete the truth.<sup>23</sup> In this vein, as correctly argued by Driberg, 'a debt or a feud is never extinguished till the equilibrium has been restored, even if several generations elapse ...'<sup>24</sup>

In an effort to restore equilibrium the TRC was established under the Promotion of National Unity and Reconciliation Act.<sup>25</sup> Anchored in ubuntu, the TRC 'was conceived as part of the bridge-building process designed to help lead the nation away from a deeply divided past to a future founded on the recognition of human rights and democracy'.<sup>26</sup> According to Archbishop Desmond Tutu, the Chairperson of the TRC, the latter underlines the importance of forgiveness and harmony for a better South Africa. This view was crafted in his book *No future without forgiveness*.<sup>27</sup> While calling for forgiveness on the part of the victims, Tutu is of the view that the perpetrators also must take responsibility for the harm caused and

18 *Promotion of National Unity and Reconciliation Act* 34 of 1995.

19 *Azanian Peoples Organization (AZAPO) & Others v President of the Republic of South Africa & Others* 1996 (4) SA 671 (CC) para 19.

20 MB Ramose 'The ethics of ubuntu' in PH Coetzee & APJ Roux (eds) *Philosophy from Africa* (2002) 324. .

21 MO Eze *Intellectual history in contemporary South Africa* (2010) 109-121.

22 R Mogobe 'The ethics of ubuntu' in Coetzee & Roux (n 20) 329.

23 JH Driberg 'The African conception of law' in E Cotran & NN Rubin (eds) *Readings in African law* (1969) 172.

24 As above.

25 *Promotion of National Unity and Reconciliation Act* 34 of 1995.

26 *Truth and Reconciliation Commission Report* (1998) ch 4 48.

27 D Tutu *No future without forgiveness* (2000).

apologise profusely. Subsequently, responsibility and forgiveness prepare the ground for harmony and transformation in terms of reparations in the form of compensation and a change in socio-economic conditions.

Critics of Tutu are of the view that it is almost impossible to apply his theory, which focuses on reconciliation between individuals at the state level, whereas there are several actors, including groups, and numerous other stakeholders.<sup>28</sup> From this perspective, individual reconciliation is not necessarily the panacea of political reconciliation. Nevertheless, it can be argued to Tutu's credit that the state, groups and communities are made up of individuals, and reconciliation between individuals will filter down to society where the personal and political often intertwine. As observed by Oelofsen, Tutu's theory of ubuntu is crafted 'on an Afro-communitarian metaphysics and ethics' which goes beyond 'the private sphere of intimate personal relationships' to cover the community as whole.<sup>29</sup> In this vein, Tutu writes:<sup>30</sup>

A person is a person through other persons. None of us comes into the world fully formed. We would not know how to think, or walk, or speak, or behave as human beings unless we learned it from other human beings. We need other human beings in order to be human. I am because other people are.

Building on the African communitarian way of life or ubuntu, the TRC was a platform to interrogate and unearth the human rights atrocities of the past, through reflection, within a reconciliatory process that aimed to establish the truth, and with perpetrators being encouraged to take responsibility for past deeds. All stakeholders relied on ubuntu to unearth the truth, and to promote reconciliation and healing for both the victims and the perpetrators. Swanson observes that in this context ubuntu as an African philosophy was used beyond the 'forensic' functions of fact – arriving at a finding with regard to the atrocities committed by the former regime.<sup>31</sup>

As well as revealing the truth, the harmony ethos of ubuntu enabled people to understand that they were linked and had to live together under the same sky, hence the need to heal as a society. Describing the TRC, Henebury writes:<sup>32</sup>

28 D Moellendorf 'Reconciliation as a political value' (2007) 38 *Journal of Social Philosophy* 211-12.

29 R Oelofsen 'Afro-communitarianism and the nature of reconciliation' PhD thesis, Rhodes University, 2013 49.

30 D Tutu (introduced by) *Peace: The words and inspiration of Mahatma Gandhi* (2007) 3.

31 D Swanson 'Ubuntu: An African contribution to (re)search for/with a "humble togetherness"' (2007) 2 *Journal of Contemporary Issues in Education* 55.

32 A Henebury 'Review of Cornell, Drucilla, *Law and revolution in South Africa: Ubuntu, dignity, and the struggle for constitutional transformation*' *H-Socialisms, H-Net Reviews* 2, June 2015, <http://www.h-net.org/reviews/showrev.php.id=Y2394> (accessed 2 December 2018).

The act of testimony – which was a central pillar of its proceedings and was a precondition for amnesty – was not only for the sake of the victims who heard the truth about the fate of their loved ones and gained a public acknowledgment of the pervasive human rights violations under apartheid. However, as a shared space of communal mourning, it was also supposed to allow the perpetrators to restore their own human beings.

In other words, the ubuntu philosophy was the healing source upon which every South African needed to rely to be able to recover from the horrors of the past. The building blocks for the miracle in the transition to democracy as a peaceful process were found in 'the pre-European African concept [of] ubuntu [to] establish a personal and national sense of justice'.<sup>33</sup>

Nevertheless, for many the TRC was a travesty of justice as the general perception of unaccountability for harms caused remains a reality. Many perpetrators of human rights violations were granted amnesty and let off the hook or receiving a minimum sentence not proportional to the crime committed in the name of 'restorative justice'. Echoing the South African TRC,<sup>34</sup> Oelofse and Oosthuyzen write:<sup>35</sup>

The TRC did not make enough efforts towards ensuring reconciliation in the end. People believed that reconciliation would occur automatically after the TRC processes had taken place, but this was not the case.

In reality, the high level of emotional pain caused by the truth hinders reconciliation.<sup>36</sup>

Reflecting on the issue Mamdani argues that reconciliation is unachievable without reparations which are essential for social reconciliation.<sup>37</sup> For it to be achieved, to protect the violators of human rights or beneficiaries of the violations, they in return must pay compensation to their victims, and this should be enforced through legislative means.<sup>38</sup> This suggests that '[r]eparations need to be drawn from perpetrators and beneficiaries, in order to level the societal inequalities'.<sup>39</sup> As this did not happen the claim is that for many the TRC was simply a 'denial of justice'. In similar vein, Khulumani (a non-governmental organisation (NGO)) noted that in spite of the 'complexity of the process that the government is faced with', the process of reparations was an integral 'part of the healing of the

33 JR Saul *On equilibrium* (2001) 94.

34 Truth and Reconciliation Commission *Truth and Reconciliation Commission of South Africa Report* 306.

35 M Oelofse & A Oosthuyzen 'The knowledge and perceptions of history students of South Africa's Truth and Reconciliation Commission (TRC)' (2014) 10 *The Journal for Transdisciplinary Research in Southern Africa* 260.

36 As above.

37 M Mamdani 'When does reconciliation turn into a denial of justice?' Sam Nolutshungu memorial lecture (1998); M Mamdani *Citizen and subject: Contemporary Africa and the legacy of late colonialism* (1996).

38 Mamdani (1998) (n 37).

39 Oelofsen (n 29) 111.

nation'.<sup>40</sup> This view is shared by the Apartheid Debt and Reparations Campaign, Jubilee South Africa, which said that 'the issue of accountability for reparations for apartheid human rights violations was still unresolved and vowed to continue its fight for compensation for survivors'.<sup>41</sup> From this standpoint, it was argued that the TRC was a bridge that enabled whites to map out a cynical deal to transfer political power to blacks and keep economic power and privileges in a context where transformation remains a myth.<sup>42</sup> These views clearly underline the importance of reparations in the reconciliation process, even though it could be argued that the adoption of policies of affirmative action which prioritise the previously-disadvantaged groups in various spheres of society is an attempt to advance distributive justice and foster structural changes in order to transform the society into an egalitarian one.<sup>43</sup> In a similar vein, some critics of the concept argue that ubuntu has been 'elevated into a central element of a new cultural nationalism'<sup>44</sup> in the name of nation building, but unfortunately disenfranchised dissidents.<sup>45</sup> Swartz writes that

while ubuntu provides a basis for civic virtue, moral renewal and public-spiritedness, like so much else in the aftermath of apartheid, it conceals the need for redistributive justice and silences those who call attention to it – all in the name of public-spiritedness.<sup>46</sup>

However, restorative justice is more about securing social harmony 'to build partnerships to re-establish mutual responsibility for constructive responses to wrongdoing within [broken] communities'.<sup>47</sup> This approach to justice is not retributive and is not based on punishment but on the need to redress the damage in a fractured society, and is centred on the African communitarian way of life, and has informed the TRC. According to Tutu, it is important to distinguish the 'African understanding of justice' from the Western approach. Tutu observes.<sup>48</sup>

I contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern

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40 K August 'Reconciliation in the South African political context: A challenge to the church for community building' (2005) 88 *Scriptura* 18.

41 As above.

42 P-J Salazar *An African Athens: Rhetoric and the shaping of democracy in South Africa* (2002); KH Wilson 'Is there an interest in reconciliation?' (2004) 7 *Rhetoric and Public Affairs* 367.

43 Oelofsen (n 29) 121.

44 C Marx 'Ubu and ubuntu: On the dialectics of apartheid and nation building' (2002) 29 *Politikon* 52.

45 C Himonga, M Taylor & A Pope 'Reflections on judicial views of ubuntu' (2013) 16 *Potchefstroom Electronic Law Journal* 5.

46 S Swartz 'A long walk to citizenship: Morality, justice and faith in the aftermath of apartheid' (2006) 3 *Journal of Moral Education* 560.

47 L Walker 'Restorative justice: Definition and purpose' in K van Wormer & L Walker *Restorative justice today: Practical applications* (2013) 8.

48 Tutu (n 27) 51.



is not retribution and punishment but, in the spirit of ubuntu, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence. This is a far more personal approach, which sees the offence as something that has happened to people and whose consequence is a rupture of relationships. Thus we would claim that justice, restorative justice, is being served when efforts are being made to work for healing, for forgiveness and for reconciliation.

This statement highlights Africanness or an ubuntu source of forgiveness which informed the TRC. However, the TRC also had the flavour of 'theological demands for confession, repentance and, most importantly, forgiveness'<sup>49</sup> as found in the Christian faith.<sup>50</sup> Accordingly, the perpetrator of the violence or the sinner confesses his or her sin to the victim who forgives, and the matter is resolved. According to Hatch, the forgiveness of the sin by the victim provides a platform on which 'the spiritual reality of ubuntu is released in reconciliation'.<sup>51</sup> This suggests that ubuntu and the Christian faith are linked, hence the pertinence of the view that the 'TRC incorporated restorative justice and was based on the Christian concept of "forgiveness" and the African view of "ubuntu"',<sup>52</sup> or that its reconciliation agenda was 'a theologically developed expression of ubuntu, the much-heralded, traditional African notion of social harmony'.<sup>53</sup> As well, the reference to Tutu's approach to reconciliation as an 'African-Christian vision of ubuntu'.<sup>54</sup>

Notwithstanding the link between the Christian faith and the African value in seeking reconciliation and social harmony, it could be argued that the African reality is more tangible because, as correctly observed by Smit,<sup>55</sup>

[The new] South Africa is not the kingdom of God ... The logic of Christian confession of guilt and forgiveness is not the logic of the public, political and economic world. The grammar of Christian contrition, confession and absolution is not the grammar of public jurisprudence.

In other words, the South African community is real and does not depend only on faith for its existence, but is regulated by norms, social and traditional institutions in which ubuntu is crafted. Bishop

49 August (n 40) 21.

50 TS Maluleke 'National unity and reconciliation in South Africa' in M Guma & L Milton (eds) *An African challenge to the church in the 21st century* (1997) 14.

51 J Hatch 'Between religious visions and secular realities: (Dia)logology and the rhetoric of reconciliation' 1 2, [http://global.wisc.edu/reconciliation/library/papers\\_open/hatch.pdf](http://global.wisc.edu/reconciliation/library/papers_open/hatch.pdf) (accessed 16 June 2017).

52 Oelofse & Oosthuysen (n 35) 257.

53 For a thorough explication of Tutu's ubuntu theology, see MJ Battle *Reconciliation: The ubuntu theology of Desmond Tutu* (1997).

54 Hatch (n 51); see also Salazar (n 42); Wilson (n 42).

55 DJ Smit 'The Truth and Reconciliation Commission: Tentative religious and theological perspectives' (1995) 90 *Journal of Theology for South Africa* 12; see also August (n 40) 24.

Tutu, the Chairperson of the TRC, was resolute in using and permanently referring to the term ubuntu in his conclusions and related statements.

Based on the analysis above it can be argued that ubuntu was trumped by the need for nation building in South Africa. Nevertheless, at the same time, the authentic ubuntu which expresses togetherness cannot be dissociated from harmony and nation building. In spite of the shortcomings of the TRC it may be argued that ubuntu is part of the South African landscape and has influenced the country's jurisprudence. In other words, claiming that ubuntu philosophy was significant in the TRC, which kept South African society together, would not be an exaggeration. In addition, in spite of its relatively low usage by the courts, it cannot be argued that it is not part of the South African legal landscape.

The African cultural value of ubuntu was significant from the beginning in laying the foundation of the new South Africa, and cascades down to the 1996 Constitution as it resonates with its value.<sup>56</sup> Himonga, Taylor and Pope write that 'the relevance of ubuntu for South Africa's new order extended well beyond what a narrow reading of its brief appearance in the post-amble of the interim Constitution might have suggested'.<sup>57</sup> Notwithstanding numerous views<sup>58</sup> which extol ubuntu for being a moral theory which 'serves as a cohesive moral value in the face of adversity',<sup>59</sup> the theory had been criticised for being vague,<sup>60</sup> and a threat to individual freedoms,<sup>61</sup> obsolete and anti-gender equality.<sup>62</sup>

As correctly argued by Himonga, the vagueness of the concept is its strength as it provides avenues for an adjustment of customary realities to advance human rights.<sup>63</sup> It is submitted that ubuntu is an

56 *S v Makwanyane & Another* 1995 (3) SA 391 (CC) para 237.

57 Himonga, Taylor & Pope (n 45) 380.

58 T Metz 'Towards an African moral theory' (2007) 15 *The Journal of Political Philosophy* 321; T Metz & JBR Gaie 'The African ethic of ubuntu/botho: Implications for research on morality' (2010) 39 *Journal of Moral Education* 273; JD Bessler 'In the spirit of ubuntu: Enforcing the rights of orphans and vulnerable children affected by HIV/AIDS in South Africa' (2008) 31 *Hastings International and Comparative Law Review* 33; M Letseka 'Educating for ubuntu/botho: Lessons from Basotho indigenous education' (2013) 3 *Open Journal of Philosophy* 333.

59 M Letseka 'In defence of ubuntu' (2012) 3 *Studies in Philosophy and Education* 4.

60 T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 533; see also P Enslin & K Horsthemke 'Can ubuntu provide a model for citizenship education in African democracies?' (2004) 40 *Comparative Education* 545.

61 GM Nkondo 'Ubuntu as a public policy in South Africa: A conceptual framework' (2007) 2 *International Journal of African Renaissance Studies* 90.

62 D Cornell 'Is there a difference that makes a difference between ubuntu and dignity?' in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the bar, the bench and the academy about the South African Constitution* (2012) 221.

63 C Himonga 'The right to health in an African cultural context: The role of ubuntu in the realisation of the right to health with special reference to South Africa' (2013) 57 *Journal of African Law* 173.

African reality<sup>64</sup> which on every account fosters human rights and social justice, including gender justice. It is an opportunity for the implementation of social justice and equality for the sake of the community as a whole. According to Metz ubuntu is 'fairly precise, as it clearly accounts for the importance of individual liberty, and is readily applicable when addressing present-day South Africa as well as other societies'.<sup>65</sup> The next section focuses on examining ubuntu jurisprudence and the trends in South Africa.

### 3 Ubuntu jurisprudence and its specificity

This section starts with an examination of ubuntu jurisprudence before examining its trends and specificity.

#### 3.1 Ubuntu jurisprudence

This section unpacks aspects of the Constitution and case law to unveil ubuntu jurisprudence.

##### 3.1.1 Ubuntu and the 1996 South African Constitution

Notwithstanding controversial views on ubuntu in the 1993 interim Constitution discussed earlier,<sup>66</sup> the African notion is an indication of what was to be expected in a post-apartheid South Africa. However, the word 'ubuntu' does not feature in the 1996 South African Constitution, which created a perception that the African philosophy was excised from the law of the land. Moosa writes:<sup>67</sup>

The omission of ubuntu must therefore mean that the Constitution was de-Africanised in the re-drafting process. With that the religio-cultural values of African people are also devalued. Thus the desire to formulate a core legal system which encapsulates the multiple value systems in South Africa was not necessarily accomplished in the final Constitution.

The current prevailing perception that ubuntu erroneously was removed from the South African Constitution leads to much criticism. In this regard the Constitution seems to lack the moral strength needed to secure harmony and fight crime in the country and, as such, 'it is a worthless piece of paper which is set to do more harm to us as a people than even the devil-inspired apartheid'.<sup>68</sup> This strong criticism of the Constitution as perceived to be removed from

64 B Chigara 'The *Humwe* principle: A social-ordering *grundnorm* for Zimbabwe and Africa' in R Home (ed) *Essays in African land law* (2011) 113.

65 Metz (n 60) 534.

66 See the epilogue of the 1993 interim Constitution (n 17).

67 E Moosa 'Tensions in legal and religious values in the 1996 South African Constitution' in M Mamdani (ed) *Beyond rights talk and culture talk: Comparative essays on the politics of rights and culture* (2000) 131.

68 C Mogale 'We are breeding a generation of scum' *City Press* 25 October 1997, as quoted by Mogkoro (n 10) 6.

'ubuntu(ism)'<sup>69</sup> in itself is indicative of the significance of ubuntu in South African society.

Nevertheless, the perception as to the removal of ubuntu from the Constitution is perhaps ill-founded. Although the Constitution did not expressly mention ubuntu, a teleological interpretation or an investigation of its intent reveals that the Constitution carries within it the spirit of ubuntu. In this respect it calls for equality, dignity, non-discrimination and all other fundamental rights recorded in the Bill of Rights.<sup>70</sup> Its ability to reconcile the people of South Africa under the equality tenets of the Constitution has led to a characterisation of this Constitution as 'transformative'.<sup>71</sup> The transformation objective of the Constitution is a way of carrying forward the ubuntu(ism) without which society cannot become equal. Letseka correctly observes that '[u]buntu has a critical role to play in enabling South Africans to achieve a common understanding vis-à-vis the constitutional values [revolving] around equality and respect for human rights in general'.<sup>72</sup> Sharing this view, Himonga, Taylor and Pope argue that '[s]ince *S v Makwanyane*, ubuntu has become an integral part of the constitutional values and principles that inform the interpretation of the Bill of Rights and other areas of law'.<sup>73</sup>

Furthermore, ubuntu is elevated by the Constitution which unequivocally recognises customary law applicable by 'the courts subject to the Constitution'.<sup>74</sup> This development illustrates the vital location of ubuntu in the South African legal landscape. It could be argued that subjecting customary law to the Constitution seeks to expunge negative features of customary law from the national law and, more importantly, to prevent marginal development of customary law principles. In this regard, the Constitution expressly requests that '[w]hen 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'.<sup>75</sup> This requirement clearly suggests that the Constitution is paramount and is the benchmark with which all other laws should comply. In reality there is no divergence between the value of the Constitution and ubuntu which is implied in it. On the contrary the two are linked and although South African law in general is under 'the scrutiny of the Constitution, [t]he values of ubuntu can therefore provide it with the necessary indigenous impetus',<sup>76</sup> in the words of Mokgoro.

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69 As above.

70 See Ch 2 of the South African Constitution.

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

72 Letseka (n 59) 48.

73 Himonga, Taylor & Pope (n 45) 370.

74 Sec 211(3) of the Constitution of the Republic of South Africa, 1996.

75 Sec 39(2) (my emphasis).

76 Mokgoro (n 10) 10.

As far as the application of customary law by the courts is concerned, the Constitution remains the benchmark for legislation (including customary law). From this perspective the patriarchal element in customary law, for example, depriving women of the right to property and inheritance, does not comply with the principle of equality enshrined in the Constitution. This was confirmed by the Constitutional Court in the *Bhe* case<sup>77</sup> where the male primogeniture rule under customary law was declared unconstitutional. This example clearly explains the application of customary law 'by the courts subject to the Constitution'.<sup>78</sup>

Nevertheless, the value of customary law cannot be ignored. The significance of customary law was underlined by the *Bhe* Court which noted its flexibility as needed for the resolution of conflicts and preserving the cohesion and harmony in families and 'the nurturing of healthy communitarian traditions such as ubuntu'.<sup>79</sup> Highlighting the importance of customary law, Langa J noted that it

provide[s] a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as ubuntu.<sup>80</sup>

Similarly, in *Mayelane v Ngwenyama*<sup>81</sup> the Constitutional Court reiterated the value of customary law 'as one of the primary sources of law under the Constitution'. According to the Court,<sup>82</sup> this means *inter alia* recognising that

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; and ... [that] these aspects provide a setting which contributes to the unity of family structures and the fostering of cooperation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy communitarian traditions like ubuntu.

Furthermore, while mindful of the need to ensure the constitutionality of customary law, courts are expected to apply customary law<sup>83</sup> whenever such law is applicable to a specific case in a particular

77 *Bhe & Others v Magistrate, Khayelitsha & Others* (2004) AHRLR 212 (SACC 2004).

78 Sec 211(3) of the Constitution.

79 Citing Mokgoro J in *S v Makwanyane* (n 56) paras 307-308.

80 *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) para 45.

81 *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC).

82 *Mayelane v Ngwenyama* (n 81) para 24.

83 Sec 211(3) of the Constitution requires 'the courts to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. See also sec 39(2), which requires the courts to promote the spirit and purport of the Bill of Rights when interpreting any legislation or developing common or customary law.

context. Prior to the *Mayelane* case,<sup>84</sup> customary law was validated in the *Gumede* case<sup>85</sup> where it was held that customary law issues

should not be seen through the prism of marital property regimes under common law or divorce legislation that regulates civil marriages ... but to be understood within their own setting which does not place a premium on the dichotomy between marriages in and out of community of property.<sup>86</sup>

These examples clearly demonstrate that ubuntu, which echoes customary law, has an important place in South African law. In summary, the fact that the Constitution does not mention ubuntu specifically does not mean that this notion is discarded in the supreme law of the land. On the contrary, ubuntu is the source and the inspiration which converts the Constitution into a transformative document. Importantly, customary law, which echoes ubuntu, explicitly was given the force of law by the Constitution<sup>87</sup> and has been given effect to by the Constitutional Court.<sup>88</sup>

### 3.1.2 Ubuntu and the South African courts

This section demonstrates how the courts have shown that ubuntu is a source of law, and it further assists in understanding the meaning or significance of this concept. Claiming that ubuntu is a source of law suggests that a judge cannot simply rely on the Constitution to render judgments without reference to his or her environment, or the local culture and value embedded in society. This reality was recognised outside Africa when Walsh J of the European Court of Human Rights wrote:<sup>89</sup>

In a democracy the law cannot afford to ignore the moral consensus of the community. If the law is out of touch with the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt.

Even though in his context Walsh J was calling for respect for the legislative process, in an African context it amounts to a call for respect to be shown to traditions and social realities on which the law is grounded; to respect the local reality which is also a source of law. In this perspective, Sachs J urges courts to consider 'African law and legal thinking as a source of legal ideas, values and practice' as capable of guiding South African constitutional jurisprudence.<sup>90</sup> He is of the view that the South African legal system will not evolve in an appropriate manner if the courts fail to draw 'from all the streams of justice in the country'; if they do not give 'long overdue recognition'

84 *Mayelane v Ngwenyama* (n 81).

85 *Gumede (born Shange) v The President* 2009 (3) BCLR 243 (CC).

86 *Gumede* (n 85) para 43.

87 Sec 211.

88 See *Mayelane v Ngwenyama* (n 81) and *Bhe* (n 77).

89 *Dudgeon v United Kingdom* (1982) 4 EHRR 149 184.

90 *Makwanyane* (n 56) para 365.

to African legal traditions;<sup>91</sup> or if they do not recognise ubuntu as a source of law. In this vein, as will be demonstrated below, the notion of ubuntu is recognised in numerous examples of South African case law. Judging by the significant place of ubuntu in the jurisprudence of the Constitutional Court, the concept is 'far more important than one might generally tend to assume'.<sup>92</sup> It features in numerous pronouncements of the Constitutional Court,<sup>93</sup> including the following cases:<sup>94</sup> *Makwanyane*;<sup>95</sup> *Port Elizabeth Municipality v Various Occupiers*;<sup>96</sup> *Dikoko v Mokhatla*;<sup>97</sup> *Masethla v President of the RSA*;<sup>98</sup> *Union of Refugee Women v Private Security Industry Regulatory Authority*;<sup>99</sup> *Barkhuizen v Napier*;<sup>100</sup> *Bhe*;<sup>101</sup> *The Citizen v McBride*;<sup>102</sup> and *Koyabe*.<sup>103</sup>

Outside the Constitutional Court, ubuntu was also discussed in *Bophuthatswana Broadcasting Corporation v Ramosa*;<sup>104</sup> *S v Mandela*;<sup>105</sup> *Crossley v The National Commissioner of the South African Police Services*;<sup>106</sup> *Du Plooy v Minister of Correctional Services*;<sup>107</sup> *City of Johannesburg v Rand Properties (Pty) Ltd*;<sup>108</sup> and *AfriForum v Malema*.<sup>109</sup> Although these cases are not of lesser importance, the section focuses on Constitutional Court cases. Ubuntu has informed decisions in various areas of law, including criminal law, private law, eviction law, social security, migrants' rights, contract law and many other fields of law.<sup>110</sup>

91 As above.

92 K Malan 'The suitability and unsuitability of ubuntu in constitutional law: Inter-communal relations versus public office-bearing' (2014) *De Jure* 232.

93 Although there are some decisions by the High Court on ubuntu, the focus here is on the Constitutional Court. For more on ubuntu at the High Court, and those judgments that may be interpreted as capturing the notion of ubuntu, see in general D Cornell & N Muvangua *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012).

94 For an extensive analysis of some of these cases, see Malan (n 92) 234-239.

95 *Makwanyane* (n 56).

96 2005 (1) SA 517; 2004 (12) BCLR 1258 (CC).

97 2006 (6) SA 235; 2007(1) BCLR 1 (CC).

98 2008 (1) SA 566; 2008(1) BCLR 1 (CC).

99 2007 (4) SA 395; 2007 (4) BCLR 339 (CC).

100 2007 (5) SA 323; 2007 (7) BCLR 691 (CC) para 50.

101 *Bhe* (n 77) paras 45 & 163.

102 *The Citizen 1978 (Pty) Ltd & Others v McBride (Johnstone & Others as Amici Curiae)* 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) paras 164-165, 168, 210 & paras 216-218.

103 *Koyabe & Others v Minister for Home Affairs & Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) para 62.

104 1997 HOL 283 (B).

105 2001 (1) SACR 156 (C).

106 2004 (3) All SA 436 (T).

107 2004 (3) All SA 613 (T).

108 (253/06) [2007] ZASCA 25; [2007] 2 All SA 459 (SCA); 2007 (6) SA 417 (SCA); 2007 (6) BCLR 643 (SCA).

109 *Afri-Forum & Another v Malema & Others* [2011] ZAEQC 2; 20968/2010.

110 See T Bennett 'Ubuntu: An African equity' 2011(14) *Potchefstroom Electronic Law Journal* 30.

The landmark case which signalled ubuntu as a source of law was *Makwanyane*.<sup>111</sup> In this case capital punishment was declared unconstitutional because of its lack of compassion, respect for dignity and solidarity, amongst other grounds. In this important judgment, Langa<sup>112</sup> and Mokgoro<sup>113</sup> explained that ubuntu was a culture that emphasises community, interdependence, togetherness, respect, conformity to basic norms and collective unity, and denotes humanity and morality. In addition, it is equivalent to duty to the community and sharing of co-responsibility and the mutual enjoyment of rights by all. Even though Justices Ackerman, Didcott, Kentridge, Kriegler and O'Regan, as well as the main order, did not mention ubuntu, nor did they find that the death penalty was inherently incompatible with South African culture, the features of ubuntu, as highlighted by Justices Langa,<sup>114</sup> Mokgoro,<sup>115</sup> Sachs,<sup>116</sup> Madala<sup>117</sup> and Mahomed,<sup>118</sup> were instrumental in abolishing the death penalty which violates the philosophy of compassion, love and caring for each other and, above all, of dignity. Malan in his analysis of the significance of ubuntu in South African jurisprudence writes (correctly in my view) that '[t]he first case where ubuntu featured prominently was in *S v Makwanyane*'.<sup>119</sup> Although ubuntu was not mentioned by all the judges, and did not appear in the main judgment, its essential place in reaching the decision cannot be ignored.

The other interesting constitutional law case where the nature and aim of ubuntu were clarified is *AZAPO v TRC*.<sup>120</sup> In this case a black consciousness movement questioned the constitutionality of the amnesty provided to culprits of apartheid era crimes by the TRC. According to the applicant such amnesty was unconstitutional as it prevented the victims of apartheid seeking a remedy for the violations of their rights provided for by the Constitution. The Court disagreed with the applicant on the ground that the aim of the TRC was to 'promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past'.<sup>121</sup>

Although this decision is controversial, as shown earlier, it can be argued that it infused the South African legal system with the African culture of understanding, tolerance and reconciliation. Henebury observes that the *Azapo* decision 'amount[s] to a dismissal of retributive in favour of restorative justice, bringing to the fore the

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111 *Makwanyane* (n 56).

112 *Makwanyane* (n 56) para 224.

113 *Makwanyane* para 308.

114 *Makwanyane* para 224.

115 *Makwanyane* paras 307, 308, 309, 311 & 313.

116 *Makwanyane* paras 374-380.

117 *Makwanyane* paras 237, 241, 243, 244, 245, 250 & 266.

118 *Makwanyane* para 263.

119 Malan (n 81) 235.

120 *AZAPO & Others v TRC & Others* 1996 (4) SA 671 (CC).

121 *AZAPO v TRC* (n 120) para 677.



aspirational character of ubuntu'<sup>122</sup> which seeks social harmony to transform the society for the good of all.

In relation to the rights of migrants, another insightful case in which the Constitutional Court relied on ubuntu to protect a non-South African citizen's right to social security<sup>123</sup> is *Khosa*.<sup>124</sup> A group of permanent residents in South Africa challenged the constitutionality of some provisions of the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997. These provisions limited access to social security to South African citizens. The provisions also excluded primary caregivers from accessing the Child Support Grant for children in their care, especially where these children are non-South African citizens. Foster-care parents did not have to comply with the requirement of citizenship; children of non-citizens would have been separated from their families to join a foster family in order to benefit from the Child Support Grant.

The Court acknowledged the vulnerability of permanent residents and held that refusing them the benefit of social security was inconsistent with section 27(1)(c) of the Constitution which entitles 'everyone' to access to social security. The Court further held that excluding permanent resident children from social grants constituted unfair discrimination and, taking into account the need of care of everyone, including permanent residents, it concluded that 'everyone's right to access social security encompasses permanent residents in the country'. This ruling is another application of ubuntu.

This type of reasoning also informed the decision of the Court in another case dealing with migrants, namely, that of *Union of Refugee Women*.<sup>125</sup> At the centre of this case is the prohibition upon refugees taking employment in the security industry in South Africa. The Court per Sachs J held that this prohibition constituted unfair discrimination.<sup>126</sup> Relying on ubuntu, Sachs J emphasised that '[t]he culture of providing hospitality to bereft strangers seeking a fresh and secure life for themselves is not something new in our country'.<sup>127</sup>

In a similar vein, in *Koyabe*<sup>128</sup> the issue before the Constitutional Court was to find whether or not certain constitutional and statutory rights of some Kenyan nationals living in South Africa had been violated by an administrative action (amounting to the withdrawal of residence permits) taken by the Department of Home Affairs. The Court unanimously found that it was illegal or inappropriate to

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122 Henebury (n 32) 2.

123 See sec 27(1)(c) of the Constitution.

124 *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

125 *Union of Refugee Women* (n 99) para 145.

126 *Union of Refugee Women* (n 99) para 147.

127 *Union of Refugee Women* para 145.

128 *Koyabe* (n 103) (my emphasis).

declare foreigners illegal inhabitants in the country without providing reasons behind the decision: The Court held:<sup>129</sup>

In the context of a contemporary democratic public service like ours, where the principles of *batho pele*, coupled with the values of *ubuntu*, enjoin the public service to treat people with respect and dignity and avoid undue confrontation, the Constitution indeed entitles the applicants to reasons for the decision declaring them illegal foreigners. It is excessively over-formalistic and contrary to the spirit of the Constitution for the respondents to contend that under section 8(1) they were not obliged to provide the applicants with reasons.

This is a clear injunction to the state to respect the dignity of all people in reaching a decision affecting people whether they are foreign nationals or not. This decision by the Court demonstrates that *ubuntu* is a source of law. Sharing this view, Himonga, Wilson and Pope write that '[w]ere it not able to call on the principles of *ubuntu*, one wonders how the Court would have substantiated its position'.<sup>130</sup>

The importance of *ubuntu* in the law of contract was highlighted by the Constitutional Court in the case of *Barkhuizen v Napier*<sup>131</sup> in which the Court had to pronounce whether the time-limitation clause in a short-term insurance contract should comply with the reasonableness and fairness standards or be found to violate public policy. The Court responded positively by highlighting the need to advance reasonableness and fairness, standards which echo *ubuntu*. The Court held:<sup>132</sup>

Broadly speaking the test announced in *Mohlomi*<sup>133</sup> is whether a provision affords a claimant an adequate and fair opportunity to seek judicial redress. Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals. Public policy is informed by the concept of *ubuntu*. It would be contrary to public policy to enforce a time-limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress.

The other case in which the relevance of *ubuntu* to the law of contract is evident is *Everfresh Market Virginia*.<sup>134</sup> The Constitutional Court was approached to decide whether values, such as *ubuntu*, that inform the Bill of Rights should apply in the law of contract or whether the latter should rely on law from the colonial period embedded in the common law. The matter was raised after Everfresh had been evicted from a leased property by Shoprite Checkers. The decision of the High Court, upheld by the Supreme of Court of Appeal, was in favour of Shoprite with a strong reliance on the

129 *Koyabe* (n 103) para 62.

130 Himonga, Wilson & Pope (n 45) 415.

131 *Barkhuizen v Napier* (n 100).

132 *Barkhuizen v Napier* para 51 (my emphasis).

133 *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC).

134 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

common law. While seeking leave to appeal, the applicant advanced new arguments based on the need to consider the values that inform the Bill of Rights, namely, good faith and ubuntu. While expressly recognising the significant place of ubuntu 'as informing public policy in a contractual context',<sup>135</sup> the majority of the Court, however, refused leave to appeal not because of the inconsistency of ubuntu and good faith with contract law, but because the applicant had initially agreed with the decision of the High Court based on the common law,<sup>136</sup> and raised the ubuntu question only in the Constitutional Court. Moseneke J observed:<sup>137</sup>

Had the case been properly pleaded, a number of interlinking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact.

The minority opinion underlined the need effectively to transform contract law by moving from the colonial legal tradition at the centre of common law<sup>138</sup> to adopt an approach which captures ubuntu. Yacoob J explained:<sup>139</sup>

It may be said that a contract of lease between two business entities with limited liability does not implicate questions of ubuntu. This is in my view, too narrow an approach ... The idea that people or entities can undertake to negotiate and then not do so because this attitude becomes convenient for some or other commercial reason, certainly implicates ubuntu.

The importance of ubuntu can also be perceived in a case of eviction. In *Port Elizabeth Municipality v Various Occupiers*<sup>140</sup> the case was anchored on the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act (PIE).<sup>141</sup> The aim of this legislation is to protect homeless people who occupy private property from illegal eviction. In this case, the Municipality sought an eviction order against 68 persons who had erected shacks on private land within the municipality after having received a petition signed by 1 600 persons who supported the removal of illegal occupiers. Sachs J reminded the applicant that

PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern.<sup>142</sup>

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135 *Everfresh Market Virginia* (n 134) para 61.

136 *Everfresh Market Virginia* paras 56, 59, 60 & 61.

137 *Everfresh Market Virginia* para 71.

138 *Everfresh Market Virginia* para 23.

139 *Everfresh Market Virginia* para 24.

140 *Port Elizabeth Municipality* (n 96) para 37.

141 Prevention of Illegal Evictions From and Unlawful Occupation of Land Act 19 of 1998.

142 *Port Elizabeth Municipality* (n 96) para 37.

This view was a clear reliance on ubuntu in dealing with issues of private property. Sachs J reminded the defendant:<sup>143</sup>

We are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy and should be considered when dealing with foreigners.

This reliance on ubuntu has led to the development of what is known as the concept of 'meaningful engagement' in which parties to a dispute are encouraged to talk to each other, to engage, to find suitable solutions to conflicts. 'Meaningful engagement' was first used in the case of *Olivia Road*,<sup>144</sup> where the City of Johannesburg, seeking an eviction order to remove approximately 400 people who illegally occupied unsafe buildings, was requested to meaningfully engage with them to 'resolve the differences and difficulties aired in this application in the light of the *values of the Constitution*, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned'.<sup>145</sup> After engaging with each other the parties agreed to make the building safer and more habitable and provide alternative accommodation for the illegal occupiers in the city. This agreement was endorsed by the Court, which later ruled that allowing a municipality to evict people from their home without meaningfully engaging them would amount to the violation of the spirit and purpose of the Constitution.<sup>146</sup>

The concept of meaningful engagement has now been institutionalised as it was relied on in numerous cases,<sup>147</sup> including matters around education rights,<sup>148</sup> but it is criticised for not engaging the substantive rights at stake, deferring the outcome of the litigation to the engagement between the parties.<sup>149</sup> Liebenberg is concerned that 'meaningful engagement as an adjuratory strategy may descend unto an unprincipled, normatively empty process of

143 As above. A similar conclusion decision was reached in *Koyabe* (n 103).

144 *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).

145 Order 1 (my emphasis).

146 *Olivia Road* (n 144) para16.

147 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC); *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC), *Abahlali base Mjondolo Movement of South Africa & Another v Premier of the Province of KwaZulu-Natal & Others* 2010 (2) BCLR 99 (CC).

148 *Governing Body of the Juma Masjid Primary School v Essay* NO 2011 (8) BCLR 761 (CC) (see paras 74-78); *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC) paras 128 & 139; *MEC for Education v Governing Body of the Rivonia Primary School* 2013 (6) SA 582 (CC) paras 69, 72 & 73.

149 S van der Berg 'Conceptualising meaningful engagement in South Africa: Eviction cases' exclusive gem?' 16 November 2012, <http://ohrh.law.ox.ac.uk/conceptualising-meaningful-engagement-in-south-africa-eviction-cases-exclusive-gem/> (accessed 17 June 2017).

local dispute settlement'.<sup>150</sup> Nevertheless, it could be argued that this approach is 'valuable and it advances constitutional justice particularly by ensuring that the parties themselves become part of the solution',<sup>151</sup> on the understanding that they are members of a human family. In addition, it enables the Court to advance humanism and compassion in reading the law, and this approach echoes ubuntu philosophy which cannot be dissociated from the spirit of the Constitution. This link is expressed by Sachs J<sup>152</sup> in his call for the infusion of an 'element of grace and compassion into the formal structure of the law' and always to remember the element of human interdependence.<sup>153</sup>

The significance of ubuntu also has surfaced in the law of delict. In *Dikoko v Mokhatla*<sup>154</sup> the Court was called upon to determine whether municipal councillors are liable for defamation for statements made in executing their official duties and whether a public hearing of the Council is protected by privilege.<sup>155</sup> Upholding the judgment of the High Court, the Constitutional Court found that statements were not afforded privilege by statute of the Constitution. In their judgment, both Mokgoro and Sachs JJ relied on ubuntu to highlight the inadequacy of the damages imposed by the High Court. In Mokgoro's view, the amount imposed was extremely high,<sup>156</sup> and Sachs was of the view that a request for an honest apology would have been enough to repair the prejudice suffered.<sup>157</sup>

Essentially, the two justices called for restorative justice in a case of defamation which involved restoring a person's self-worth or dignity. The latter is not necessarily repaired through monetary compensation, but could be settled by an apology or withdrawal of the defamatory comments as the core objective ultimately is to restore harmony between the parties, as expressed in ubuntu principles.<sup>158</sup> As correctly noted by Himonga, Wilson and Pope, this decision 'reaffirmed the important constitutional status of ubuntu',<sup>159</sup> by explaining that it

has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It

150 S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of "meaningful engagement"' (2012) 12 *African Human Rights Law Journal* 19.

151 *Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 97.

152 As above; see also *Port Elizabeth Municipality* (n 96) para 37.

153 *Hoërskool Ermelo* (n 151).

154 *Dikoko v Mokhatla* (n 97).

155 In terms of sec 28 of the North West Municipal Structures Act 3 of 2000.

156 *Dikoko v Mokhatla* (n 97) para 80.

157 *Dikoko v Mokhatla* paras 116-119.

158 *Dikoko v Mokhatla* paras 69 & 112.

159 Himonga, Wilson & Pope (n 45) 402-404.

feeds pervasively into and enriches the fundamental rights enshrined in the Constitution.<sup>160</sup>

Emphasising the importance of ubuntu in the law of delict, Bennett describes the *Dikoko* case as instrumental in showing that an African concept at the centre of this article is applicable in matters of defamation.<sup>161</sup>

The other defamatory case in which the Constitutional Court referred to ubuntu was the case of *The Citizen v McBride*.<sup>162</sup> Under the Promotion of National Unity and Reconciliation Act of 1995, Mr McBride was granted amnesty for the murder committed while he was an ANC operative. However, when McBride applied for a senior police post and was appointed, the newspaper *The Citizen* published articles claiming that he was a 'murderer' and had no contrition or remorse for his crime. The Court had to decide whether a newspaper was liable for defamation for publishing articles that called the respondent a 'murderer' and indicating that he lacked contrition for his crime. According to the majority judgment the claim about the lack of contrition of the defendant only was defamatory,<sup>163</sup> hence the Court awarded Mr McBride R50 000 in damages.

Nevertheless, the minority judgment found for the respondent. It highlighted the importance of ubuntu which is 'the embodiment of a set of values and moral principles which informed the peaceful co-existence of the African people in this country who espoused ubuntu based on, among other things, mutual respect'.<sup>164</sup> Mogoeng J explicitly underlined 'our constitutional values and our unique and rich history' based on ubuntu which should be applied,<sup>165</sup> particularly in 'cases of defamation that relate to the amnesty process sensitivity to this national project is called for. The law cannot simply be applied with little regard to the truth and reconciliation process and ubuntu.'<sup>166</sup> In other words, more attention should have been paid to the ubuntu philosophy by the majority opinion in this case.

In the final analysis ubuntu informs the decisions of South African courts and therefore is a valuable source of law as demonstrated through court decisions. From the foregoing, it is imperative to identify the trends of ubuntu jurisprudence.

### 3.2 Trends and distinctiveness of ubuntu jurisprudence

From the above examination of the Constitution and case law informed by ubuntu, it is observed that unlike jurisprudence in the West, which foregrounds the abstract and the individual, ubuntu

160 *Dikoko v Mokhatla* (n 97) para 113.

161 Bennett (n 110) 40.

162 *The Citizen 1978 (Pty) Ltd v McBride* (n 102).

163 *The Citizen* (n 102) para 136.

164 *The Citizen* para 217.

165 *The Citizen* para 244.

166 *The Citizen* para 243.

jurisprudence is characterised by a 'legal subject as a living and lived experience'.<sup>167</sup> Essentially, it seeks equilibrium, fairness, concord and harmonisation of human relations.<sup>168</sup> In its quest for social harmony, it becomes flexible and provides the necessary space needed by judges to reach their objective of ensuring that their judgment is responsive to a specific context at a particular time. According to Ramose, ubuntu jurisprudence puts a 'strong emphasis on the creativity of the judge to advance the compassion and harmony and preserve "the family atmosphere"'.<sup>169</sup>

The other specificity of ubuntu jurisprudence is that it disregards the notion of prescription which is considered an impediment to unveiling the truth which is the core element of justice. In other words, unlike in Western jurisprudence where prescription at all times should be observed, ubuntu law has no such limitation and the matter can reach the court at any time. This practice is informed by the fact that the concrete character of the law originates from people's tangible experiences. Mbaye explains that prescription is alien to Africa in the following terms:<sup>170</sup>

Prescription is unknown in African law. The African believes that time cannot change the truth. Just the truth must be taken into consideration each time it becomes known, so must no obstacle be placed in the way of the search for it and its discovery.

Sharing this view, Ramose argues that 'law as a continuous live experience cannot reach the point of finality' or cannot be obstructed by prescription which in ubuntu philosophy is considered as a 'mechanism to affirm and eternalise an injustice'.<sup>171</sup>

Unlike Western concepts of law, ubuntu jurisprudence is not determined by the typology of laws such as contract law, defamation law, delict, and so forth, but by its appetite to find the truth and its consideration of the humanity of the parties to a case. From this perspective it always seeks to preserve the tree of humanity with the view that the parties to a case are all branches of the same tree. Therefore, in its endeavour to humanise justice, it relies on reconciliatory notions such as 'meaningful engagement', which enables litigants to talk to one another and seek an amicable settlement to the dispute. For Ramose, ubuntu jurisprudence captures three elements simultaneously at play, namely, 'the speech of reason,

167 Ramose (n 1) 72.

168 K Mbaye 'The African conception of law' in R David & International Association of Legal Sciences (eds) *The legal systems of the world: Their comparison and unification* (1974) 2 *International Encyclopaedia of comparative law* 37.

169 Ramose (n 1) 72.

170 Mbaye (n 168) 147.

171 Ramose (n 1) 86-87; see also HV Alison 'Redefining "property": The constitutional battle over land redistribution in Zimbabwe' (1994) *Journal of African Law* 146-152.

responsiveness to concrete experience, and the laying down of a rule or rules for responding to a specific experience'.<sup>172</sup>

It could be argued that unlike Western law which finds its source in equity,<sup>173</sup> ubuntu jurisprudence goes beyond equity and is based on local reality for the sake of preserving harmony, social justice and dignity. Even though the latter is often equated to ubuntu, it is important to note, as correctly argued by Bennett, 'while [t]he Western conception of dignity envisages the individual as the right-bearer, ubuntu sees the individual as embedded in a community'.<sup>174</sup> This understanding and implementation of ubuntu is important in fostering human rights in South Africa and Africa in general because, as correctly argued by Merry, 'for human rights to be culturally legitimate, they must fit into existing normative and ways of thinking'.<sup>175</sup>

## 4 Concluding remarks

The aim of this article was to assess the extent to which the cultural value of ubuntu, which echoes the togetherness, compassion and respect for dignity in communities, is a source of law in South Africa. If so, it aimed to unveil the emerging trends of ubuntu jurisprudence. During this interrogation the article unpacked the concept of ubuntu which includes an exploration of its role in the TRC. It proceeded to examine emerging ubuntu jurisprudence to unveil its trends and distinctiveness.

First, in terms of findings the article found that ubuntu was significant in achieving a peaceful transition from apartheid to a democratic state in South Africa. Even though for many the TRC did not yield positive results as the question of reparation is still pending, in line with the ubuntu requirement this transition was built on forgiveness, tolerance, reconciliation and the need for restorative justice for the sake of the entire country. Although some views hold that ubuntu was used to advance the 'nation-building' agenda that followed the transition to democracy, it is also credited with the peaceful transition to democracy in South Africa, which is considered an achievement.

Second, the article found that in the early days of constitutionalism in South Africa, the interim Constitution expressly referred to ubuntu as a tool to establish an egalitarian nation. Although the concept of ubuntu did not appear in the final Constitution, its transformative attributes based on equality, dignity, respect for human rights and the

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172 Ramose (n 1) 87-88.

173 Bennett (n 110).

174 Bennett (n 110) 48.

175 SE Merry *Human rights and gender violence: Translating international law into local justice* (2006) 179.



prohibition of discrimination echo the ubuntu notion of caring for one another. Furthermore, the Constitution unambiguously recognised customary law as a source of law to be applied subject to it, and this recognition was highlighted by some judges in the cases of *Bhe*,<sup>176</sup> *Mayelane*<sup>177</sup> and *Gumede*.<sup>178</sup>

Third, the concept of ubuntu informed the decisions of the Constitutional Court in many other cases involving criminal law, immigration, social security, eviction, delict and many others. The article found that the cultural value of ubuntu indeed is a source of law in South Africa.

In terms of trends and specificity, unlike Western ideas of law, ubuntu jurisprudence originates from lived experience and a local context with a strong emphasis on the need to preserve social harmony. It does not believe in prescription which is considered an obstruction to justice. In addition, its flexibility enables the judge to create responsive solutions to the problem without focusing on branches of laws. Ubuntu jurisprudence echoes the notion of togetherness of African people by enabling the judge to create and rely on reconciliatory notions such as 'meaningful engagement' to secure social equilibrium. It is hoped that unveiling the trends and specificity of ubuntu jurisprudence or the African approach to law will inspire other African countries to rely on local realities to protect human rights, as this method legitimises the human rights discourse and enhances the enforcement of these rights because of their embodiment in the local community.

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176 *Bhe* (n 77).

177 *Mayelane* (n 81).

178 *Gumede* (n 85).

## Editorial: Special focus on 'Dignity takings and dignity restorations'

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In her book published in 2014, *We want what's ours: Learning from South Africa's land restitution program*, Professor Bernadette Atuahene introduced two significant and inter-related concepts, namely, 'dignity takings' and 'dignity restoration'. Atuahene defined 'dignity takings' as the confiscation of property that also involves the dehumanisation of people so dispossessed of their property as well as the deprivation of their dignity.

Atuahene argues that the appropriate remedy for a dignity taking is dignity restoration, a concept based on restorative justice principles. Dignity restoration seeks not merely to compensate for the legal harm, but also to address the *dignitas* and social harm, thereby restoring to those dispossessed their humanity. The process of dignity restoration, she argued, may also serve to eliminate the vulnerability and recognise and reinforce the agency of those who had been dispossessed.

Professor Atuahene tracks these two concepts by examining the processes of land dispossession and land expropriation in South Africa during colonialism and apartheid and their devastating impact on black individuals and communities (dignity takings). She then explores subsequent steps taken by the post-apartheid democratic government to 'make whole' those who had suffered from the theft of their land, beyond the formal legal process of reparations (dignity restoration).

In this volume of the *African Human Rights Law Journal*, three contributors examine dignity takings and dignity restoration in three contexts: The first revisits this issue with a focus on the Popela community of Limpopo Province in South Africa whose land was expropriated; the second and third reach geographically beyond South Africa to Kenya and Nigeria, and expand the conceptual moorings of dignity takings and dignity restoration from land and property to the criminalisation of same-sex conduct and the

deprivation of the property rights of African women under customary law.

In the first article, 'From reparations to dignity restoration: The story of the Popela community', Atuahene and Sibanda explore the plight of the Popela community who were subjected to dignity takings by successive colonial and apartheid regimes. Their struggle was a long and protracted one, but nevertheless offered significant promise. This is because the post-apartheid democratic government publicly committed itself not only to providing reparations to the Popela community and others similarly situated, but also to facilitating the processes of dignity restoration.

Pondering whether the South African government has facilitated or undermined dignity restoration for the Popela community, Atuahene and Sibanda detail a litany of legal and political gains and setbacks in the land restitution process, culminating in a Constitutional Court victory for the Popela community. The judgment signified a comprehensive remedial approach to compensate for the dignity takings of the Popela community and the beginning of the dignity restoration project for them. Despite this legal victory, the South African government failed to follow up on the judgment and provide the relief accorded the community.

Atuahene and Sibanda highlight a *lacuna* in the effectiveness of socio-economic rights litigation and the ensuing jurisprudence to deliver on the promises of the Constitution to poor and marginalised communities. They point out how court victories that explicitly provide for remedial action to be taken by government are often not followed by executive action in implementing these remedies. As an example, they refer to the significant Constitutional Court decision in *Grootboom*,<sup>1</sup> where a combination of indifference and incompetence led to Ms Grootboom dying in her shack several years later, without her and her co-litigants ever receiving the houses that had been to be allocated to them.

Similar indications of official indifference and incompetence are evident in the wake of the Constitutional Court victory for the Popela community, while some in the community also suspect that corruption may be at play in their situation. In a rather dispiriting conclusion, Atuahene and Sibanda show how several years after the court victory, dignity restoration still is not within reach for the Popela community, although the members of the community remain hopeful. The authors warn that the failure to engage in a meaningful process of dignity restoration for the Popela community and others

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1 *Government of the Republic of South Africa v Grootboom & Others* 2001 (1) SA 26 (CC).

jeopardises the fledgling constitutional democracy, leading to greater instability that will multiply across South Africa.

In 'From disgust to dignity: Criminalisation of same-sex conduct as a dignity taking and the grassroots battle to achieving dignity restoration', Shaw analyses whether the criminalisation of consensual same-sex conduct in Kenya constitutes a 'dignity taking'. In pursuing his research question, Shaw builds on Atuahene's scholarship on dignity takings, as well as the recent work of legal scholars and social scientists who extend the concept to other spheres of inquiry. These scholars see dignity takings as a useful methodology for understanding the range of dignity-related harms inflicted by the state on individuals and communities.

Although Atuahene and other scholars have cautioned against extending the concept of dignity taking that may dilute its analytic potency, Shaw employs a 'body as property' framework to argue that the criminalisation of same-sex conduct in Kenya constitutes a dignity taking. He sees this framework as an effective way to illustrate that the violation of the bodies of LBGTQ people by the state (through forced medical and other tests), as well as 'othering' LBGTQ people (through stigma) constitute both direct and indirect takings.

As in the property dispossession context, where reparations are not sufficient, so too decriminalising same-sex conduct is insufficient for the purposes of dignity restoration. Shaw points out that decriminalising same-sex conduct is but one step in the process of dignity restoration. What will be required is a range of legal and extra-legal steps by the government to combat widespread homophobia that continue to condone violence and discrimination against LBGTQ people.

Shaw questions whether the activism and advocacy by civil society advocates with the specific goal of decriminalising same-sex conduct constitute a form of dignity restoration. He concludes that they probably do not, since same-sex conduct as well as the resultant queer identities remain a crime in Kenya, giving rise to a particularised homophobia ready to be conscripted by opportunistic politicians.

In 'The shadow of legal pluralism in matrimonial property division outside the courts in Southern Nigeria', Diala explores the issue of legal pluralism and specifically the interaction of state and customary law in Southern Nigeria. Building on the work of Atuahene, he argues that the denial of women's rights under customary law to matrimonial property in the case of divorce or death results in dignity takings as such denial ignores the agency of women, especially in the economic realm. Such denial also discounts the capacity of women to make informed decisions regarding their contributions to matrimonial property.

The author notes that dignity takings occur on two fronts. The first is in the private realm, where men rely on customary law to deny women equality in the marriage, in effect treating women as minors, therefore depriving women of their rightful access to matrimonial

property. The second is a public or state failing, namely, the failure to create the regulatory conditions that might enable women with a rightful claim to marital property, either through constitutional or legislative means.

Diala argues that dignity restoration occurs through the interventions of the state that are mindful of the power inequalities in customary law and therefore act to redress such power imbalance in favour of women. To demonstrate the point, he highlights the active interventions of a government agency, the Social Welfare Department, mandated to protect the rights of women and children. These interventions, according to the author, are 'facilitating a living customary law of matrimonial property', which in no small way contributes to dignity restoration.

The concepts of dignity takings and dignity restoration provide an empathetic and innovative approach to issues of harm and attendant remedies. They centre the experiences of the victims and allow for a fuller recognition of the dimensions and consequences of dispossession, beyond the legal to include the human. Such recognition thereby enables the restoration of dignity and humanity for those previously dispossessed and allows for societal healing, social sustainability and for democracy to flourish.

Professor Atuahene's intellectual contribution to land dispossession through an analysis of dignity takings and dignity restoration has been significant. This special focus furthers the discussion and will hopefully spur scholars and activists to continue to expand our intellectual bandwidth as we continue to address historical harms.

## From reparations to dignity restoration: The story of the Popela community

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### Summary

*In certain circumstances property takings are part of a larger strategy to further subjugate a certain group within the polity by denying their humanity or their capacity to reason. These takings involve more than the confiscation of property; they also involve the deprivation of dignity. In her book, We want what's ours: Learning from South Africa's land restitution program, Atuahene has called these dignity takings. The Popela people are a resource-poor, but culturally-rich African community from South Africa's Limpopo region that the colonial and apartheid regimes subjected to dignity takings. The post-apartheid state was interested not only in providing compensation for property taken from the Popela community and others, but also facilitating dignity restoration – a comprehensive remedy that addresses the deprivations of property as well as dignity. At the end of a protracted legal battle, the Constitutional Court ruled that the Popela community was entitled to reparations requiring the post-apartheid state to purchase the disputed land from its current owners and return it to the community. However, the state went above and beyond the Court-ordered remedy and tried to facilitate dignity restoration by expanding the number of community members entitled to land and increasing the amount of land transferred. The problem, however, is that over ten years since the much-celebrated court victory, the state has failed to deliver the more modest reparations mandated by the Constitutional Court as well as the more ambitious remedy designed to bring about dignity restoration. This article charts the consequences of the state's failed move from reparations to dignity restoration.*

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**Key words:** *property taking; confiscation; dignity; restoration; reparations; post-apartheid state*

## 1 Introduction

In August 2008 several South African newspapers carried a story about a desperately poor woman in her forties who had died in her shack.<sup>1</sup> She was not the victim of some cruel crime, nor had she been reported to be involved in any criminal conduct. In fact, the news reports all stated that she had succumbed to a short illness. There is nothing remarkable or spectacular in that. So who was this woman and why did the South African popular media believe that the public needed to know of her demise? This woman was Irene Grootboom.

Ms Grootboom was the woman behind the now internationally-renowned South African Constitutional Court case of *Grootboom*.<sup>2</sup> In this case the Court handed down a decision against the government for failing to vindicate Ms Grootboom's right to housing, a socio-economic right enshrined in the Bill of Rights. At the time, *Grootboom* represented a watershed jurisprudential moment in the judicial enforcement of socio-economic rights. In fact, *Grootboom* is widely acknowledged as having played a pioneering role in shaping how the law and discourse around socio-economic rights in South Africa has developed.<sup>3</sup> However, the favorable Constitutional Court order had little practical impact on Ms Grootboom's life, and most certainly did not save her from the ignominy of living the rest of her life still residing in a shack. If anything, Ms Grootboom's ultimate plight well illustrates the sometimes illusory nature of court victories where rights are vindicated, but poor claimants must patiently await executive action in order to receive an effective remedy.<sup>4</sup> Unfortunately, in the instance of Ms Grootboom her wait was in vain.

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1 P Joubert 'Grootboom dies homeless and penniless' *Mail & Guardian Online* 8 August 2008, <https://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless> (accessed 11 December 2018).

2 As above; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 26 (CC).

3 M Pieterse 'Coming to terms with the judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 415; S Liebenberg 'The interpretation of socio-economic rights' in S Woolman (ed) *Constitutional law of South Africa* (2008); D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for the future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; DB Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 135-152; C Scott & P Alston 'Adjudicating constitutional priorities in a transnational context: A comment on Soobramoney's legacy and Grootboom's promise' (2000) 16 *South African Journal on Human Rights* 206.

4 S Liebenberg 'The implications of Grootboom for current social security policy in South Africa' (2001) 17 *South African Law Journal* 211; C Mbazira 'Non-implementation of court orders in socio-economic rights litigation in South Africa: Is the cancer here to stay?' (2009) 9 *ESR Review* 2. There are numerous examples of rights being vindicated but with subsequent delays in the implementation.

The land restitution matter of the *Popela Community* is another example of how an important judicial pronouncement has been undermined by the executive's inability or unwillingness to enforce a potentially life-changing court order. The article will discuss the community's 12-year legal battle to regain their land stolen under the permissive watch of the colonial and apartheid regimes. Despite a court victory, their battle is still ongoing. The reality is that it was nothing short of a miracle that impoverished communities such as Popela and Ms Grootboom's were ever able to secure the intellectual and monetary resources to litigate. After emerging victorious from the lengthy, taxing litigation processes, not surprisingly the communities expected that the state would implement the decisions in short order and that, consequently, their lives would improve. However, for Ms Grootboom and the people of Popela, the government's failure to enforce the judgments in a timely manner undermined the legal victory. In the *Popela* case, the judiciary deemed it unnecessary to put in place a mechanism to monitor the executive's compliance with its orders; and the community no longer has the resources to bring the case before the court again for contempt proceedings.<sup>5</sup>

Relying primarily upon 28 semi-structured interviews that were conducted in Limpopo, South Africa, with members of the Popela community in 2008, the article explores the impact of the failure to implement court-ordered legal remedies provided to individuals and communities dispossessed of their land. We will explore the relationship between takings, restoration and dignity in the context of a state that is attempting to (re)constitute a society.

In her contribution to the takings literature, Atuahene has argued that, in certain instances, takings are part of a larger strategy to further subjugate a certain group within the polity by denying their humanity or their capacity to reason. She calls this type of dispossession a dignity taking, which occurs when a state directly or indirectly destroys property or confiscates various property rights from owners or occupiers and the intentional or unintentional outcome is dehumanisation or infantilisation.<sup>6</sup> Atuahene argues that a comprehensive remedy for dignity takings involves more than providing compensation for things taken because the wrong involved

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Most notable in the US context is *Brown v Board of Education* 347 US 483 (1954) which faced resistance from southern state governments to successfully implement. However, desegregation and bussing were eventually implemented in part due to a slew of subsequent litigation; *Holmes v City of Atlanta* 350 US 877 (1955); *Swann v Charlotte-Mecklenburg Board of Education* 402 US 1 (1971).

5 *Department of Land Affairs & Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 10 BCLR 1027 (CC); 2007 (6) SA 199 (CC) (*Goedgelegen*); confidential interview with Ali, member of the Popela Community, Gauteng, South Africa (2008).

6 B Atuahene 'Dignity takings and dignity restoration: Creating a new theoretical framework for understanding involuntary property loss and the remedies required' (2016) 41 *Law and Social Inquiry* 796; B Atuahene 'Takings as a socio-legal concept: An interdisciplinary examination of involuntary property loss' (2016) 12 *Annual Review of Law and Social Science* 171; B Atuahene 'From reparations to restoration: Moving beyond restoring property rights to restoring political and



more than this. The wrong also involved the denial of the dispossessed individual or community's dignity and their subjugation within the polity. She creates the concept of dignity restoration, which is a remedy that seeks to provide dispossessed individuals and communities with material compensation through processes that affirm their humanity and reinforce their agency.<sup>7</sup>

International law remedies for past property seizures have focused on reparations rather than dignity restoration.<sup>8</sup> Reparation is 'the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately or any such property that cannot be restored to them'.<sup>9</sup> While reparations involve compensation for the property taken, dignity restoration is based on principles of restorative justice and thus seeks to rehabilitate the dispossessed.<sup>10</sup> As Braithwaite states, restorative justice is interested in 'restoring property loss, restoring injury, restoring a sense of security, restoring dignity, restoring a sense of empowerment, restoring deliberate democracy, restoring harmony based on a feeling

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economic visibility' (2007) 60 *SMU Law Review* 1419; 'property-induced invisibility' was the term I used in my prior work. Through empirical interrogation, property-induced invisibility evolved into dignity takings. An earlier iteration of the definition can be found in B Atuahene *We want what's ours: Learning from South Africa's land restitution program* (2014) ('when a state directly or indirectly destroys or confiscates property from owners or occupiers who it deems to be sub-persons without paying just compensation or without a legitimate public purpose').

- 7 Atuahene 'Dignity takings' (n 6) 796. A prior iteration of the definition can be found in Atuahene *We want what's ours* (n 6) ('a comprehensive remedy that compensates people for the physical assets confiscated through a process that affirms the dignity of the dispossessed and confirms that they are full citizens').
- 8 Atuahene (2007) (n 6) 1444. The human right that most directly deals with the confiscation of property is found in the Universal Declaration of Human Rights, GA Res 217A, UN GAOR, 3d Sess, 1st Plen Mtg, UN Doc A/810 (1948), which asserts that a person arbitrarily deprived of her property with no just compensation is entitled to an effective remedy. Art 17(2) states: 'No one shall be arbitrarily deprived of his property.' Art 8 states: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' S Leckie 'Housing and property issues for refugees and internally displaced persons in the context of return: Key considerations for UNHCR policy and practice' (2000) 2 *Refugee Survey Quarterly* 5.
- 9 Report of the Committee on the Elimination of Racial Discrimination, UN Doc A/51/18 (1996), sec 2(c).
- 10 L Magarrell 'Reparations in theory and practice' (2007) *International Centre for Transnational Justice*, <https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf> (accessed 11 December 2018), defining reparations to 'include, in some combination and as appropriate, restitution, compensation for harm, and rehabilitation in mind, body and status'. CJ Ogletree 'The current reparations debate' (2003) 36 *University of California Davis Law Review* 1051 1055. Ogletree emphasises four features of reparations: '(i) a focus on the past to account for the present; (ii) a focus on the present, to reveal the continuing existence of race-based discrimination; (iii) an accounting of past harms or injuries that have not been compensated; and (iv) a challenge to society to devise ways to respond as a whole to the uncompensated harms identified in point three'. EA Posner & A Vermeule 'Reparations for slavery and other historical injustices' (2003) 103 *Columbia Law Review* 689 691, asserting that 'paradigmatic examples of reparations typically refer to schemes that (1) provide payment (in

that justice has been done, and restoring social support'.<sup>11</sup> Atuahene argues that when reparations and restorative justice are married, dignity restoration is the offspring of this formidable union.

Most states that have addressed past property violations have not undertaken dignity restoration as it is a more time-consuming, complicated, and expensive remedy than reparations.<sup>12</sup> South Africa's colonial and apartheid era land disposessions are a quintessential example of dignity takings, and the post-apartheid government is unique because it has tried to facilitate dignity restoration. It understood its land restitution programme as an opportunity to restore wealth as well as dignity to its black citizens.<sup>13</sup> South Africa is thus an ideal place to examine the concept of dignity restoration. Using the Popela community as a case study, the research question explored in this article is the following: When there is a dignity taking and a legal victory securing property restitution, what are the consequences of a state's failed attempt to move from reparations to dignity restoration? This research question is important and timely for three primary reasons.

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cash or in kind) to a large group of claimants; (2) on the basis of wrongs that were substantively permissible under prevailing law when committed; (3) in which current law bars a compulsory remedy for the past wrong ... and (4) in which the payment is justified on backward-looking grounds of corrective justice, rather than forward looking grounds such as the deterrence of future wrongdoing'.

- 11 J Braithwaite 'Restorative justice: Assessing optimistic and pessimistic accounts' (1999) 25 *Crime and Justice* 16.
- 12 UN Committee on Economic, Social and Cultural Rights 'Property return and restitution, Kosovo' prepared for review of Covenant law issues in Kosovo (2008), <https://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/COHREUNMIK.pdf> (accessed 11 December 2018); *Handbook on housing and property restitution for refugees and displaced persons* (2007); H Das 'Restoring property rights in the aftermath of war' (2004) 53 *International and Comparative Law Quarterly* 429 436; D Isser & P van der Auwerart *United States Institute of Peace special report: Land, property, and the challenge of return for Iraq's displaced* (2009) 3; M Everingham 'Agricultural property rights and political change in Nicaragua' (2001) 43 *Latin American Policy and Society* 61; F Rainer 'Privatization in Eastern Germany: A comprehensive study' (1994) 27 *Vanderbilt Journal of Transnational Law* 809; RW Crowder 'Comment: Restitution of the Czech Republic, problems and Prague-nosis' (1994) 5 *Indiana International and Comparative Law Review* 237; NJ Gutierrez 'Righting old wrongs: A survey of restitution schemes for possible application to a democratic Cuba' (1995) 4 *University of Miami Yearbook of International Law* 111 (providing a review of restitution programmes used in the Baltic Republics, Bulgaria, Czech Republic, East Germany, Hungary, Nicaragua, Poland, Romania, and Slovakia); M Karadjova 'Property restitution in Eastern Europe: Domestic and international human rights law responses' (2004) 29 *Review Centre of Eastern and European Law* 235; B Atuahene 'Property rights and the demands of transformation' (2010) 31 *Michigan International Law Journal* 765.
- 13 Land Affairs Department: Annual Report 2001-2002, Department of Land Affairs (2002) 7. Former Minister of Agriculture and Land Affairs, Thoko Didiza, explains that 'the struggle for dignity, equality and a sense of belonging has been the driving force behind our work as the Land Claims Commission'; Our Land: Green Paper on South African Land Policy, Department of Land Affairs, 1996) I. The Green Paper states that in addition to redressing the wrongs of the past, the goals of land reform policy are to 'foster national reconciliation and stability; underpin economic growth; and to improve household welfare and alleviate poverty'.

First, the failure to remedy past land theft and redistribute land can increase the potential for political instability. Due to apartheid and colonial era land theft, when South Africa transitioned from apartheid to a non-racial democracy in 1994, whites (who constituted less than 10 per cent of the population) owned approximately 87 per cent of the fertile agricultural land.<sup>14</sup> By 2012 the state had redistributed less than 10 per cent of this land.<sup>15</sup> A governmental audit report on land revealed that in 2017 whites held approximately 70 per cent of South Africa's agricultural land.<sup>16</sup> The High-Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change led by former South African President, Mr Kgalema Motlanthe, recently attributed the failure of land reform to a toxic combination of defective legislative schemes, inept governance, bureaucratic failure, corruption and systemic malaise.<sup>17</sup>

The lack of redistribution is particularly unfair considering the constitutional bargain the apartheid government entered into with the African National Congress (ANC) and other liberation movements during the transition from apartheid to democracy.<sup>18</sup> According to the constitutional bargain inscribed in section 25 of the South African Constitution, in 1994 existing property owners (who were primarily white) received valid legal title to property acquired under prior apartheid and colonial era regimes despite the historically-tainted circumstances of acquisition.<sup>19</sup> In exchange, dispossessed blacks were promised land reform. In effect, the existing property rights of whites were immediately secured while blacks had to wait for land reform. However, nearly 25 years later most blacks are still waiting.<sup>20</sup> Most importantly, there is evidence that there could be potentially disastrous political consequences if land redistribution does not occur.<sup>21</sup>

14 Atuahene (n 12) 765-767.

15 Department of Rural Development and Land Reform, Annual Report: Rural Development and Land Reform, 1 April 2012-31 March 2013 (Department of Rural Development and Land Reform, 2013) (Annual Report) 19-20-25.

16 Department of Rural Development and Land Reform: Land Audit Report: Phase I: Private Land Ownership by Nationality (Department of Rural Development and Land Reform, 2017).

17 Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (2017), Foreword. The Report provides a detailed examination of the legislation enacted to advance South Africa's land reform process and its implementation in fulfilment of the government's constitutional mandate. The report presents a toxic combination of gaps in legislation, often inept governance, bureaucratic failure, corruption and generally systemic malaise.

18 H Clung *Constituting democracy: Law, globalism, and South Africa's political reconstruction* (2000) 110-115.

19 The Constitution of the Republic of South Africa, 1996 ch 2 sec 25.

20 E Lahiff *Land reform in South Africa: A status report 2008* (Programme for Land and Agrarian Studies 2008) 2-4; Annual Report (n 15) 25; Atuahene (2014) (n 6) 15.

21 Atuahene (n 12); B Atuahene 'Things fall apart: The illegitimacy of property rights in the context of past property theft' (2009) 51 *University of Arizona Law Review* 829.

In one of the most impressive public opinion studies done on land reform in South Africa to date, Gibson surveyed 3 700 South Africans and found that 85 per cent of black respondents believed that 'most land in South Africa was taken unfairly by white settlers, and they therefore have no right to the land today'.<sup>22</sup> Only 8 per cent of whites held the same view.<sup>23</sup> His most revealing finding is that two out of every three blacks agreed that 'land must be returned to blacks in South Africa, no matter what the consequences are for the current owners and for political stability in the country'.<sup>24</sup> Ninety-one per cent of whites disagreed with this statement.<sup>25</sup> Gibson's data suggests that if South Africa's unjust property distribution is not transformed, this may increase the chance of political instability.

Second, unenforced court victories can have a negative economic, political and psychological impact, especially on vulnerable plaintiffs who do not have resources to hold the executive accountable for its failure to enforce court judgments. Since litigation is expensive and consumes limited resources that social activists or movements could use for political advocacy and community mobilisation, activists must carefully weigh its costs and benefits before employing this tool. When vulnerable plaintiffs decide to engage in costly litigation, unfortunately it is not uncommon for the executive to delay or renege altogether on the enforcement of court victories involving socio-economic rights.<sup>26</sup> The negative impact of unenforced court decisions that reinscribed indignity has thus far been understudied.

Third, when the executive fails to implement judicial decisions, the separation of powers is violated and democracy imperilled. Socio-economic rights cases usually involve poor claimants, buttressed by civil society organisations, who are challenging an executive action that usually involves resource allocation.<sup>27</sup> Consequently, socio-economic rights decisions serve as an important check on executive power. However, the catch is that courts have no enforcement powers of their own and thus rely on the executive to enforce decisions that, ironically, the executive went to court to fight against. When the executive fails to enforce court orders in a timely manner, this severely undermines the checks and balances that enliven democracy. Also, if the court order was handed down in favour of vulnerable plaintiffs,

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22 J Gibson *Overcoming historical injustices: Land reconciliation in South Africa* (2009) 31.

23 As above.

24 Gibson (n 22) 32.

25 As above.

26 Bilchitz (n 6) 135-152; D Brinks 'Solving the problem of (non)compliance in socio-economic rights litigation' presented at the International Symposium on Enforcement of ESC Rights Judgments, Bogotá, Colombia, 6-7 May 2010).

27 D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for the future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; DM Brinks & V Gauri *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008).

then the executive's lack of enforcement may further ossify their marginal status within the democracy.

The article proceeds in five parts. In part 2 we describe the methodology used to empirically investigate the consequences of a state's failed attempt to move from reparations to restoration. In part 3, we discuss the history of the Popela community and demonstrate that they, indeed, were the subjects of dignity takings. In part 4 we describe the South African state's attempt to remedy the Popela community's land dispossession. We briefly explain the land restitution process, chronicle the community's journey through the courts, and explain the executive's failed attempts to implement the Constitutional Court decision in favour of the community. Part 5 examines the impact that the state's prolonged delay in restoring land had on members of the community. While the plaintiffs' successful litigation was the cause of much hope and celebration, the executive's failure to implement the court order has precipitated a deep sense of hopelessness extending beyond the plaintiffs and including their broader community. We find that instead of dignity restoration, the land restitution process led to dignity deterioration.

## 2 Methodology

To empirically explore the impact of a state's failed attempt to move from reparations to dignity restoration, we first obtained human subjects' approval to conduct interviews. We then undertook one trip to Limpopo, South Africa, in July and another in August of 2008 to interview members of the Popela community. We conducted 28 semi-structured interviews with community members, which lasted between 30 to 90 minutes, were audio-taped, and done with the promise of confidentiality. We use pseudonyms to mask the identity of respondents.

To collect our primary interview data, we first obtained a list from the Commission of all members of the community eligible to receive compensation under the Act, and randomly selected people from the list to interview. Locating people was a challenge as members of the Popela community live primarily in the town of Sekgopo (which neighbours the land forming the subject matter of the claim) where few people have formal residential addresses. In addition, simultaneous translation was necessary because members of the community spoke Sepedi – a language in which the authors are not fluent. Thus, on the first trip we used community leaders to help us locate the people we had randomly chosen and also to perform simultaneous translation. After having exhausted the list of randomly-selected names, we then used referrals from initial respondents to generate additional respondents – the snowballing method. In total, we interviewed 28 community members of which 15 were women and 13 were men.

The vast majority of these interviews took place at respondents' homes. In the same year we also interviewed employees of the Land Claims Commission (Commission), which is the administrative body charged with implementing the Land Restitution Act of 1994 (Act). These interviews with public officials were audio-taped and not confidential. In August 2008 we also had an introductory meeting with two senior representatives of the current owner of the land in question – the Westfalia group. Before answering any substantive questions, the representatives requested the questions in writing so that the Westfalia compliance division could vet them. The authors duly supplied these questions and made numerous unsuccessful attempts to have a substantive meeting with representatives of Westfalia.

Ten years after the court decision, the authors conducted follow-up interviews telephonically with a community leader (who had been interviewed in the original study) and a manager in the Commission's legal unit. The interviews sought to understand why the Commission had not yet transferred the land to the Popela community.

The methods we employed had certain limitations. First, although we needed a community leader to locate respondents, there was also the possibility that people would not be as forthcoming with the leader present. To adjust for this, on the second trip we hired local people who were not members of the Popela community to help us locate respondents and do the simultaneous translation. There was no significant difference in the topics discussed or answers given by respondents when the community leader was present versus when he was not. Consequently, we concluded that the bias added by using a community leader was nominal.

Second, one strength of this study is that we rely heavily on the words of our respondents, but when using simultaneous translation it is important to be critical of whose voice comes through. We posed questions in English to a translator who purportedly translated what we said (or meant to say) to the respondents in Sepedi, who in turn tried to understand our translated questions and replied to the translator in Sepedi, which was translated back to us in English. The entire conversation was recorded; the English translations of the respondents' answers were transcribed *verbatim* and may be interpreted as the 'voice of the voiceless'. To partially address this concern and to scrutinise the authenticity of the data, after the interviews were completed we asked the transcribers (who were not present at the actual interview) to note when the simultaneous translation was not in line with what respondents said and the transcribers found that the simultaneous translation was highly accurate.

Third, the Popela community consists of about 1 200 members and we conducted interviews with 28 of them, which amounts to approximately 2 per cent of the total population. The virtue of conducting in-depth interviews with a relatively small portion of the

total population is that, unlike large 'N' quantitative studies, we can locate new variables and relationships by identifying and describing the meanings that people have of themselves and of the situation. Our primary contribution in this article is to examine the Commission's attempt to provide a remedy for past land dispossession and describe how successful litigants understand and interpret the executive's failure to comply with a court order in their favour.

### 3 Dignity takings: The Popela community deprived of land and dignity

Most constitutional democracies have expropriation or, as we refer to them here, takings clauses (that is, eminent domain provisions) that require forced deprivations of land to be for a public use or a public purpose, and require the state to pay fair or just compensation.<sup>28</sup> The takings literature has focused extensively on routine takings where the primary controversy surrounds the definition of just compensation and public purpose.<sup>29</sup> There is, however, an under-theorised class of extraordinary takings that have accompanied revolutions, warfare or other upheavals and resulted in a massive restructuring of existing property rights. Rose has recognised an extraordinary class of takings in American law, which includes property taken from native Americans, slave holders, and British loyalists. She argues that in these instances the 'denial of property is denial of membership in a community; it is a part of a radical othering'.<sup>30</sup> Atuahene builds upon Rose's theoretical contribution and focus on the subset of extraordinary takings where the state takes property from a class of people that has also been dehumanised or infantilised.

This category of extraordinary takings includes the Nazi expropriations of Jewish property; the US expropriation of Japanese property during World War II; the Australian, New Zealand, Canadian and US expropriation of property from native peoples; and the colonial and apartheid governments' expropriation of property from

28 AJ van der Walt *Constitutional property clauses: A comparative analysis* (1998).

29 T Merrill 'The economics of public use' (1986) 72 *Cornell Law Review* 61; DB Kelly 'The public use requirement in eminent domain law' (2006) 92 *Cornell Law Review* 1; R Epstein *Takings: Private property and the power of eminent domain* (1985); FI Michelman 'Property, utility and fairness: Comments on the ethical foundations of "just compensation"' (1967) 80 *Harvard Law Review* 1165; L Blume & DL Rubinfeld 'Compensation for takings: An economic analysis' (1984) 72 *University of California Law Review* 569; C Serkin 'The meaning of value: Assessing just compensation for regulatory takings' (2005) 99 *Northwestern University Law Review* 679.

30 C Rose 'Property and expropriation: Themes and variations in American Law' (2000) 2000 *Utah Law Review* 6, stating: 'Type III disruptions are what I will call "extraordinary". These are the rights alterations that accompany revolutions and warfare or other or other upheavals that create massive overthrows of existing property rights and resource uses.' This is in contrast to property disruptions classified as Type I and Type II, which are of the 'housekeeping' and 'regulatory' varieties respectively.

blacks in South Africa, Zimbabwe, Namibia and beyond. In these examples, the taking of an individual or community's property moved beyond the mere confiscation of things and instead entailed something more damaging – disdain for a group's humanity or mental capacity, leading to their subordination within the social contract.<sup>31</sup> These are all examples of dignity takings.

The erosion of the Popela community's land rights is also a quintessential example of a dignity taking. The Popela community is made up of a large extended family who generally share the surname Maake, or somehow trace their lineage to the Maakes. They trace their origins to a lush fertile valley in Limpopo where they reportedly lived from as far back as the 1800s, herding cattle and tilling the soil. They married, raised children, laughed, bickered, and buried their dead undisturbedly until the advent of colonialism and apartheid. One respondent remembered that the community ploughed the land 'from the river up to the mountain'.<sup>32</sup> Another respondent tenderly reminisced that in the 'olden times we were freely living on the farm, so we could also catch different types of wild animals and the birds you know which are very delicious, which today you can't'.<sup>33</sup>

Under white minority rule, the Popela community's rights to their ancestral lands were progressively eroded as successive governments unjustly transferred their land to whites. The record shows that the first such transfer occurred in 1889 to PDA Hattingh. Members of the community remained on the land, but with the passage of time were transformed from land owners into labour tenants with limited occupancy rights. As a result of this dispossession, the entire community was forced to work for the white landowner for half the year to pay rent for land they rightfully owned, and the other half of the year they were free to cultivate the land and graze their animals. If community members rejected this labour tenancy arrangement, then they had to leave the land. One community elder explained:<sup>34</sup>

While I'm still young I was working at the farm as a shepherd [clears throat] if I want to go to school, I was supposed to, my family was supposed to move there from the farm. Therefore we were forced to stay at the farm and work for the white people, six months a year, six months working at home.

Although colonialism and apartheid progressively eroded the community's rights to the land and disrupted their way of life, it is notable that members of the community continued to live what was

31 Atuahene (n 12).

32 Confidential interview with 3, member of the Popela community, Limpopo, South Africa (2008).

33 Confidential interview with 13, member of the Popela community, Limpopo, South Africa (2008).

34 Confidential interview with JM, member of the Popela community, Limpopo, South Africa (2008).



described by a respondent as a comparatively 'good life'.<sup>35</sup> Many respondents stressed that the living conditions on the farm were better when they were labour tenants than in subsequent years. According to one respondent, the community was permitted to rear their own livestock as well as 'cultivate maize, peanuts, pumpkins and so on'.<sup>36</sup> Another said that '[w]e were living better because we were cultivating our land for maize and had livestock farming and we were able to support our children, to feed them properly'.<sup>37</sup> One younger member of the Popela community remembered stories that his grandparents told him about how his parents

had cows, sheep and goats and they were also ploughing mealie meals [maize] at that farm and other groups of people from different places came to buy maize because at that time of the apartheid there was starvation. There was drought, but this land was good to us.<sup>38</sup>

Life worsened when the land changed hands again and was transferred in 1963 to HMJ Altenroxel, who in about 1969 unilaterally terminated the labour tenancy arrangements prevailing at the time. Altenroxel consequently extinguished any residual rights the members of the Popela community had in the land, with devastating effects on the Popela community. Altenroxel robbed the community of their freedom to use their land. One community member lamented that

we were more treated like animals, you know. So and literally we were just like a donkey on a donkey cart you know because you will report even a simple thing like I'm going to slaughter a chicken or a goat, or a sheep, or a cow you need to get permission.<sup>39</sup>

Many members of the community rejected the new dehumanising conditions, quit the farm, and sought employment in Sekgopo, Johannesburg, and elsewhere in South Africa. One elder regretted that the new labour arrangement forced him 'to go and work in other areas because I was no longer a farmer and what we used to produce was no longer coming and the money that we were supposed to earn here was not even enough'.<sup>40</sup> There is little doubt that although the then prevailing conditions forced many to leave, their deep connection to the land was not attenuated. With a heavy heart, one community member explained that although he left, 'I still love that place because my fathers, mothers, and grandparents are still there,

35 Confidential interview with BM, member of the Popela community, Limpopo, South Africa (2008).

36 Confidential interview with M, member of the Popela community, Limpopo, South Africa (2008); confidential interview with MM, member of the Popela community, Limpopo, South Africa (2008).

37 As above.

38 Confidential interview with 18, member of the Popela community, Limpopo, South Africa (2008).

39 Confidential Interview (n 33).

40 As above.

they died there and we buried them there. That's why I love that place.<sup>41</sup>

The conditions prevailing on the farm for those who stayed on as workers were harsh and exploitative as they had to endure meager wages and the threat of physical abuse if they did not follow orders. A community leader described the typical work cycle on the farm under Altenroxel, which entailed working for two days in order to pay 'rent' and then three days for wages at the rate of 20 cents per day. Workers would only be paid after having accumulated 30 working days. The white farm owner had total control and his poor black farm workers had no rights. In an unsettling description of the extent to which workers were subjugated, a community leader explained:<sup>42</sup>

During those times they would make you shit. If you left the farm, they would look for you until they find you and kill you they would even kill you. It was painful, but there's nothing you can do, but it was not only the Popela people. All around our area they've just been treated the same, so there was nothing they can do. If you raised your concern, you'll be beaten.

Eventually Altenroxel decided to terminate the labour tenancy arrangement and families were forcibly separated if certain members did not opt to take up full employment with the farm owner. The termination of the labour tenancy led to the destruction of family life, the division of the community and the weakening of valuable social bonds. According to one community member, after her husband had left the farm to take up employment in Johannesburg, he was not allowed on the farm to visit his family as this was against the regulations. When he did visit he was subjected to beatings and even arrested for being unlawfully present on the farm. Explaining the severely unfair power dynamic that led to these abusive practices, she said:<sup>43</sup>

There's nothing we can do because it was force, it's not like it's a choice. It was force because there was no other alternative ... to resist is either you have to move out of the farm. So, the best thing is to, if you don't have alternative, is to comply.

One community member perfectly and succinctly articulated what we heard over and over in the interviews about the termination of the labour tenancy agreements: 'We felt powerless.'<sup>44</sup>

In 1993, shortly before the beginning of the democratic dispensation, a subsidiary of a German multinational corporation

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41 Confidential interview with 15, member of the Popela community, Limpopo, South Africa (2008).

42 Confidential interview with AM, member of the Popela community, Limpopo, South Africa (2008).

43 Confidential interview with MMM, member of the Popela community, Limpopo, South Africa (2008).

44 Confidential interview with 1, member of the Popela community, Limpopo, South Africa (2008).

called Goedgelegen Tropical Fruits (Pty) Ltd, now called Westfalia Fruit Estate (Pty) Ltd (Westfalia) purchased the Popela community's land from Altenroxel. When apartheid officially ended in 1994, many families did not leave Sekgopo to reoccupy their ancestral land because, as one respondent explained, 'I stay here in Sekgopo because even though I can go back to staying there while they are still there, the land is still owned by the hands of the white people. It will be difficult for me to make plans.'<sup>45</sup> According to various respondents, life for members of the Popela community living or working on the farm had not become any easier since the end of apartheid, and ownership in the farm was transferred to Westfalia.<sup>46</sup>

The graves located on the farm were a constant source of conflict between Westfalia and the Popela community. It was very important culturally for members of the Popela community to bury their dead on their ancestral land, but Westfalia has often prevented the Popela community from accessing their graves.<sup>47</sup>

Normally every year we have this thing of ritual sacrifices where you have to do something on the grave. So, then you are not allowed. You have to beg, so sometimes it's difficult to beg. Even now for us to go there like we have to phone the current owner to unlock the gate because it's four gates from my place to the cemetery. So, you have to ask them to unlock the gate. Tomorrow we'll be burying my sister, my sister here. I don't know how these people are going to manage to go to the funeral because if they don't find him we are going to have a problem.

Many respondents reported that they felt that Westfalia's blockade of the graves was dehumanising.

This brief history of the Popela community's dispossession has demonstrated that they were subjected to dignity takings. The colonial government was directly responsible for confiscating the community's property in 1889 when they were downgraded from having full control over their land to being labour tenants for Mr Hattingh. The further erosion of the community's rights due to the subsequent transfers in 1969 and 1993 was allowed under racially-discriminatory, apartheid-era laws. Historian Leonard Thompson explained how whites justified the appropriation of African lands.<sup>48</sup>

Virtually all the whites in the region, in common with their contemporaries in Europe and the Americas, regarded themselves as belonging to a superior, Christian, civilized race and believed that, as such, they were justified in appropriating native land, controlling native labour and subordinating native authorities.

45 Confidential interview with 14, member of the Popela community, Limpopo, South Africa (2008).

46 Confidential interview with PM, member of the Popela community, Limpopo, South Africa (2008); confidential interview with JM, member of the Popela community, Limpopo, South Africa (2008); confidential interview with PM; confidential interview with AM.

47 Confidential interview with ALM, member of the Popela community, Limpopo, South Africa (2008).

48 L Thompson *History of South Africa* (2001) 122.

The historical record shows that the Popela community indeed was subject to a dignity taking because dehumanisation and infantilisation were deeply intertwined with the dispossession of their land.

#### 4 Dignity restoration: A comprehensive remedy for dignity takings

Whereas the previous section established that the Popela community was subject to dignity takings, this section discusses the appropriate remedy. When a state takes the private property of an individual or community, the appropriate remedy is just compensation, which is most commonly calculated based on the market value of the property rights confiscated.<sup>49</sup> However, when a dignity taking has occurred, the state has done more than confiscate property – it has also denied the dispossessed their dignity. As a result, dignity restoration – a comprehensive remedy that addresses both the deprivation of property and dignity – is required.<sup>50</sup> South Africa's post-apartheid government is unique because it understood its land restitution programme as an opportunity to restore wealth as well as dignity to its black citizens.<sup>51</sup> That is, through the land restitution programme, the post-apartheid government sought to achieve dignity restoration.

The Popela community's involvement with the land restitution programme began in 1996 when the legal position of the members of the Popela community who remained on the farm was placed in question when an adjoining farmer started bulldozing black-occupied houses on his property after the owner had learned of the Extension of Security Act 62 of 1997.<sup>52</sup> The farmer wanted to ensure that occupants would not gain rights to the land through the impending Extension of Security Act. Fearful that they would be next, members of the Popela community who remained on the land sought the help of the Nkuzi Development Association – a non-governmental organization (NGO) primarily aimed at assisting historically-disadvantaged communities in accessing and protecting their land rights. Nkuzi secured an interdict that disallowed any evictions until the community had filed their land restitution claim.<sup>53</sup> Westfalia

49 Y-C Chang 'Economic value or fair market value: What form of takings compensation is efficient?' (2012) 20 *Supreme Court Economic Review* 35; R Innes 'Takings compensation and equal treatment for owners of developed and undeveloped property' (1997) 40 *Journal of Law and Economics* 403 430-432.

50 Atuahene (n 12) 4-5; Atuahene (n 6 above).

51 Annual Report (n 15) 7; see also *Our land* (n 13) i.

52 Extension of Security Act 61 of 1997. This Act was designed to, amongst other things, facilitate long-term tenure security; regulate the terms and conditions under which occupiers of certain categories of land could be evicted; and balance the interests of land occupiers with those of landowners.

53 According to the Act, sec 11(7)b states: 'Once a notice has been published in respect of any land ... no claimant who was resident on the land in question at the date of commencement of this Act may be evicted from the said land without the written authority of the Chief Land Claims Commissioner.'

fought back by legally challenging the Popela community's right to restitution of their land under the Act. Nkuzi initially served as the community's legal representative, with the Legal Resources Centre stepping in after Nkuzi had been forced to quit due to funding constraints.

#### 4.1 The land restitution process explained

The land restitution process has five phases which run concurrently. In the first of the five phases, an individual or community had to lodge a claim by 31 December 1998 in order to become eligible for compensation. These people were called claimants.<sup>54</sup> In the second phase the Commission determined whether the claims were valid by researching whether the claims met certain statutory requirements. Each claim had to involve (i) a person, community or a deceased estate or direct descendant of a person or a community; (ii) dispossessed of a right in land; (iii) after 19 June 1913; (iv) as a result of past racially-discriminatory laws or practices; and (v) without the receipt of just and equitable compensation.<sup>55</sup>

Once the Commission had determined that a claim fulfilled the five statutory requirements, it verified in the third phase that the claimant was either the prior owner or occupant of the property in question or the descendant of the prior owner or occupant.<sup>56</sup> The Commission accepted various forms of evidence to validate and verify claims, including deeds, oral testimony, aerial maps, ruins, tombstones and baptismal records. During the fourth phase, called the negotiation phase, the Commission was supposed to give claimants a choice between financial compensation, land restitution or some other equitable remedy.<sup>57</sup> During the fifth and final (valuation) phase, the Commission determined the amount it would spend on each claim.<sup>58</sup> If claimants chose land, then the Commission would have to purchase the land. However, if the claimants instead chose financial compensation, then the Commission paid most claimants using a

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54 As above.

55 Restitution of Land Rights Act of 1994.

56 Sec 1(11) Restitution of Land Rights Act (n 55).

57 South African Department of Land Affairs, White Paper on South African Land Policy of 1998 sec 2(1). The White Paper on Land Policy, the government's definitive policy on land matters, states that choice is to be central to the restitution process: 'Solutions must not be forced on people.' But, in truth, almost no one had the opportunity to craft his or her own equitable remedy because giving claimants choice and allowing them to craft their own remedies would have involved taking time to consult with claimants and devise workable arrays of options. The Commission had no such time; it had resolved very few claims from 1995 to 1999 and so from 2000 to 2008 was under extreme pressure to settle claims rapidly. From its inception to 2008, the Commission has settled 65 642 urban claims: 73% financial compensation; 24% land restitution; and 4% other equitable remedy. Annual Report (n 15), noting that of the total claims settled, financial compensation accounted for 51 973 claims; land for 19 862 claims; and alternative remedies for 2 912 claims.

58 Atuahene (2014) (n 6) 103.

standard settlement offer (SSO) ranging from R17 000 to R60 000 (approximately \$2 428 to \$8 571), depending upon the SSO amount adopted by each Regional Land Claims Commission, which over time changed to account for inflation.<sup>59</sup>

Typically, the Commission played conflicting roles in the restitution process. Individuals and community claimants had a constitutional right to restitution, but the Commission is both the agency representing the claimant through the process and the adjudicator that determines the amount the claimant would receive. Although the Act establishes a Land Claims Court, the Commission often has the final word on compensation as the majority of claimants were poor and could not afford to litigate even when they were dissatisfied with the final award.<sup>60</sup> The Popela community had a unique experience because Nkuzi was the community's advocate from the moment it filed its restitution claim all the way through the Constitutional Court case victory. The community never had to directly deal with the Commission until after the court case when Nkuzi's involvement waned due to a lack of funding. One community leader confirmed: 'We started to communicate with the Land Claims Commission directly as from [2007], but previously we were communicating with Nkuzi.'<sup>61</sup>

In the following section we will explain the legal journey of the Popela community, which began in the Land Claims Court, then progressed to the Supreme Court of Appeal, ultimately ending up in the Constitutional Court, South Africa's highest court on all constitutional matters.

## 4.2 The journey through the courts

### 4.2.1 Land Claims Court

The legal battle commenced at the Land Claims Court. The Court first had to decide whether the Popela case involved a community or individual claim because according to Section 1 of the Act, each claim had to involve 'a person, community, or a deceased estate or direct descendant of a person or a community'.<sup>62</sup> Determining whether it was a community or individual claim affected the size of the claimant group as well as the nature of the relief sought. The Commission declared that the claimants qualified as a community in terms of section 1 of the Restitution Act, but this view was ultimately challenged by Westfalia and rejected by the Court. The Court

59 Atuahene 105.

60 Atuahene 108-109 & 146; R Hall 'Reconciling the past, present and future: The parameters and practices of land restitution in South Africa' in C Walker et al (eds) *Land, memory, reconstruction, and justice: Perspectives on land claims in South Africa* (2010) 27.

61 Confidential interview with member of the Popela Community, Limpopo, South Africa (2008).

62 Sec 1 Land Restoration Act.

concluded that the Popela community's sole statutory basis for restitution was as individual labour tenants.<sup>63</sup> Therefore, the Land Claims Court only considered the legal claims of the nine individuals who lived on the land and had a labour tenancy agreement with the former landowners. The extent of each claim was 800 square meters of individually-owned land where their homesteads were or used to be, and the balance of the farm was claimed collectively by the nine claimants to be held in undivided shares.<sup>64</sup>

The Court then considered whether the nine claimants met the statutory requirements for a successful restitution claim. Section 2(1) of the Act provides that a person or community shall be entitled to restitution if dispossessed of any right in land after 19 June 1913 as a result of past racially-discriminatory laws or practices.<sup>65</sup> Central to this inquiry was the question of whether labour tenant rights qualified as a right in land worthy of restitution. The Court accepted that in 1969 the claimants did have rights in the land and, further, assumed without deciding that the claimants were in fact dispossessed of these rights.<sup>66</sup> Therefore, the Court favourably decided the question of whether labour tenants qualified for restitution.

The Court then proceeded to decide whether the claimants' dispossession was a result of a past racially-discriminatory law or practice. Although in 1970 the state prohibited further labour tenant contracts in the then Northern Transvaal where the Popela community lived, the land owners had phased out the labour tenant system approximately one year before the state promulgated this law.<sup>67</sup> The Court took the view that racially-discriminatory practices had to be attributable to a public functionary or state department, with the result that the main issue was whether or not the claimants' rights to land were actually terminated as a result of legislation or some other state-sanctioned action on the part of the farm owner.<sup>68</sup> The Court concluded that there were no laws at the relevant time that either abolished labour tenancy or compelled the farm owner to terminate the labour tenancy agreements, but that instead the farmer had been motivated by 'economic and business considerations'.<sup>69</sup>

Given the respondents' descriptions of how their freedom was drastically curtailed and their ability to earn a livelihood was

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63 *Popela Community v Department of Land Affairs and Another In Re: Restitution Claim Boomplaats 408LT Presently Consolidated into Goedgelegen* [2005] ZALCC 7 (*Popela Community*) para 55.

64 *Popela Community* (n 63) para 8.

65 Sec 2(1) Restitution of Land Rights Act.

66 *Popela Community* (n 63) para 58.

67 *Popela Community* paras 59-61.

68 *Popela Community* paras 67-69.

69 *Popela Community* para 76.

eviscerated by the labour tenancy revocation, in the most controversial passage of the judgment Justice Gildenhuys argued:<sup>70</sup>

They [the claimants] continued living on the farm. The *only* change in their circumstances was that they received monthly wage in lieu of their cropping and grazing rights. *There are strong indications that the change actually benefited them.*

On 27 June 2005 the Court dismissed the claim concluding that the claimants had failed to show that the dispossession was a result of a discriminatory law or practice.<sup>71</sup> The Popela claimants lost the first court battle.

#### 4.2.2 Supreme Court of Appeal

Undeterred, the Popela community and their representatives pressed on and took their matter on appeal to the Supreme Court of Appeal.<sup>72</sup> This Court agreed with the Land Claims Court that the claimants would have to show that any racially-discriminatory practices were as a result of any direct or indirect conduct by a public official or state department.<sup>73</sup> In this respect the Court held that there was no evidence of involvement of any public official or authority in the former landowner's decision to terminate the labour tenancies.<sup>74</sup> According to the Court, in order to be successful the claimants would have to prove that the farm owners acted as an instrument of the state.<sup>75</sup> The Court accepted the farm owners' argument that the system of labour tenancy had become inefficient and ill-suited to modern farming methods.<sup>76</sup> The Supreme Court of Appeal ruled that the farm owner was not acting as an instrument of the state.<sup>77</sup> The Popela community lost the second court battle.

#### 4.2.3 Constitutional Court

The defeat at the Supreme Court of Appeal coupled with an adverse cost order did not deter the claimants who, with the continuing support from Nkuzi, took their matter on final appeal to the Constitutional Court. Justice Moseneke wrote the unanimous Constitutional Court decision that overturned the lower court

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70 *Popela Community* paras 76 & 79 (our emphasis). To gain some perspective as to just how patronising, reductionist and insensitive Gildenhuys J's take is on the impact of the nature and termination of the labour tenancy agreements, it is worth contrasting his views with those of Moseneke DCJ in *Popela Community* (n 63) paras 17-18 & 46 of the Constitutional Court appeal of this matter; *Popela Community* (n 63) para 12.

71 *Popela Community* (n 63) paras 83-85.

72 *Goedgelegen* (n 5) para 5 (providing the procedural history of the case).

73 *Popela Community & Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2006 SCA 124 (RSA) para 8 (*Popela Community Appeal*).

74 *Popela Community Appeal* (n 73) para 15.

75 *Popela Community Appeal* para 8.

76 *Popela Community Appeal* para 12.

77 *Popela Community Appeal* paras 18-19.



decisions.<sup>78</sup> The approach of the Constitutional Court differed from the lower courts in its willingness to engage in greater depth and with greater sensitivity with the history of the claimants' connection to the land.<sup>79</sup> More specifically, the Constitutional Court gave careful consideration to the residual power that the colonial and apartheid super-structure brought to bear even on seemingly private relations between a farm owner and his employees.<sup>80</sup>

The Court first had to decide whether the claimants at the time of dispossession in 1969 were a 'community', meaning that they derived their possession and use of the land from common rules.<sup>81</sup> The Court concluded that at the time of the dispossession in 1969, the claimants' possession and use of the land were fragmented with each individual family subject to individualised relations with the farm owner that determined their presence on the land.<sup>82</sup> Therefore, confirming the decision of the lower courts, the Constitutional Court determined that the community claim could not succeed.<sup>83</sup>

The next major question was whether the dispossession was as a result of past racially-discriminatory laws or practices.<sup>84</sup> The Court stated the phrase needed to be construed in light of the Act in its entirety, its purpose to provide restitution for the dispossession of land rights and, more generally, in the full context of the history of land dispossessions in South Africa.<sup>85</sup> Moseneke recognised that '[i]n enacting the Restitution Act the legislature must have been aware that apartheid laws on land were a labyrinth and mutually supportive and in turn spawned racist practices. And vice versa.'<sup>86</sup>

On 6 June 2007 the Court concluded that the former owner's termination of the claimants' rights was as a result of the apartheid laws and practices.<sup>87</sup> The Court reasoned that had it not been for apartheid laws and practices, the farm owners would never have been able to unilaterally terminate the labour tenancy agreements and dispossess the claimants of their rights.<sup>88</sup> The nub of the Court's reasoning is well captured by Moseneke when he writes:<sup>89</sup>

The racially-discriminatory laws in force and the racially-discriminatory practices that prevailed materially affected and favoured the ability of the [farm owners] to dispossess the [claimants] of their labour tenancy rights. In a normal society based on dignity and equality, a truly representative

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78 *Goedgelegen* (n 5).

79 *Goedgelegen* paras 6-19.

80 *Goedgelegen* paras 48-50.

81 *Goedgelegen* paras 43-47.

82 *Goedgelegen* para 45.

83 *Goedgelegen* para 47.

84 *Goedgelegen* paras 48-50.

85 *Goedgelegen* para 63.

86 *Goedgelegen* para 66.

87 *Goedgelegen* para 81.

88 *Goedgelegen* paras 79-80.

89 *Goedgelegen* para 71.

government would have had a duty to protect and respect existing rights. It would have cared about the effect that any unilateral change in those rights would have had on the labour tenants and their families. The [farm owners] would have been compelled by law and practice not to take away any vested rights in land of others as at 1913, particularly because the original rights of the people concerned preceded the first land registration and went back generations. Simply put, without the effect of apartheid laws, policies and practices on land rights of black people, the [farm owners] would never have had the power to do what they did.

In the final analysis, the Court held that the nine applicants had been dispossessed of a right in land after 19 June 1913 as a result of a past racially-discriminatory law and practice and that accordingly they were entitled to restitution under the Act.<sup>90</sup> Nine members of the Popela community arose victorious after the Constitutional Court litigation.

The Constitutional Court deferred the specifics of how their decision was to be implemented to the Commission, which was to act in accordance with the provisions of the Act.<sup>91</sup> The Court deemed it inappropriate to fashion a more precise remedy beyond a declaratory order as the claimants had not requested a more precise remedy, and neither had the Department of Land Affairs.<sup>92</sup> Due to the vast range of possible remedies for resolving this land dispute, the Constitutional Court did not consider it appropriate to venture into the terrain of deciding what an appropriate remedy should be, especially as a court of last instance.

### 4.3 Implementation of the Constitutional Court decision

After the Constitutional Court's decision, the state conceivably had two options. The first was to provide reparations, which required giving the nine named plaintiffs the 800 square meters of land mandated by the Court. The other option was dignity restoration, which was a more robust remedy requiring the state to go beyond vindicating legal rights to property and included efforts to restore dignity as well. In an effort to move from reparations to dignity restoration, rather than to simply focus solely on the nine claimants, the state decided to purchase 2 000 hectares of land for the whole community.<sup>93</sup> Consequently, the Popela community finally basked in the sweet smell of victory after so many years of struggle and uncertainty.

The Commission's first task after the Constitutional Court decision was to identify the legitimate members of the community. The Commission verified that 11 families qualified as part of the Popela

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90 *Goedgelegen* paras 81 & 82.

91 *Goedgelegen* para 84; Land Restitution Act of 1994.

92 *Goedgelegen* para 85.

93 See sec 2(1)(d) of the Land Restitution Act of 1994.

community.<sup>94</sup> The Commission then required the members of the 11 families to register as a legal entity called a Community Property Association (CPA), to form a constitution and to hold elections. The Commission also had to hire a service provider to value the land that the Court had given to the Popela community. If the Commission concluded that the valuation was done in good faith, then the valuation would serve as the basis for the offer it presented to the current landowner. However, if there were mistakes or disagreements, then the Commission and the valuer had to go back and forth until an acceptable valuation was reached.<sup>95</sup> Prior to transfer of the land to the CPA, the Commission had to draft a sale agreement, obtain various internal approvals to purchase the land required by section 42(d) of the Act, survey the land, and the newly-formed CPA would have to sign the deed of sale.<sup>96</sup>

The Commission faced numerous challenges.<sup>97</sup> First, valuers were not delivering their valuations in a timely manner.<sup>98</sup> Second, due to various bureaucratic obstacles, the Commission had not spent money allocated for prior projects and consequently could neither get additional money for new projects (including the Popela project) nor could it transfer monies allocated for the old projects to the new ones.<sup>99</sup> Third, negotiating with the current landowner, Westfalia, was a long, arduous process.<sup>100</sup>

#### 4.3.1 The Popela community and Westfalia

The Constitutional Court judgment states that the nine named claimants are entitled to restitution for the gradual erosion of their rights to 800 square meters of land that they each occupied.<sup>101</sup> However, this land has since become aggregated with other parcels and disaggregating the land is not a simple task. More specifically, the community's land became an extension of a farm called Boomplaas, which in turn was consolidated into a larger farm called Goedgelegen. Goedgelegen and Deilkraal operated as one business unit. Therefore, when faced with the court order and the Commission's proposed redistributive scheme, Westfalia preferred to sell both properties and not only one.<sup>102</sup>

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94 Interview with Nkatingi, Commissioner of the Department of Land Affairs, Pretoria, South Africa (2008).

95 Atuahene (2014) (n 6) 103-105.

96 Interview with Nkatingi, Commissioner of the Department of Land Affairs, Pretoria, South Africa (2008).

97 Interview with Letseja, member of the Land Commission, Pretoria, South Africa (2008).

98 Interview with Mulaudzi, manager, Legal Services, Office of the Regional Land Claims Commissioner for Limpopo Province, Johannesburg (2018).

99 As above.

100 As above.

101 *Goedgelegen* (n 5) paras 89 & 91.

102 Interview with Nkatingi (n 96).

At the time Westfalia operated a large, capital-intensive agribusiness producing avocados, tomatoes and other produce. The Commission wanted to purchase the entire business unit and transfer the 2 000 hectare Boomplaas farm to the Popela community as part of its dignity restoration scheme, involving the entire community. However, the Commission had to ensure that the farm's productivity would not decline, jobs were not lost, and economic development was not retarded. While the Popela community does have extensive farming skills, it does not have the capital or management skills to maintain the existing high-technology, large-scale operation established by Westfalia. To resolve this dilemma, the Commission had at one point recommended that Westfalia become the community's strategic partner.<sup>103</sup> At that time, Commissioner Miyelani Nkatingi said that

as the Commission we are saying and the community is agreeable, we are saying the nine individuals and also the community should be able to be given land to benefit out of it and also be able to see if they cannot benefit in the economic spin-offs within the Westfalia group.<sup>104</sup>

However, before approaching Westfalia and spending significant time negotiating the potential strategic partnership, the Commission did not investigate whether this was something the Popela community wanted.<sup>105</sup> Consequently, the respondents' primary complaint was that the Commission had prioritised negotiations with Westfalia and treated them like second-class citizens. One respondent complained: 'We were never consulted. The Commission wants to hold the meetings with the Westfalia, but we were not invited. They just got the meeting on. We were not invited.'<sup>106</sup> Another lamented that '[the Commission] start to go to Westfalia and see exactly what is Westfalia feeling about the farm and so on. I mean I'll say they are treating them much better than us.'<sup>107</sup> As one community leader poignantly articulated, the Commission's downfall was its total disregard for process.<sup>108</sup>

I think we should be involved and know exactly how it works and who should be our strategic partners even if it's Westfalia, but if the people of Popela can sit down and discuss the whole process and start to feel that maybe they don't have that skill and that capacity to run the farm and they think the best partner will be Westfalia through votes then there's no problem. I'll be happy with that if they agree or not. It is not like somebody has to dictate to us and tell us who should be our strategic partner and so on.

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103 Interview with Letseja (n 97).

104 Interview with Nkatingi (n 96).

105 Confidential interview with 15 (n 41); confidential interview with 11, member of the Popela Community, Limpopo, South Africa (2008).

106 Confidential interview with 16, member of the Popela Community, Limpopo, South Africa (2008).

107 Confidential interview with ALM (n 47).

108 As above.

Although they knew that partnering with Westphalia was untenable, there was no consensus in the community on how to move forward. Some of the nine named plaintiffs wanted the Commission to immediately give them the court-ordered 800 square meters of land so that they could begin earning from the land. Given their experience with the Commission, they did not believe it had the integrity or capacity to deliver the promised 2 000 acres. One said that 'as things are standing we really want the title deed for the small land. So, there is no need to go for the title deed for the whole property whereas there is still a problem on that small land.'<sup>109</sup> If given only the limited land ordered by the Court instead of Westphalia's entire business unit, community members would have been able to use farming methods familiar to them and operate without a strategic partner. On this score, respondents stated that 'we will plough tomatoes, oranges, and cabbages, onions. All these things that we've been planting before.'<sup>110</sup> Another stated that 'we are going to plant and do everything because of I've grown up here and I know all the corners and everything'.<sup>111</sup>

On the other hand, some respondents were more hopeful that the Commission would deliver the 2 000 hectares. However, they were amenable to maintaining the existing capital-intensive farming operation if only they could find a partner who would teach them how to run it while not trying to control them. As one respondent said, 'I will feel very much happy if government brings someone to volunteer to run our place whereby that person will not abuse us and work with us properly. We will feel very much happy.'<sup>112</sup>

For several reasons, respondents' resounding conclusion was that Westphalia was not a suitable strategic partner.<sup>113</sup> First, respondents reported that Westphalia had a history of treating its labourers very poorly, subjecting them to sub-standard working conditions. One community member emphatically declared: 'No, no I say no, I say no, I don't want them because even those who are working at the farm, they are working just like slaves.'<sup>114</sup> Second, Westphalia had disrespected the community and had done irreparable damage to the relationship by systematically blocking access to the graves. One

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109 Confidential interview with 16 (n 106).

110 Confidential interview with 2, member of the Popela Community, Limpopo, South Africa (2008).

111 Confidential interview with 3 (n 32).

112 Confidential interview with 20, member of the Popela Community, Limpopo, South Africa (2008).

113 Confidential interview with P1, member of the Popela Community, Limpopo, South Africa (2008); confidential interview with P16, member of the Popela Community, Limpopo, South Africa (2008); confidential interview with P26, member of the Popela Community, Limpopo, South Africa (2008), confidential interview with P27, member of the Popela Community, Limpopo, South Africa (2008); confidential interview with P30, member of the Popela Community Limpopo, South Africa (2008).

114 Confidential interview with 7, member of the Popela Community, Limpopo, South Africa (2008).

community member recently failed to bury her sister in the community's sacred graveyard because the gates were locked, and 'if you can go and ask them to go and open the gates or to unlock the gates, it is another war with the white people'.<sup>115</sup>

Third, given the tense history between the Popela community and Westfalia, respondents were extremely suspicious of Westfalia's motives for wanting to become a strategic partner. One respondent was concerned: 'I think they will take all over the farm. Why are they, for the first time, why are they willing to help us for the first time, that is why I don't trust them.'<sup>116</sup> Another said:<sup>117</sup>

No, we can't work together with them because they will also, they will again chase us from the land. I don't think it's, I think it will be impossible because we are, those people they don't like us because they are the whites and from a long time the white people are chasing people from our farms.

Fourth, respondents were concerned that the existing asymmetry of power between them and Westfalia would undermine any potential strategic partnership. Many respondents were certain that a strategic partnership between two unequal partners was bound to result in the domination of the stronger partner over the weak. One respondent stated that 'Westfalia will take over. They will keep on leading and it will just go back as in old ages whereby he will take the land back and it will be like nothing has changed.'<sup>118</sup> Another said that '[t]he only thing that I want is the land, it is our land, not the former owner of the land. What is the most important thing is if Westfalia is under our control, but I'm doubting whether it is possible.'<sup>119</sup>

#### 4.3.2 Moving beyond Westfalia

The Commission gave up trying to force the Popela community to enter into a strategic partnership, and purchased the 2 000 hectares of land from Westfalia. However, the land was transferred to the state rather than to the nine Popela claimants or the broader community. According to a legal manager employed at the Commission, there is an internal dispute within the community about how to partition the farm. A community leader, however, contradicted this view. He stated that the community was ready to take the land and there were no internal disputes. What is certain is that the Popela community continues to wait for their land, and the excessive waiting has rendered them marginal. The land reform process intended to achieve

115 Confidential interview with 9, member of the Popela Community, Limpopo, South Africa (2008).

116 Confidential interview with 5, member of the Popela Community, Limpopo, South Africa (2008).

117 Confidential interview with 10, member of the Popela Community, Limpopo, South Africa (2008).

118 Confidential interview with 20 (n 112).

119 Confidential interview with Albert Maake, member of the Popela Community, Limpopo, South Africa (2008).

dignity restoration lamentably seems to have instead produced dignity deterioration.

## 5 A failed attempt to move from reparations to dignity restoration

When the state purchased the 2 000 hectares of land for the whole community instead of the Court-mandated 800 square meters of land for each of the nine families, this was an attempt to include a people who had been excluded and denigrated under prior white regimes. While this was an important step towards dignity restoration, it was not sufficient because dignity restoration is contingent upon the experience of dispossessed communities and individuals in the restitution process and not only the material outcome of the process.<sup>120</sup>

In her book *We want what's ours*, Atuahene uses 150 interviews with urban claimants in the South African land restitution process to identify the main obstacles to dignity restoration.<sup>121</sup> First, the restitution process undermined dignity restoration when it transformed poor claimants into marginalised members of the polity unable to assert their rights and challenge the Commission. This happened because the Commission gained overwhelming power in the restitution process after the legislature had removed the court's power to review all the Commission's settlement decisions and limited the court's review to instances where claimants filed a case in court.<sup>122</sup> Since the majority of poor claimants did not have the resources to bring a complaint before the Land Claims Court, the court's ability to monitor the Commission was greatly reduced and the Commission's decisions, in effect, were final. More detrimentally, civil society organisations did not adequately fill the monitoring role that the court once had. As a result, like a private defence attorney, the Commission protected the interests of claimants; like a prosecutor, the Commission defended the interests of the state; and like a judge, the Commission decided what type of compensation each claimant received. With the Commission's overwhelming power, acting as the prosecutor, defence and judge, many claimants were left powerless.<sup>123</sup>

Second, for many respondents the Commission did not facilitate dignity restoration because the process did not establish them as full citizens with voices capable of demanding the state's attention. When respondents and Commission officials were able to sustain a conversation throughout the five phases of the restitution process, the

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120 Atuahene (2014) (n 6) 191-192.

121 Atuahene 16-17.

122 Atuahene 68-70.

123 Atuahene 71.

Commission was able to more effectively address the deprivations of wealth, agency, and community caused by the dignity takings.<sup>124</sup> A sustained conversation occurred when respondents attended meetings and responded to requests for documentation, and when Commission officials were able to explain the process, respond to inquiries, and proactively address concerns. Unfortunately, several obstacles prevented Commission officials and claimants from sustaining a conversation.<sup>125</sup> More importantly, the failure of Commission officials to give respondents the attention they deserved signalled that their status in the political community had not been fully upgraded with the end of apartheid.<sup>126</sup> The *Popela* case confirms Atuahene's findings because no access to the courts as well as communication breakdowns undermined the Commission's attempts at dignity restoration.

The prolonged wait and resulting pervasive disappointment among respondents from the Popela community transformed a potential moment of dignity restoration into a moment of dignity deterioration. The majority of respondents thought that their day of redemption had come and that they would immediately be free to walk and farm again on their land after, literally, a lifetime of waiting. As one respondent said: 'What I know about the court's decision regarding Popela is that those men who were claiming that this is their land [Westfalia], they should know that we also belong here. This is also our land.'<sup>127</sup> No one expected that more than ten years later they would still be waiting for their land. Mr Maake and the other members of his community have all been gravely disappointed.<sup>128</sup>

We were expecting someone to come, to tell us that we will own the land again and we can do anything we want so there will be no one interfering with our movement on the land, on our graveyards, our farming and all these things ... It was supposed to be a very big party, then and from that day on they were expecting they can now have the access to that land. We did not expect that delay of the government process. They just expecting well from that 6th of June onwards they can still (makes a sound and accompanying hand motions like a vehicle taking off) just take the car, hey my son take me to the grave I want to see A, B, C then no restriction, just drive straight, so we were not expecting we were going to experience this.

At the time of the interviews in 2008, the prolonged wait to receive their land brought about a sense of despondency, anxiety, helplessness, exclusion, marginalisation and resignation. For example, one respondent declared that he was happy with the court victory but said that 'the delay is so unbearable'.<sup>129</sup> Other respondents said that

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124 Atuahene 140.

125 Atuahene 122.

126 Atuahene 193.

127 Confidential interview with 3 (n 32).

128 Confidential interview with 2 (n 110).

129 Confidential interview with PhM, member of the Popela Community, Limpopo, South Africa (2008).



the delay has been 'painful'<sup>130</sup> and they feel 'doomed because we don't know where we are going now'.<sup>131</sup> After about ten years of waiting, one of the leaders of the Popela community reported that the community found it incredible that things were effectively at a standstill and without any clarity as to the source of the continuing delay. He said that it proved that the Commission believed that the Popela community did not matter. He believes that there is some form of corruption occurring, although he could not prove it.

The main finding that emerged from the interviews conducted for this study was that the executive's delayed implementation has led the majority respondents to two conclusions. Prior to the Constitutional Court victory in 2007, community members believed that rich whites were above the law and, in this sense, apartheid was still alive and well. To explain this, one community member recounted a chilling story:<sup>132</sup>

White people hey [laughs] be careful when you want to talk too much, they will beat you. Even now, even if you are in the new government [continues laughing] don't just stand up and say you can just do whatever you want, be careful. Sometimes it's good for you to sit down. There's another guy [more laughter] the nearest farm there. This guy was just walking around the farm from there. He was looking for a toilet, he didn't see the toilet so he just passes his things next to the road. So, the white guy came and found him while sitting there. Hey you, they forced him to eat his own waste [more laughter]. Never arrested! He's rich! Ja, Westfalia is rich, it's like government they are on top of the law and you can't arrest them.

There was a prevalent feeling among respondents that many things had yet to change from the dark days of apartheid, and as one community member poignantly put it, 'freedom is still coming'.<sup>133</sup>

During apartheid, respondents, like other blacks, occupied a marginal space in the polity, and were routinely dehumanised and denied their dignity. The Constitutional Court's decision signalled that the post-apartheid state was actively attempting to restore the Popela community's land rights, celebrate their humanity, and aid them in gradually restoring their dignity that had been robbed in past years. Consequently, the executive's failure to implement the decision in a timely manner was also thick with symbolism and meaning for respondents. To many respondents the executive's failure to implement means that the owners of Westfalia and other whites are still above the law – the same as during apartheid.<sup>134</sup> The Commission's attempts to negotiate with Westfalia without conferring

130 Confidential interview with PuM, member of the Popela Community, Limpopo, South Africa (2008).

131 Confidential interview with Renkie Maake, member of the Popela Community, Limpopo, South Africa (2008).

132 Confidential interview with 3 (n 32).

133 Confidential interview with 13 (n 33).

134 Confidential interview with Jan Maake, member of the Popela Community, Limpopo, South Africa (2008).

with the community added fuel to the fire and signalled that blacks were still not equals – the same as under apartheid.<sup>135</sup>

After the Constitutional Court decision, community members are convinced that some form of corruption is occurring. They are having a difficult time understanding why they do not have their land after an unequivocal court decision from the highest court in the land. One respondent put it succinctly:<sup>136</sup>

We can categorise it [the problem] into two. First, the people who implemented the rules [the ANC] are working for us, but the public servants [at the Commission] are not working for us because they are not doing enough for the community.

From the respondents' perspective, the Commission has failed to deliver on the Court's promise and, surprisingly, both the ruling party (the ANC) and the Constitutional Court are held blameless.

In sum, this study advances our current understanding of dignity restoration. The *Popela* case teaches us that if in its efforts to move from reparations to dignity restoration the state overpromises, then these unfulfilled expectations can have both political and psychological consequences. Politically, South Africa's nascent democracy is weakened by the pervasive belief among respondents that whites are above the law. Also, the strongly-held suspicion that there is some form of corruption delegitimises the Commission, which is an important institution in South Africa's democracy. On a psychological front, respondents interpreted the executive's failure to implement the Court order as an affirmation of their low worth and status in society.

## 6 Conclusion

Like many blacks in South Africa, under colonialism and apartheid the *Popela* community was subjected to dignity takings through the confiscation of their property rights. The post-apartheid state decided to move beyond the Court-mandated reparations and to facilitate dignity restoration by increasing the number of community members entitled to land and also increasing the area of land transferred. The state, however, underestimated the difficulties it would encounter in acquiring and transferring land to the community. Consequently, the community has neither the more modest remedy mandated by the Constitutional Court nor the more ambitious remedy intended to facilitate dignity restoration. More detrimentally, respondents have come to believe that this is because wealthy whites are above the law and beyond the reach of the post-apartheid state. Also, respondents have come to believe that Commission officials are corrupt, and their faith in this important democratic institution has been eroded.

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135 As above.

136 As above.

The Popela story is important as it is the first empirical case to illustrate the consequences of a failed move from reparations to dignity restoration. While a state's decision to provide a comprehensive remedy for dignity takings is noble, it is not a decision that should be taken lightly. Dignity restoration is a resource-intensive, complex remedy that some bureaucracies do not have the capacity to implement, leaving dispossessed individuals and communities in a vulnerable position. Since the fall of apartheid in 1994, the Popela community has been waiting patiently to once again occupy their land as owners. Many respondents believed that the land is worth the wait because it 'will never come to an end and our children will cultivate even the coming generations'.<sup>137</sup> The Commission will hopefully in the near future be able to deliver on its promise for the Popela community's legacy to be restored.

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137 Confidential interview with 10 (n 117).

## From disgust to dignity: Criminalisation of same-sex conduct as a dignity taking and the human rights pathways to achieve dignity restoration

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### Summary

*Despite global advances in the rights of sexual and gender minorities, more than 70 countries worldwide still criminalise consensual same-sex conduct. Taking the case of Kenya, this article employs the concept of 'dignity takings' to underscore the direct and indirect costs of criminalising homosexuality. Criminalisation leads to a direct taking where it engenders forced examinations and medical tests, and indirect takings where the institutionalisation of stigma – labelling sexual and gender minorities as criminal – creates an environment that legitimises the use of violence against individuals on the basis of their real or perceived sexual orientation or gender identity. Viewing criminalisation as a dignity taking not only helps one to understand the direct effects by which the state is empowered to violate the bodies of lesbian, gay, bisexual and transgender persons, but also the more pernicious ways in which the state uses homophobia as a political weapon that can exclude individuals from meaningfully participating as citizens in the body politic. The article also examines the efforts of Kenyan LGBT activists to reclaim dignity by employing international human rights norms and institutions of the African regional human rights system. I argue that the pursuit of public, grassroots activism is an assertion of agency in the face of institutionalised*

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*stigma and systemic violence, and that the strategic mobilisation of human rights norms has allowed activists to reframe LGBT rights in terms of fundamental rights to life and dignity guaranteed to all Africans, effectively countering the false claim that homosexuality is 'un-African'.*

**Key words:** *dignity restoration; criminalisation; same-sex conduct; forced anal examination; LGBT*

## 1 Introduction

On 18 February 2015 two men were arrested near Mombasa, Kenya on suspicion of engaging in homosexual acts. The men were brought to the police station in Diani, a small town on Kenya's southeastern coast, where they were charged with committing an 'unnatural offence'.<sup>1</sup> They were subsequently taken to a local hospital, where each was subjected to a forced examination of his anus, and blood samples were taken to test for HIV and hepatitis B. In the hospital the men were told to undress in full view of police and medical personnel, to lie on a table, and to place their legs in stirrups, while a physician inspected their anal orifices for signs of penetration.<sup>2</sup> With the support of the National Gay and Lesbian Human Rights Commission (NGLHRC), a Kenyan advocacy group, the men challenged the legality of forced medical examinations and testing, arguing that it amounted to cruel and degrading treatment in violation of the Kenyan Constitution and international law.<sup>3</sup> In June 2016, however, the Kenyan High Court at Mombasa upheld the constitutionality of such procedures, accepting the government's contention that the examinations were reasonable and in accordance with the law.<sup>4</sup>

The arrest and charges stemmed from a colonial era law in place prior to Kenya's independence in 1963. As with many former British colonies, Kenya inherited and retained the Colonial Office Model Code of 1930 as its own national Penal Code. Section 162 of the Penal Code classifies 'carnal knowledge of a person against the order of nature' as a felony, punishable by up to 14 years in prison.<sup>5</sup> The law is widely acknowledged to prohibit anal sex or sexual conduct

1 COL & Another v Resident Magistrate Kwale Court & 4 Others eKLR, Petition 51 of 2015, 16 June 2016, [kenyalaw.org/caselaw/cases/view/12375/](http://kenyalaw.org/caselaw/cases/view/12375/) (accessed 29 November 2018). COL and GMN were charged with (i) practising an unnatural offence contrary to sec 162(a) as read with sec 162(c) of the Penal Code (Cap 63, Laws of Kenya); (ii) committing an indecent act with an adult contrary to sec 11A of the Sexual Offences Act 3 of 2006; (iii) trafficking in obscene literature (publications) contrary to sec 181(1) of the Penal Code (Cap 63, Laws of Kenya).

2 As above.

3 The Constitution of Kenya, 2010. Petitioners claimed that the forced examination violated *inter alia* their right to privacy under art 22(1) and amounted to degrading treatment in violation of Kenya's obligations as a state party to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment.

4 As discussed in sec 4 below, this ruling was later overturned on appeal.

5 The Kenyan Penal Code, Cap 63, sec 162.

between men, and between 2010 and 2014 595 people were prosecuted under this law.<sup>6</sup> According to one public opinion poll, nearly 90 per cent of Kenyans find homosexuality 'unacceptable'.<sup>7</sup>

This criminalisation of consensual same-sex conduct (criminalisation) is not unique to Kenya. More than 70 countries worldwide continue to criminalise homosexuality, with more than 30 countries in Africa alone.<sup>8</sup> To be sure, many anti-sodomy laws on the books go unenforced. Nevertheless, the presence of such laws stigmatises homosexuality by giving sexual minorities – that frequently are subjected to discrimination and physical violence – a 'criminal identity'.<sup>9</sup> Even if not rigorously enforced, the mere existence of anti-sodomy laws serves to express contempt and degrade the dignity of homosexual persons.<sup>10</sup>

This article examines whether the criminalisation of consensual same-sex conduct in Kenya constitutes a 'dignity taking'. This concept grows out of the ground-breaking work of Atuahene based on her extensive empirical research in South Africa.<sup>11</sup> Atuahene defines a dignity taking as when a state 'directly or indirectly destroys or confiscates property rights from owners or occupiers and the intentional or unintentional outcome is dehumanization or infantilization'.<sup>12</sup> While the concept was initially developed to address property rights tied to land, I build on the recent work of legal scholars and social scientists who have extended the concept to other political, legal and issue domains and, in so doing, have demonstrated the utility of dignity taking as a mode of understanding the depth and breadth of dignitary harm inflicted on individuals and communities through state takings of property.<sup>13</sup> Employing a 'body as property'

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6 J Ndiso 'Kenya awaits ruling in landmark case to legalise gay sex' *Reuters* 1 March 2018 <https://www.reuters.com/article/us-kenya-lgbt-rights/kenya-awaits-ruling-in-landmark-case-to-legalize-gay-sex-idUSKCN1GE069> (accessed 25 March 2018).

7 Pew Research Centre 'Global views on morality' 15 April 2014 <http://www.pewglobal.org/2014/04/15/global-morality/country/kenya/> (accessed 28 March 2018).

8 P Duncan 'Gay relationships are still criminalised in 72 countries, report finds' 27 July 2017 <https://www.theguardian.com/world/2017/jul/27/gay-relationships-still-criminalised-countries-report> (accessed 20 March 2018); see also A Carroll *State-sponsored homophobia* (2016).

9 Human Rights Watch *This alien legacy: The origins of 'sodomy' laws in British colonialism* (2008) 32. See also CR Leslie 'Creating criminals: The injuries inflicted by unenforced sodomy laws' (2000) 35 *Harvard Civil Rights-Civil Liberties Law Review* 103.

10 See TS Kogan 'Legislative violence against lesbians and gay men' (1994) *Utah Law Review* 209 and DM Kahan 'The secret ambition of deterrence' (1999) 113 *Harvard Law Review* 413.

11 See generally B Atuahene *We want what's ours: Learning from South Africa's land restitution program* (2014).

12 B Atuahene 'Dignity takings and dignity restoration: Creating a new theoretical framework for understanding involuntary property loss and the remedies required' (2016) 41 *Law and Social Inquiry* 817.

13 See, generally, Atuahene (n 12); B Atuahene (ed) 'Dignity takings and dignity restoration' (Symposium) (2017) 92 *Chicago-Kent Law Review* 715.

framework, I argue that criminalisation does constitute a dignity taking.<sup>14</sup> More specifically, as the Kenyan case illustrates, I find that criminalisation can give rise to both *direct* and *indirect* dignity takings. Criminalisation leads to a direct taking where it engenders forced examinations and medical tests, and indirect takings where the institutionalisation of stigma – marking sexual and gender minorities as criminal – creates an environment that legitimises the use of violence against individuals on the basis of their real or perceived sexual orientation or gender identity.<sup>15</sup> Viewing criminalisation as a dignity taking not only helps one to understand the direct effects by which the state is empowered to violate the bodies of lesbian, gay, bisexual and transgender (LGBT)<sup>16</sup> persons, but also the more pernicious ways in which the state uses homophobia as a political weapon that can exclude individuals from meaningfully participating as citizens in the social contract.

The article proceeds in three parts. First, I build on the body as property framework to connect the dignitary violations of criminalisation to the property law concept of dignity takings. Second, I describe the nature of criminalisation in Kenya and identify both the direct and indirect dignity takings that flow from state-sanctioned homophobia. This section relies on analyses of media reports, court documents, non-governmental organization (NGO) records, and semi-structured interviews to identify evidence of the dehumanising and infantilising effects of criminalisation. Third, I address the question of whether activists' efforts to decriminalise consensual same-sex conduct in Kenya reflect a case of dignity restoration. I draw on original fieldwork, including 23 semi-structured interviews with Kenyan LGBT activists and public officials,<sup>17</sup> to explore the pathways through which advocates mobilise to assert their agency and dignity in challenging discriminatory laws. I find that, while this case does not yet rise to the level of dignity restoration since homosexuality remains illegal in Kenya, it does highlight how non-state actors can catalyse the process of dignity restoration where the state remains intransigent. In this case activism itself can serve the ends of dignity restoration by foregrounding the agency of activists and reclaiming autonomy and dignity through coordinated pressure campaigns that assert the humanity of sexual and gender minorities. Moreover, the

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14 On the proposition of body as property, see JF Acevedo 'Dignity takings in the criminal law of seventeenth century England and the Massachusetts Bay Colony' (2017) 92 *Chicago-Kent Law Review* 743.

15 In the case of an 'indirect taking' the state tacitly authorises the theft of property by failing to protect the property and personhood of targeted communities.

16 Many scholars and activists adopt labels including lesbian, gay, bisexual, transgender, intersex, queer, and questioning to reflect various identities. Many activists interviewed used the acronym LGBTI, although transgender and intersex issues are not central to their advocacy efforts. For simplicity in this essay, I use the terms 'LGBT' and 'queer' to encompass sexual and gender minorities.

17 The interviewees were granted confidentiality in accordance with the requirements of institutional review board approval.

Kenyan case illustrates how the language and institutions of international human rights law can provide an opportunity for activists to universalise and legitimise their dignity claims in the face of neo-colonial critiques against LGBT rights.

## 2 Identifying the property interest in LGBT rights

Atuahene's research on the dispossession of black South Africans under apartheid drew attention to the extraordinary nature of the taking in which the loss of property is inextricably linked to a more insidious perpetuation of dehumanising or infantilising policies and practices toward oppressed groups.<sup>18</sup> In many ways, then, the application of dignity takings to LGBT rights reflects a natural extension of the concept to other subjugated communities. Indeed, appeals to human dignity have been central in United States (US) gay rights jurisprudence. Most notably, in his string of US Supreme Court opinions affirming the fundamental rights of gays and lesbians,<sup>19</sup> Justice Anthony Kennedy has drawn what Tribe terms a doctrine of 'equal dignity'. In *Lawrence v Texas*, for example, which struck down state anti-sodomy laws as a violation of the Fourteenth Amendment right to substantive due process, Justice Kennedy held that the stigma of a criminal statute against consensual same-sex conduct offends the 'dignity of persons charged'.<sup>20</sup> The preservation of human dignity thus is integral to the claim for recognising the liberty rights of gays and lesbians. This reasoning finds its apogee in *Obergefell v Hodges*, where Justice Kennedy, again writing for the majority, affirms the right to equal marriage for same-sex couples.<sup>21</sup>

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The concept of dignity also features prominently in foreign legal discourses around LGBT rights. Dignity has been key to the South African Constitutional Court's jurisprudence advancing gay rights. In *Minister of Home Affairs v Fourie*, the Court extended the right to marry

18 See Atuahene (n 12).

19 L Tribe 'Equal dignity: Speaking its name' (2015-2016) 129 *Harvard Law Review* 16; see generally *Romer v Evans* 517 US 620 (1996); *Lawrence v Texas* 539 US 558 (2003); *United States v Windsor* 570 US 744 (2013); *Obergefell v Hodges* 576 US (2015).

20 *Lawrence* (n 19) para 575.

21 *Obergefell* (n 19) 28.



to same-sex couples, finding that 'the exclusion to which same-sex couples are subjected, manifestly affects their dignity as members of society'.<sup>22</sup> The Colombian Constitutional Court similarly appealed to human dignity in its 2011 opinion ruling that the prohibition on same-sex marriage 'violates the right of same-sex couples to constitute a family in conditions of equality and dignity' under the law.<sup>23</sup> In other words, the concept of dignity in the analysis of LGBT rights is not new. The dignitary harm of treating sexual and gender minorities as marginalised and unequal lies at the centre of past and current debates around LGBT rights.<sup>24</sup>

However, to examine whether the criminalisation of consensual same-sex conduct constitutes a dignity taking, we must identify the property interest that connects dignity claims to the direct and indirect confiscation of property by the state. For this, I build on previous studies that identify the body as property. As early as the seventeenth century, Locke contended that every individual 'has a *property* in his own *person*: This no body has any right to but himself.'<sup>25</sup> The right to fully control and assert ownership over one's body forms a precondition of Locke's labour theory of property. To the extent that individuals relinquish rights to political society for the protection of their property, the government is obliged to minimally infringe upon or regulate one's property interest in their own body.<sup>26</sup>

Legal scholars have further developed this framework to explore an intrinsic link between the ownership of the physical body and one's autonomous existence. Margaret Radin develops the 'personhood perspective' premised on the notion that one maintains sole ownership over one's body, and that interference with the body infringes on the right to be treated as a person. If that is the case, she argues, 'the body is quintessentially personal property because it is literally constitutive of one's personhood'.<sup>27</sup> The property interest in the body, therefore, is 'the right to possess one's own body and the

22 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) (SAfr) para 114, as discussed in M Finck 'The role of human dignity in gay rights adjudication and legislation: A comparative perspective' (2016) 14 *International Journal of Constitutional Law* 39.

23 C-577 (2011) Colombia Constitutional Court.

24 Similar to Kenya, sec 377 of the Indian Penal Code, also a relic of the British colonial era law, has been employed to criminalise consensual same-sex conduct. In the 2009 case of *Naz Foundation v Government of NCT of Delhi & Others*, the Delhi High Court declared the law unconstitutional as applied to the consensual private acts of adults ('The discrimination severely affects the rights and interests of homosexuals and deeply impairs their dignity' (92)). On 11 December 2013 the Indian Supreme Court overturned this ruling and upheld the constitutionality of sec 377. On 10 July 2018 the Supreme Court heard a new challenge to the law based, in part, on recent jurisprudence affirming a fundamental right to privacy. As at the date of publication, the Court had not yet issued judgment in the case. See 'India's Supreme Court considers decriminalising gay sex' *New York Times* 10 July 2018.

25 J Locke *Second treatise of government* (1980).

26 See Acevedo (n 14) 743.

27 MJ Radin 'Property and personhood' (1982) 34 *Stanford Law Review* 966.

right to exclude others from it'.<sup>28</sup> This exclusion includes the right against intrusive measures by the state. According to Ramachandran, the body is particularly personal as it grounds our subjective experiences and identities.<sup>29</sup> Ownership over the body is necessary to buffer against coercive efforts by the state or powerful actors to consolidate control over personal subjectivity – that is, thoughts, beliefs, and values – and to defend against the suppression of alternative or queer identities.<sup>30</sup>

Just as individuals have a property right in the body as a whole, that right extends to the body's component parts. As Rao notes, US case law treats bodily fluids, such as blood, as products that can be bought and sold on the market.<sup>31</sup> Courts have come to see blood as 'a full-fledged commodity' produced by its owner and thus considered property.<sup>32</sup> In *Moore v Regents of the University of California*, the Californian Supreme Court held that the patient could not claim a property right to his spleen cells as he had given his consent and did not expect to retain possession after they had been removed from his body.<sup>33</sup> However, the Court's finding that a property right was lost with the cells' removal implies that there was a property interest in the cells while they were still in Moore's body.<sup>34</sup>

Others have employed this framework more concretely in research on worker injuries and criminal justice. Nadas and Rathod argue that injuries suffered by immigrant workers can result in a dignity taking where lax state regulation and a climate of anti-immigrant hostility render the injuries a property right violation.<sup>35</sup> In a study of police misconduct, Acevedo highlights the dignitary harm of discriminatory practices of the New Orleans Police Department, which targeted LGBT individuals for stops and did not adequately investigate crimes committed against LGBT persons.<sup>36</sup> Baer similarly applies the body as property framework to his analysis of Chicago's Jon Burge police torture scandal, in which police officers regularly abused black criminal suspects to extract confessions.<sup>37</sup>

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28 R Rao 'Property, privacy, and the human body' (2000) 80 *Boston University Law Review* 364.

29 G Ramachandran 'Against the right to bodily integrity: Of cyborgs and human rights' (2009) 87 *Denver University Law Review* 4.

30 Ramachandran (n 29) 39.

31 Rao (n 28) 371.

32 Rao 372, discussing *Carter v Interfaith Hospital of Queens* (1969) 304 NYS 2d 97, 101.

33 (1990) 51 Cal 3d 120.

34 Acevedo (n 14) 629.

35 R Nadas & J Rathod 'Damaged bodies, damaged lives: Immigrant worker injuries as dignity takings' (2018) 92 *Chicago-Kent Law Review* 1155.

36 JF Acevedo 'Restoring community dignity following police misconduct' (2015) 59 *Howard Law Journal* 628-629.

37 AS Baer 'Dignity restoration and the Chicago police torture reparations ordinance' (2017) 92 *Chicago-Kent Law Review* 769.

To be sure, conceptualising the body as property raises difficult questions about how such property may be commodified or otherwise exchanged on the market. Some might argue that treating the body as property opens a Pandora's box of potential dignitary harms, where one opts to use her body in a manner that others consider degrading or demeaning. A full treatment of these concerns, however, is beyond the scope of this analysis. Rather, I employ this framework to the extent that it underscores a property interest in the physical body and the concomitant right to protect against dispossession or destruction of that property that can occur either through direct or indirect takings.

### 3 Is criminalisation a dignity taking?

#### 3.1 Direct takings through forced examinations

For Atuahene, dignity takings are distinct from other forms of takings (for instance, constitutional takings) because, in addition to the involuntary loss of property, the 'intentional or unintentional outcome is dehumanization or infantilization'.<sup>38</sup> She specifies that dehumanisation is 'the failure to recognize an individual's or group's humanity', and infantilisation is 'the restriction of an individual's or group's autonomy based on the failure to recognize and respect their full capacity to reason'.<sup>39</sup> While a case of theft by the state need not include both dimensions to constitute a dignity taking, I argue that the direct taking stemming from criminalisation, in the form of forced anal examinations and medical procedures, reflects the confiscation of property that results in both infantilisation and dehumanisation.

The involuntary loss of property is evident in the 2015 case of forced anal examinations noted above. Upon their arrest the two men accused of engaging in homosexual acts were escorted by police to the large public hospital in Mombasa.<sup>40</sup> Prosecutors sought and received a court order that the men submit to 'medical examination'.<sup>41</sup> The men were forced to disrobe in front of police and hospital staff. As one of the men later recounted to Human Rights Watch, '[t]hey told me to lay down and put my legs up and they just looked at it. Then they put something inside that felt like a stick. I didn't see it because I was lying down. It felt terrible, and

38 Atuahene (n 12) 817. For a more general discussion of various forms of takings, see B Atuahene 'Takings as a socio-legal concept: Interdisciplinary examination of involuntary property loss' (2016) 12 *Annual Review of Law and Social Science* 171.

39 Atuahene (n 12) 801.

40 Human Rights Watch 'Dignity debased: Forced anal examinations in homosexuality persecutions' (2016) 30 <https://www.hrw.org/report/2016/07/12/dignity-debased/forced-anal-examinations-homosexuality-prosecutions> (accessed 26 March 2018).

41 COL (n 1) para 4.

uncomfortable.<sup>42</sup> Blood samples were withdrawn to test for HIV and hepatitis B. Furthermore, the men claimed that they did not fully understand the nature of the examination they were about to undergo, and that they signed consent forms under duress while in police custody.<sup>43</sup> Given the involuntary taking of bodily fluids and the manipulation of orifices in the course of the examination, one can observe a clear violation of the men's property rights over their bodies.<sup>44</sup>

In a general sense, medical personnel that have engaged in such examinations may justify their actions as facilitating a public good. The testing is not viewed as a human rights violation; rather, medical personnel are 'helping' men by 'inform[ing] them if they have [sexually transmitted infections], which allows them to get treatment'.<sup>45</sup> Although testing and treatment for HIV and hepatitis B ostensibly are beneficial from a public health perspective, the coercive testing of men suspected of engaging in same-sex conduct suggests that they are unable to act responsibly on their own behalf – that they would not otherwise seek out testing or treatment. Indeed, methods of forced examinations are not regularly employed against other populations with a high incidence of HIV or used for recognised clinical purposes.<sup>46</sup> Such treatment infantilises men by perpetuating the notion that they lack the capacity to monitor their own sexual health.

On 16 June 2016 Justice Anyara Emukule of the Mombasa High Court ruled that the examination was lawful and did not violate the petitioners' constitutional rights. While the judgment dealt a blow to LGBT activists, who saw it as a dangerous precedent, the text of the ruling itself offers a compounding injury through its infantilisation of men who engage in same-sex sexual conduct. In his ruling, Justice Emukule concludes:<sup>47</sup>

I am not a doctor, nor do I understand much biology. But this much I could be tested on. The human alimentary canal starts from the mouth, ringed with lips, teeth, tongue and salivary glands, leading to the throat, the small intestine, large intestine the digestive system where the necessary bodily nutrients are squeezed and absorbed into the body and surplus waste is passed out through the urinary duct, for waste water and the rectum

42 Human Rights Watch (n 40) 30.

43 Human Rights Watch 'Kenya: Court upholds forced anal exams' 16 June 2016 <https://www.hrw.org/news/2016/06/16/kenya-court-upholds-forced-anal-exams> (accessed 4 April 2018).

44 The prosecution argued that, in the absence of explicit consent from the accused, it nevertheless had the authority to seek a court-ordered examination according to sec 36(1) of the Sexual Offences Act, which allows for sample collection for the purpose of gathering evidence.

45 Human Rights Watch (n 40) 2.

46 C Cichowitz et al 'Forced anal examinations to ascertain sexual orientation and sexual behaviour: An abusive and medically unsound practice' (2018) 15 *PLoS Med* <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002536> (accessed 10 April 2018).

47 COL (n 1) paras 46-47.

through the anus for the solid waste. That to my understanding means that neither the mouth nor the anus is a sexual organ. However, if modern man and woman have discovered that these orifices may be employed or substituted for sexual organs, then medical science or the purveyors of this new knowledge will have to discover or invent new methods of accessing those other parts of the human body even if not for purposes of medical forensic evidence, but also curative medical examination.

Although he concedes his limited medical knowledge, the judge focuses on the anatomical and physiological aspects of same-sex conduct and its relationship to the medical examination. He provides a level of detail and specificity that underscores his association of homosexual conduct with digestive processes. The implication of this condescending remark is that engaging in consensual same-sex behaviour does not align with his understanding of appropriate sexual behaviour. He operates from the premise that anal sex is not a practice that one could or would engage in for sexual fulfilment. His failure to even consider the substantive question of whether the examination, given its putative necessity for gathering evidence, violated the petitioners' constitutional rights, reinforces the infantilisation of the men, as the judge instead opts to consider only their relationship to their own bodies and private acts.

At the same time, his detailed focus on biological processes and opprobrium toward homosexual acts signals a broader dehumanisation of men who engage in consensual same-sex conduct. In *From disgust to humanity*, Nussbaum examines how the politics around homosexuality are rooted in a rhetoric of disgust.<sup>48</sup> Opponents characterise homosexual behaviour as 'dirty' and 'revolting', focusing on bodily fluids and 'aspects of the body that many if not most people view with discomfort'.<sup>49</sup> They also reduce anal sex to the pathologised bodies of gay men with the goal, according to Nussbaum, of '[inspiring] simple revulsion and loathing for gay men, and to link their practices to disease and danger'.<sup>50</sup> Justice Emukule's ruling reflects a similar language of disgust, strictly associating anal sex with bodily waste. To be sure, the comparison and rhetoric alone do not rise to the level of dehumanisation. However, when viewed in conjunction with Justice Emukule's ratification of the invasive forced medical examinations and testing, the full effect is 'an insult to human dignity reminiscent of prisons and concentration camps, where the removal of simple bodily privacy became a way of marking some people as not fully human'.<sup>51</sup> In so doing, the judge reduces the petitioners to a status less than human, whose 'disgusting' practices render them subject to invasive procedures and violations of their bodily integrity and property rights.

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48 See MC Nussbaum *From disgust to humanity: sexual orientation and constitutional law* (2010).

49 Nussbaum (n 48) 5.

50 As above.

51 Nussbaum (n 48) 55.

### 3.2 Indirect takings through state-sanctioned violence

A second taking arises from the hostile, homophobic environment enacted by the institutionalisation of anti-LGBT stigma and the criminalisation of sexual and gender minorities in Kenya. An indirect taking can stem from state inaction where the state has a duty to act.<sup>52</sup> Among the most fundamental responsibilities of the state, for which individuals accede to the social contract, is security. Political philosophers from John Locke to Jean-Jacques Rousseau have recognised the obligation of government to protect natural rights, including the self-preservation and physical integrity of its citizens.<sup>53</sup> Not only does the Kenyan government in many instances fail to protect the safety of its most vulnerable citizens, but by criminalising same-sex sexual conduct – and therefore the identities of LGBT Kenyans – it creates a climate that condones violence against individuals on the basis of their real or imputed sexual orientation or gender identity and subordinates them to the dominant orientations and expressions of gender and sexuality. In this sense it is not merely a metaphorical social contract from which LGBT Kenyans are marginalised; rather, anti-sodomy laws target the very essence of sexual and gender minorities and render them subhuman through violent exclusion. They are empirically restricted from full citizenship because the structures of power within that very contract *a priori* exclude them for who they are and deny them the dignity of full participation in the polity.<sup>54</sup>

#### 3.2.1 A dehumanising climate for sexual and gender minorities

Kenyans who identify as or are perceived to be LGBT persons face a dangerous national climate. While criminalisation originated with the colonial era penal code, Kenyan political and religious figures have subsequently championed criminalisation as an anti-colonial-rallying cry and have used the persecution of homosexuality as a domestic scapegoat for external political and economic pressure. In 1999 then President Daniel arap Moi publicly condemned homosexuality as a colonial export: 'It is not right that a man should go with another man or woman with another woman,' he railed. 'It is against African tradition and Biblical teaching. I will not shy away from warning

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52 Atuahene (n 11) 27.

53 Locke (n 25); JJ Rousseau *The social contract: Or, the principles of political rights* (1893).

54 This argument builds on the work of Mills, who uses the concept of 'The racial contract' to describe 'a rhetorical trope and theoretical method for understanding the inner logic of racial domination and how it structures the politics of the west and elsewhere' relative to the central concept of Western political philosophy – the social contract. He describes how a racialised social contract employs law and custom to subordinate non-whites to an overriding structure of white supremacy. See CW Mills *The racial contract* (1997) 6. I thank John Acevedo for highlighting this comparison.

Kenyans about the dangers of the scourge [of homosexuality].<sup>55</sup> His remarks followed events in neighbouring Uganda, where a few days earlier President Yoweri Museveni had ordered the police to 'look for homosexuals, lock them up and charge them' after a same-sex wedding had been held outside Kampala.<sup>56</sup> Moi's attack likely was in response to criticism by the Roman Catholic Church, which had recently criticised the President for, among other crimes, fomenting political violence and rampant corruption.<sup>57</sup>

Although Kenyans ratified a progressive, rights-rich Constitution in 2010, the interests of LGBT individuals were excluded from the reform process. The previous Constitution had long been deemed ineffective and insufficiently protective of fundamental rights.<sup>58</sup> The Constitution of Kenya Review Commission was established in 2000 to propose and evaluate constitutional reforms that would strengthen fundamental rights and institutions to promote them. The review offered an opportunity to expand the discussion around conceptions of equality and non-discrimination to include protections for sexual orientation and gender identity. Rather than encompassing the diverse rights and interests of marginalised groups, the constitutional referendum campaign proved to be a crucible for mobilising homophobia.

In October 2010 the issue of LGBT rights was thrust into the spotlight following the civil partnership of two Kenyan citizens, Charles Ngengi and Daniel Gichia, in London.<sup>59</sup> The local press sensationalised what was seen as the first such ceremony between two Kenyans. In response, the Committee of Experts on Constitutional Review publicly rebuffed the explicit inclusion of 'homosexual and lesbians' rights' in the draft Constitution, viewing them as a poison pill that would lead voters to reject the proposed Constitution.<sup>60</sup> Nevertheless, opponents of the new Constitution seized on the issue of LGBT rights during the referendum campaign, charging that it would legalise same-sex marriage as a strategy of mobilising

55 'Moi condemns gays' *BBC* 30 September 1999 <http://news.bbc.co.uk/2/hi/africa/461626.stm> (accessed 15 March 2018).

56 C McGreal 'Debt? War? Gays are the real evil, say African leaders' *The Guardian* 1 October 1999 <https://www.theguardian.com/world/1999/oct/02/chrismcgreal> (accessed 4 April 2018).

57 As above. See also KG Adar & IM Munyae 'Human rights abuse in Kenya under Daniel arap Moi, 1978-2001' (2001) 5 *African Studies Quarterly* 1.

58 CE Finerty 'Being gay in Kenya: The implications of Kenya's new Constitution for its anti-sodomy laws' (2013) 45 *Cornell International Law Journal* 447.

59 M Ringa 'Law review experts rule out rights for homosexuals' *Daily Nation* 18 October 2009 <https://www.nation.co.ke/news/1056-674074-jkp312z/index.html> (accessed 4 April 2018).

60 As above. See also The Equal Rights Trust, 'ERT interview with David Kuria, Chairman of the Gay and Lesbian Coalition of Kenya (GALCK)' (2010) 5 *The Equal Rights Review* 86-87.

opposition. During a 'No' campaign rally, MP Linah Jebii Kilimo cautioned:<sup>61</sup>

We can see now that they are saying that should this PCK [Proposed Constitution of Kenya] pass it will not discriminate against any marginalised groups that include sex. You have heard it said that there are gay marriages; there is lesbianism, isn't it? And we know that according to our African culture ... we don't even want to mention ... but now it looks like they will be protected under the PCK. They will have rights. That means we are introducing gay marriages in our Constitution, we are allowing lesbianism in our Constitution.

The campaign ultimately was ineffective, and the new Constitution was approved in 2010. Yet, Prime Minister Raila Odinga reassured the public that homosexuality would not be sanctioned under the new constitutional order:<sup>62</sup>

We will not tolerate such behaviours in the country. The Constitution is very clear on this issue and men or women found engaging in homosexuality will not be spared. Any man found engaging in sexual activities with another man should be arrested. Even women found engaging in sexual activities will be arrested. This [homosexual] kind of behaviours will not be tolerated in this country. Men or women found engaging in those acts deserve to be arrested and will be arrested.

This sentiment presaged a continued anti-gay climate. As recently as in August 2014, an 'Anti-Homosexuality Bill' was introduced in the Kenyan Parliament that would have prohibited 'any form of sexual relations between persons of the same sex', as well as the 'promotion' of such practices in public institutions, mandating life imprisonment for an individual that 'aids, abets, counsels or procures another to engage in acts of homosexuality ...'<sup>63</sup>

On the one hand, we can understand this propagation of homophobia as part of a global pattern of state and nation building, where an 'LGBT boogeyman' serves as a focal point for deflecting international and/or domestic political pressure.<sup>64</sup> As Kenya underwent a constitutional revision, which encompassed a process of defining legal citizenship, the politics of organising citizenship turned, at least in part, on competing claims about sexuality and gender roles. Such rhetorical violence degrades and marginalises LGBT Kenyans, but does it rise to the level of a dignity taking? There are multiple forms of

61 Kenya Human Rights Commission 'Wanjiku's journey: Tracing Kenya's question for a new Constitution and reporting on the 2010 national referendum' (November 2010) 25 <http://www.khrc.or.ke/publications/38-wanjiku-s-journey-tracing-kenya-s-quest-for-a-new-constitution-reporting-on-the-2010-referendum/file.html> (accessed 31 March 2018).

62 B Momanyi 'Arrest gays, Kenyan PM orders' *Capital News* 28 November 2010 <https://www.capitalfm.co.ke/news/2010/11/arrest-gays-kenyan-pm-orders/> (accessed 31 March 2018).

63 C Wafula 'Draft Bill proposes harsh penalties against gays' *Daily Nation* 9 August 2014 <http://www.nation.co.ke/news/politics/Republican-Liberty-Party-Bill-Homo-sexuality/-/1064/2414002/-/jiv3s4z/-/index.html> (accessed 31 March 2018).

64 M Bosia 'Why states act: Homophobia and crisis' in M Weiss & M Bosia (eds) *Global homophobia: States, movements, and the politics of oppression* (2013) 37.



violence that do not necessarily threaten the physical body. However egregious the acts, hate speech or public shaming, for example, do not rise to the level of a dignity taking if there is no destruction of the body or other taking of property.<sup>65</sup> On the other hand, I argue that there is a dignity taking where criminalisation and anti-gay stigma engender physical violence due to state inaction – that is, where the state neither recognises nor protects its vulnerable queer population, which is dehumanised through rhetorical and physical exclusion from full participation in the social contract.

LGBT Kenyans have faced persistent physical violence and death threats. In a seminal report from 2011, the Kenya Human Rights Commission (KHRC), an NGO,<sup>66</sup> documented instances of violence against the LGBT community. ‘The outlawed amongst us’ was the first comprehensive, nationwide effort to investigate the situation of sexual and gender minorities in Kenya, based on more than 450 interviews.<sup>67</sup> Respondents reported physical violence including harassment, rioting, beatings, lynching, and mob justice.<sup>68</sup> Individuals recalled being forcibly removed from nightclubs and public spaces.<sup>69</sup> Several related accounts of being gang raped:<sup>70</sup>

Earlier this year in February, we had come home late with two of my gay friends (all from our estate) from town. It was deserted. When we alighted of the *matatu*, we found some four men on the stage. They ordered us to stop and said they knew us and that we were *shogas* [homosexuals]. They said they were *mungiki*. They slapped us and demanded silence as they dragged us to a bush. We were forced to bend and undress and they raped us using saliva as lubricant. They never used any condom. They strangled any who moaned of pain. When they were done, they beat us up and let us go, threatening to kill us if we ever reported or told anyone.

I documented similar accounts through personal interviews with activists in 2013 and 2014. One activist recounted being raped by a group of local men intent on ‘correcting’ her orientation through sexual violence.<sup>71</sup> Another described the danger faced in daily interactions with family and neighbours:<sup>72</sup>

65 Acevedo (n 14) 767 (noting that ‘punishments such as the imposition of “scarlet letters” and other shaming punishments (sitting on the gallows, wearing hemp ropes) were humiliating, but did not rise to the level of dignity takings.)

66 The KHRC is distinct from the quasi-governmental Kenya National Human Rights Commission established by art 59 of the 2010 Constitution of Kenya.

67 Kenya Human Rights Commission ‘The outlawed amongst us: A study of the LGBTI community’s search for equality and non-discrimination in Kenya’ (2011) <http://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/70-the-outlawed-amongst-us/file.html> (accessed 15 March 2018).

68 Kenya Human Rights Commission (n 67) 27.

69 Kenya Human Rights Commission 28.

70 Kenya Human Rights Commission 29. The *Mungiki* are a Kikuyu religio-political movement, which traces its militancy to the anti-colonial Mau Mau rebellion and has some elements linked to sectarian political violence. See PW Kagwanja ‘Facing Mount Kenya or facing Mecca: The *Mungiki*, ethnic violence and the politics of the Moi succession in Kenya, 1987-2002’ (2003) 102 *African Affairs* 25.

71 Personal Interview with Kenyan LGBT activist (B) on 5 September 2014.

72 Personal interview with Kenyan LGBT activist (E) on 27 August 2014.

My neighbours – I played with their kids. One day I went to work. I came back, and my neighbours would not speak to me. The next day I was attacked. When this happened, seven guys waited for me outside my gate ... When I walked past, they started pushing me and kicking me. My neighbour and everybody else did nothing. I was lucky because I escaped. I cannot just go and say to people I'm gay, or lesbian, or homosexual, because they want to kill me.

What is more, there is little accountability for those perpetrating such acts of violence. As one activist remarked, '[t]he police do nothing. They are not interested in us.'<sup>73</sup> Although there are existing laws that proscribe physical violence, including assault and rape, state officials 'indiscriminately apply and enforce existing laws to protect and safeguard the rights of [LGBT] persons'.<sup>74</sup> As a result, impunity is the norm, and LGBT Kenyans, often afraid to go to the police, are further dehumanised because the state fails to recognise them as worthy of protection and the pursuit of justice on their behalf.

The criminalisation of consensual same-sex conduct, and the resulting criminalisation of queer identities, enable a climate that condones physical violence against individuals on the basis of their actual or perceived sexual orientation or gender identity. Some might argue that this is more consistent with a case of radical 'othering' that does not constitute a dignity taking *per se*.<sup>75</sup> Indeed, Atuahene has cautioned against the overextension of the dignity taking concept that would diminish its analytic utility.<sup>76</sup> However, I contend that the violation of bodily integrity fuelled by a context of dehumanisation in which LGBT Kenyans are defined as un-African, un-Kenyan, and not worthy of full participation in the political life of the country, denies these individuals their full humanity and sets them apart from the social contract, thereby restricting their capacity to engage as equal citizens. In other words, homophobic violence against the property and personhood of LGBT Kenyans is the logical extension, and physical manifestation, of a politic that seeks to deny the place of LGBT Kenyans in the social contract and thus deny them their dignity.

#### 4 Decriminalisation as dignity restoration?

Efforts to decriminalise consensual same-sex conduct in Kenya have been met with limited success. On 22 March 2018 the Court of Appeal at Mombasa declared forced anal examinations unconstitutional, overturning the previous ruling from 2015 that

73 Personal interview with Kenyan LGBT activist (A) on 4 September 2014.

74 Kenya Human Rights Commission (n 67) 31.

75 See A Kedar 'Dignity takings and dispossession in Israel' (2016) 41 *Law and Social Inquiry* 866.

76 Atuahene (n 12) 809.

upheld the legality of such procedures.<sup>77</sup> However, as demonstrated by the persistent use of homophobic rhetoric and queer scapegoating by political elites, the Kenyan government has demonstrated little willingness to fully acknowledge or remedy the dignity takings against LGBT people that are enacted through criminalisation. The concept of dignity restoration entails a 'remedy that seeks to provide dispossessed individuals and communities with material compensation through processes that affirm their humanity and reinforce their agency'.<sup>78</sup> At its core, this model of dignity restoration emphasises the *process* through which those who are the subjects of dignity takings seek redress and 'are made whole'.<sup>79</sup> To the extent that criminalisation remains a part of the Kenyan Penal Code and victims have not been compensated, this does not represent a case of complete dignity restoration as Atuahene defines it. Yet, the concept serves to draw our attention to the agency of local activists as well as the broader mobilisation dynamics through which LGBT Kenyans are advocating decriminalisation as a mode of dignity restoration. In addition, the Kenyan case illuminates the use of human rights framings and mechanisms to contest homophobia where other domestic institutions prove closed or unresponsive to dignity claims.<sup>80</sup>

The application of international human rights to sexual orientation and gender identity does not signal the pursuit of new or special categories of rights. Rather, the architecture of rulings by international institutions and 'soft law' norms regarding sexual orientation and gender identity reflects an extension of existing universal and fundamental rights to life and equality.<sup>81</sup> In the face of domestic opposition, Kenyan activists have drawn upon international human

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77 T Odula 'Kenyan court rules forced anal exams as gay test unlawful' *Washington Post* 22 March 2018; *COI & Another v Chief Magistrate Ukundla Law Courts & 4 Others* [2018] eKLR, Civil Appeal 56 of 2016, [kenyalaw.org/caselaw/cases/view/150781/](http://kenyalaw.org/caselaw/cases/view/150781/) (accessed 29 November 2018).

78 Atuahene (n 12) 819.

79 As above.

80 Human rights offer one of many possible modes of asserting dignity claims. Rights are entitlements owed to individuals by virtue of being human. A number of international human rights treaties expressly link human rights to dignity, that is, rights derive from the inherent dignity of each person. How human rights are applied or utilised to realise human dignity can vary across political and cultural contexts. See J Donnelly 'Human rights and human dignity: An analytic critique of non-Western conceptions of human rights' (1982) 76 *American Political Science Review* 303.

81 At the international level, the application of human rights principles to sexual orientation and gender identity has occurred across a range of organisational forums and institutions. In 2006 a group of eminent international lawyers and human rights experts outlined a set of existing universal human rights obligations that applied to sexual orientation and gender identity (see <https://yogyakartaprinciples.org/>). A number of UN bodies have applied human rights law to cases implicating diverse sexual orientations and gender identities, including the Human Rights Committee, the Committee on Economic, Social, and Cultural Rights, and the Committee on the Rights of the Child. See M O'Flaherty & J Fisher 'Sexual orientation, gender identity and international human rights law:

rights norms to push for equal protection under the law.<sup>82</sup> Two developments made it appealing for activists to adopt explicit human rights framings for LGBT advocacy. First, the 2010 Constitution established a national human rights institution, the Kenya National Commission on Human Rights (KNCHR), whose operations are guided by international human rights laws and principles.<sup>83</sup> As an independent body, the KNCHR has an agenda-setting power distinct from the core branches of government. The LGBT community developed an early relationship with the KNCHR and felt it could provide a forum for institutionalising sexual and gender minority rights within mainstream domestic human rights discourse.<sup>84</sup> Second, the Kenyan Constitution incorporates international law directly into domestic law. It creates an affirmative obligation on the state to 'enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms'.<sup>85</sup> International human rights norms became explicitly applicable to domestic legal and political debates, and LGBT activists anticipated opportunities at the regional and international level to pressure the government to enact pro-LGBT reforms.

In May 2010 activists initiated efforts to increase LGBT visibility through public acts of human rights claiming. As one activist told me, '[t]he constitutional review process opened a national dialogue around human rights that we thought we could build on'.<sup>86</sup> The Gay and Lesbian Coalition of Kenya (GALCK) – an umbrella organisation for groups working on behalf of LGBT rights – partnered with the Kenyan Human Rights Commission to produce a public celebration for the International Day Against Homophobia. The event was held at the National Museum of Kenya, and media outlets were invited to cover the event for the first time. Lawrence Mute, at the time a commissioner on the KNCHR, spoke at the event in support of LGBT rights.<sup>87</sup> That same year GALCK organised events around World AIDS Day, drawing attention to the link between homophobia and the spread of HIV in Kenya.<sup>88</sup> A Human Rights Day celebration in

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Contextualising the Yogyakarta Principles' (2008) 8 *Human Rights Law Review* 207. In 2016 the UN Human Rights Council called for an independent expert on protection against violence and discrimination based on sexual orientation and gender identity.

82 This discussion of LGBT advocacy in Kenya is based upon fieldwork conducted in 2013 and 2014. These events were previously discussed in AM Shaw 'Claiming international rights: Tactical forms of human rights mobilisation in Colombia and Kenya' unpublished PhD thesis, Northwestern University, 2015 ch 4.

83 The KNCHR operates in accord with the UN Paris Principles; see Office of the High Commissioner for Human Rights 'Principles relating to the Status of National Institutions (The Paris Principles)' UN GAOR 48/134 of 20 December 1993.

84 Personal interview with Kenyan human rights activist (E) 27 August 2014.

85 Kenya Constitution Ch IV sec 21(4).

86 Personal interview with Kenyan LGBT activist (B) on 5 September 2014.

87 L Barasa & J Wanja 'LGBT celebrate IDAHO, go public' *Daily Nation* 20 May 2010.

88 UHAI-EASHRI *Lived realities, imagined futures: Baseline study on LGBTI organising in Kenya* 16-17.

collaboration with KHRC and KNCHR included participation by Makau Mutua and Martha Karua, an eminent legal scholar and former Minister of Justice, respectively.

LGBT activists raised their public profile by organising events and contesting the marginalisation of and violence against sexual minorities in Kenya as human rights violations. In doing so, they attracted new elite allies who began to include LGBT activists in mainstream human rights processes. In 2010 GALCK was invited to participate in the Universal Periodic Review (UPR) of Kenya's human rights record before the United Nations (UN) Human Rights Council – the periodic review process of all UN member states by the Human Rights Council. KNCHR was coordinating the Kenyan government's official report. In this capacity it conducted consultative meetings with a number of civil society organisations. Lawrence Mute included GALCK in the review process to represent LGBT concerns in the UPR stakeholder report. For the first time before the Human Rights Council, the Kenyan government was compelled to address questions by other member states about discriminatory practices as regards the criminalisation of consensual same-sex behaviour. The UPR outcome report includes the Human Rights Council's recommendation that Kenya ensure equal protection for sexual minorities by decriminalising homosexual conduct.<sup>89</sup>

A persistent charge that dehumanises LGBT Kenyans is the claim that homosexuality is 'un-African'. For activists to repudiate this and reclaim their identities as fully African and full participants in the social contract, they have pursued a strategy of constructing and disseminating an alternative narrative. The African Commission on Human and Peoples' Rights (African Commission), in part created as a counterweight to Western human rights instruments, offered an opportunity 'to create an African conversation about gay rights'.<sup>90</sup> Civil society groups in Kenya and across the region have taken a cautious approach to utilising the regional human rights system. The African Commission is historically underfunded and understaffed. The review processes are often lengthy and conducted in private, away from public scrutiny, and commissioners often lack independence from their national governments.<sup>91</sup> As such, activists needed to ensure

89 UN Human Rights Council, 15th Session, *Report of the Working Group on the Universal Periodic Review: Kenya* (A/HRC/15/8), 17 June 2010 103.5.

90 Personal interview with Kenyan LGBT activist (A) on 4 September 2014; see also AM Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 263. Based on my conversation with Kenyan activists, I understand an 'African conversation' around LGBT rights to reflect grassroots advocacy centred in African domestic and/or regional institutions that is led by local activists rather than relying on Western advocacy networks or external international pressure to shape domestic policies and practices around LGBT rights.

91 R Murray & F Viljoen 'Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 106.

that there was an adequate opening for mobilisation prior to investing in a formal advocacy strategy at the regional level.<sup>92</sup>

In May 2006 the International Gay and Lesbian Human Rights Commission (IGLHRC), a New York-based NGO,<sup>93</sup> along with the South Africa-based Coalition of African Lesbians (CAL), Behind the Mask, and the All-Africa Rights Initiative (AARI), organised a meeting of NGOs to coincide with the 39th session of the African Commission in Banjul, The Gambia. The Commission was reviewing Cameroon's country report, and the coalition took advantage of the opportunity to submit a shadow report on the status of LGBT people in Cameroon.<sup>94</sup> At the 40th session in November 2006, LGBT organisations again met in Banjul, where Uganda's country report was under review. Representatives from GALCK joined activists from IGLHRC, CAL and Sexual Minorities of Uganda (SMUG) in submitting a shadow report on the status of LGBT rights in Uganda.

Kenyan LGBT activists joined representatives from regional and international NGOs at subsequent sessions of the African Commission. Activists used the NGO forum, which ran in conjunction with the official session of the Commission, to build networks and coordinate advocacy strategies.<sup>95</sup> Lacking formal 'observer status' before the African Commission, LGBT groups were unable to directly participate in the country reviews. Instead, they were forced to file shadow reports and channel questions for commissioners through sympathetic civil society organisations that held observer status.<sup>96</sup> By the time of the 43rd session in May 2008, nearly one-third of the participants in the NGO forum were LGBT activists.<sup>97</sup>

In an effort to play a more active role in the proceedings of the African Commission, the CAL, with participation by Kenyan activists, applied for observer status in 2008. Kenyan activists were especially interested in supporting CAL:<sup>98</sup>

The CAL was a pan-African network. We were in a position to shelter ourselves from direct harm by using a South African-based group as a legal entity and the South African network. At that time at the African Commission, most people were heavily lobbying the commissioners. So, you would have people from all over Africa teaching and strategizing. You would also have people analyzing how else to initiate conversations within the civil society space. CAL would also be able to give statements, pointing to issues and making recommendations for action.

In other words, the association with CAL not only advanced tactical goals in terms of mobilisation at the regional level, but also made

92 S Ndashe 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' (2011) 15 *Feminist Africa Legal Voice* 17.

93 IGLHRC is now known as Outright Action International.

94 Ndashe (n 92) 18.

95 Personal interview with Kenyan LGBT activist (B) on 5 September 2014.

96 Ndashe (n 92) 18.

97 Ndashe (n 92) 19.

98 Personal interview with Kenyan LGBT activist (B) on 5 September 2014.

manifest the 'African-ness' of Kenyans' claims through the inclusion of Kenyan LGBT activists as part of an expressly pan-African identity movement. When the issue finally came before the African Commission for consideration, Uganda led a number of states in opposing the CAL application on the grounds that sexual orientation and gender identity were not protected by the African Charter on Human and Peoples' Rights (African Charter). The application was deferred for further discussion and, in October 2010, CAL received official notification that the Commission had refused to grant it observer status.

The rejection of CAL's application was initially seen as a limitation on both institutional access and on the overall visibility of LGBT issues at the African Commission and across the region. It was important for activists to have an organisational presence that was explicitly LGBT in name and in substance.<sup>99</sup> However, the rejection ultimately had a galvanising effect on CAL and LGBT advocacy at the African Commission. One activist recalled:<sup>100</sup>

When the registration was rejected, we went out in full. We had a panel at the NGO session, but what we wanted was for people to see that we had never been given formal reasons for rejection. We had been discriminated against because the word 'lesbian' was in the statement. And the Commission was taking a stand simply by refusing to comment on the issues. So this put pressure on us, and we had to return the pressure to [the Commission]. All levels – international, local, regional. We put together reports, got people from all over to share their experiences. We began advocacy at each session, met one on one with the commissioners, developed a plan of who is the most hostile, who is most friendly.

Activists tried to court individual commissioners who they felt would be open to persuasion. Activists frequently spent time with commissioners simply trying to 'humanise' homosexuality and the violence of the lived experiences of LGBT persons in Africa. As one activist recalled, '[w]e had to show them we are people just like them, worthy of respect and security'.<sup>101</sup> At the same time they also worked to reframe LGBT rights for other participants in the NGO forum as a matter of human rights rather than morality. Many participants from across the continent held anti-gay views that prevented LGBT issues from holding a more prominent place on the NGO Forum agenda and from receiving its full support before the African Commission. By highlighting the violence and daily struggles of LGBT individuals, activists worked to recast the debate in terms of the fundamental right to life and dignity, free from violence and insecurity, and to separate LGBT issues from debates about religious or moral approval.

In 2014, during its 55th ordinary session, the African Commission adopted Resolution 275 on the 'Protection Against Violence and

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99 Personal interview with Kenyan LGBT activist (A) on 4 September 2014.

100 Personal interview with Kenyan LGBT activist (B) on 5 September 2014.

101 Personal interview with LGBT specialist at international human rights organisation on 27 August 2014.

Other Human Rights Violations Against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity'.<sup>102</sup> The Resolution was an important step in realising full equality for LGBT persons.<sup>103</sup> In 2013 Lawrence Mute, the Kenyan human rights expert, was appointed to the African Commission and was instrumental in shepherding the Resolution to a vote.<sup>104</sup> The Resolution condemns violence on the bases of sexual orientation or gender identity and calls on states to ensure that appropriate measures are in place to protect victims and punish perpetrators. However, it stops short of calling for specific legal changes, such as decriminalisation or the expansion of same-sex partner rights.

While the human rights 'turn' has not yet led to decriminalisation, the modest gains achieved by activists nonetheless reflect a bottom-up process of rights claiming that centres their agency in restoring their own dignity. This ongoing process has advanced the dialogue around LGBT rights in Kenya and reaffirmed the dignity of sexual and gender minorities as fully African and entitled to the same fundamental rights as their fellow citizens. This continues to be evidenced by the incremental gains of local activists through strategic litigation. In 2015 the High Court in Nairobi struck down a ruling by the Kenya Non-Governmental Organisations Coordination Board which had refused to grant official NGO status to the National Gay and Lesbian Human Rights Commission (NGLHRC) and its founder Eric Gitari, arguing that the proposed organisation promoted illegal homosexual behaviour. The Court held that the ruling violated Gitari's 'constitutionally guaranteed freedom to associate', having declared that the Constitution's protection of 'every person' extended to 'all persons living within the republic of Kenya despite their sexual orientation'.<sup>105</sup> In its judgment the Court drew extensively on international law, including jurisprudence of the African Commission. In March 2018 the Kenyan High Court announced that it would finally rule on a case from 2016 challenging the constitutionality of sections of the Penal Code criminalising homosexuality.<sup>106</sup> This challenge was also spearheaded by Gitari, who makes the direct claim that such laws violate constitutional protections, including the provision that '[e]very person has inherent dignity and the right to have that dignity

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102 African Commission on Human and Peoples' Rights, 55th ordinary session, 'Resolution on Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity' (2014), <http://www.achpr.org/sessions/55th/resolutions/275/?prn=1> (accessed 6 April 2018).

103 T Senzee 'African Commission on Human Rights passes LGBT resolution' *Advocate.com* 2 June 2014 <https://www.advocate.com/world/2014/06/02/african-commission-human-rights-passes-lgbt-resolution> (accessed 6 April 2018).

104 Personal interview with Kenyan human rights public official on 24 September 2014.

105 Petition 440 of 2013 (<http://kenyalaw.org/caselaw/cases/view/108412/>).

106 Ndiso (n 6); see also petition 150 of 2016.



respected and protected'.<sup>107</sup> At the time of the publication of this article there has not yet been a final verdict. Consensual same-sex conduct remains criminalised in Kenya.

Although falling short of decriminalisation and material compensation at this point in time, LGBT activists nonetheless have carved a path that is dignity-restorative. The very pursuit of public, grassroots activism is an assertion of agency in the face of institutionalised stigma and systemic violence. Moreover, advocacy within the regional human rights system has allowed activists to reframe LGBT rights in terms of fundamental rights to life and dignity guaranteed to all Africans, effectively countering the false claim that homosexuality is 'un-African'. As such, it is LGBT Kenyans and their allies that are driving the fight for equal dignity and full citizenship, with recent court victories reflecting a growing political and legal power, even if not a full remedy for the injustice of dignity takings.

## 5 Conclusion

The concept of dignity takings offers a powerful lens through which to examine the impact of criminalising homosexuality. In addition to the direct takings through forced medical examinations that flow from state enforcement of the Penal Code, the concept elucidates the pernicious effects of criminalisation through state inaction and the failure to protect the bodies of LGBT persons. It is often noted that anti-sodomy laws are rarely enforced where they remain official law. However, as the Kenyan case illustrates, the criminalisation of same-sex conduct and, in turn, the criminalisation of LGBT identities institutionalise stigma that enables violence with the effect of dehumanising and infantilising sexual and gender minorities.

As such, any remedy necessarily requires a repeal of homophobic laws. Yet, while a favourable ruling on the constitutionality of criminalising same-sex conduct would go far in righting past wrongs, the decriminalisation of homosexuality alone would not be sufficient to constitute full dignity restoration. Dignity restoration requires an affirmative move by the state to acknowledge past injuries. A judicial ruling that overturns anti-sodomy laws would be reactive to litigants' claims and not an affirmative move by the state that takes stock of the violence – both physical and structural – that it has perpetrated against LGBT Kenyans. Activists have advanced a process that may ratify their dignity claims through judicial ruling, but the concept, as Atuahene defines it, suggests a more active and intentional response from the state. Nevertheless, the dignity restoration framework elevates the importance of activist-led mobilisation and how activism itself can serve the ends of restoring human dignity.

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107 Art 28 Constitution of Kenya.

## The shadow of legal pluralism in matrimonial property division outside the courts in Southern Nigeria

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### Summary

*Scholarly interest in the co-existence of normative orders in African social fields tends to focus on conflicts arising from the interaction of customary law with state law. This article takes a different path by revealing the normative influence of state law on actors involved in matrimonial property division outside the courts in Southern Nigeria. Based on individual interviews and focus group discussions with female divorcees, their parents, clergy, traditional leaders, NGOs and social welfare officials, it analyses inequalities in property division under customary law, arguing that these inequalities often lead to 'dignity takings'. It reveals how the Social Welfare Department, a government agency mandated to champion the interests of women and children, plays a prominent role in the privileging of gender, class and women's dignity. Spurred by statutes, this department increasingly orders men to divide matrimonial property and/or to pay compensation to women. Its quasi-judicial orders on marriage gifts, properties bought by women, and child custody potentially contribute to 'dignity restoration' for women infantilised by the customary law of matrimonial property. By revealing the driving forces behind shifts in the traditional philosophy of matrimonial property, the article demonstrates how non-judicial dialogue between state law and customary law facilitates a living customary law of marital property division in Southern Nigeria.*

**Key words:** *customary law divorce; dignity takings; matrimonial property; Social Welfare Department; Nigeria*

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# 1 Introduction

Legal pluralism in Africa is generally regarded as the co-existence of international, state, customary and religious laws within a population or social field.<sup>1</sup> Academic interest in this co-existence tends to focus on the conflicts arising from customary law's interaction with the transplanted European laws that developed into state law.<sup>2</sup> This interest is understandable, given the problems caused by the wholesale transplantation of relatively sophisticated European laws into agrarian political economies. As Merry observed, 'the imposed law, forged for industrial capitalism rather than an agrarian or pastoral way of life, embodied very different principles and procedures ... [and] overlooked, to a large extent, the complexity of previous legal orders'.<sup>3</sup> Arguably, this complexity is partly traceable to the close link between customary law and the foundational values which prompt, inform and guide the manner in which people apply customs. Unfortunately, judges and policy makers do not pay sufficient attention to these values.<sup>4</sup> For example, customary law heirs inherited property alongside duties such as care for a deceased's dependants and the preservation of the ancestral home.<sup>5</sup> However, when interpreting customary law, judges applied formal rules of inheritance without their foundational duties, sometimes relying on distorted versions of customs presented by chiefs and headmen.<sup>6</sup> Codified customs, textual descriptions and judicial precedents became known as official customary law, raising conflict of law problems that encouraged an antipodal approach to legal pluralism.<sup>7</sup> In a marked departure from mainstream scholarship, this article primarily aims to reveal dialogue between state law and customary law in the context

- 1 GR Woodman 'Legal pluralism in Africa: The implications of state recognition of customary laws illustrated from the field of land law' in H Mostert & T Bennett (eds) *Pluralism and development: Studies in access to property in Africa* (2012); PS Berman *Global legal pluralism: A jurisprudence of law beyond borders* (2012).
- 2 See, eg, M Pieterse 'Killing it softly: Customary law in the new constitutional order' (2000) 33 *De Jure* 35; A Hellum 'Human rights and gender relations in post-colonial Africa: Options and limits for the subjects of legal pluralism' (2000) 25 *Law and Social Inquiry* 635 at 637.
- 3 SE Merry 'Legal pluralism' (1988) 22 *Law and Society Review* 869.
- 4 AC Diala 'Lessons from South Africa on reform of the customary law of inheritance in Nigeria' (2014) 14 *African Human Rights Law Journal* 633.
- 5 As above; C Fombad 'Gender equality in African customary law: Has the male ultimogeniture rule any future in Botswana?' (2014) 52 *Journal of Modern African Studies* 475.
- 6 L Mbatha 'Reforming the customary law of succession' (2002) 18 *South African Journal on Human Rights* 259; *Onyibor Anekwe & Another v Maria Nweke* (2014) All FWLR (Pt 739) 1154, *Ukeje v Ukeje* (2014) 11 NWLR (Pt 1418) 384-414; *Bhe v Magistrate Khayelitsha & Others* 2005 (1) BCLR 1 (CC).
- 7 CN Himonga & C Bosch 'The application of African customary law under the Constitution of South Africa: Problems solved or just beginning' (2000) 117 *South African Law Journal* 319; TW Bennett '"Official" vs "living" customary law: Dilemmas of description and recognition' in A Claassens & B Cousins (eds) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* (2008); J Bekker & GJ van Niekerk 'Broadening the divide between official and

of matrimonial property division outside the courts. Two arguments accompany my aim.

First, although I acknowledge the seriousness of conflict of laws, I believe that legal pluralism in Africa is adaptive in nature. Accordingly, it should be approached from the perspective of dialogue between state law and customary law. This belief is informed by my empirical evidence, which reveals state law's considerable influence on the normative behaviour of individuals who observe customary law. Interestingly, this influence transcends the decisions and pronouncements of courts in Southern Nigeria. An example of this influence is the best interests of the child principle, which I discuss in part four of the article.

Second, customary law's denial of women's matrimonial property rights during divorce fits the burgeoning jurisprudence of 'dignity takings'. The notion of dignity takings is a relatively recent entrant into socio-legal theory. It developed from Atuahene's striking book *We want what's ours: Learning from South Africa's land restitution program*.<sup>8</sup> This book portrays the colonial and apartheid era land disposessions in South Africa as dignity takings as they involved not only deprivation of property but also dignity. It further argues that South Africa's attempts at confronting the underlying dehumanisation, infantilisation and political exclusion that underpinned land disposessions is a 'dignity restoration' measure, which transcends the usual remedy of providing compensation for physical property losses.<sup>9</sup> In a later contribution Atuahene conceptualised dignity takings as 'when a state directly or indirectly destroys or confiscates property rights from owners or occupiers and the intentional or unintentional outcome is dehumanisation or infantilisation'.<sup>10</sup> I argue that the denial of women's matrimonial property rights during divorce results in dignity takings as it ignores women's economic agency and capacity to make informed decisions regarding their contributions to matrimonial property. By revealing how a government agency navigates the customary law power inequalities that inform dignity takings in matrimonial property disputes, I explore whether the interventions of this agency fit the notion of 'dignity restoration'.

While it is relatively easy to conceptualise dignity takings beyond land disposessions, it is difficult to conceptualise dignity restoration. Historically, those at the receiving end of property disposessions are

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living customary law' (2010) 73 *Journal of Contemporary Roman-Dutch Law* 679; JC Bekker & IP Maithufi 'The dichotomy between "official customary law" and "non-official customary law"' (1992) 17 *Journal for Juridical Science* 47; M Pieterse 'Reform of the South African customary law of succession: Final nails in the customary law coffin?' in J Fenrich et al *The future of customary law* (2011) 336.

8 B Atuahene *We want what's ours: Learning from South Africa's land restitution program* (2014).

9 Atuahene (n 8) 796.

10 B Atuahene 'Takings as a socio-legal concept: An interdisciplinary examination of involuntary property loss' (2016) 12 *Annual Review of Law and Social Science* 171 at 178.

poor and vulnerable individuals, who are often victims of conquests, conflicts, colonialism and apartheid. More recently, communism and capitalism, which often masquerade as wealth distribution and a free market, respectively, have contributed to property dispossession under the legal banner of public purpose and just compensation. However, although 'material compensation is an appropriate remedy' in most property dispossessions, it 'is not enough' because the victims lose 'more than their property – they [are] also deprived of their dignity'.<sup>11</sup> Atuahene argues that 'the appropriate remedy for a dignity taking is "dignity restoration"', which she defines as a 'remedy that seeks to provide dispossessed individuals and communities with material compensation through processes that affirm their humanity and reinforce their agency'.<sup>12</sup> To achieve adequate dignity restoration, therefore, remedies for dignity takings must be articulated through mechanisms that respect the individuals who are harmed by such takings, thereby affirming their humanity and agency.

In extrapolating the notion of dignity takings to the customary law of matrimonial property in Southern Nigeria, I argue that dignity takings occur on two fronts. The first, which does not directly involve the state, occurs when men rely on customary law to rob women of matrimonial property during divorce. Given that women directly and indirectly contribute in the acquisition of marital property, denying them a right to benefit from this property denies their status and agency as equal partners in the marriage project. As I explain later, this denial equates to the infantilisation of women. The second front on which dignity takings occur is the non-existence of regulatory conditions that enable divorcing women to claim marital property. To limit and prevent dignity takings, married women must obtain agency through matrimonial property legislation, and/or inclusion of matrimonial property rights in the Nigerian Constitution. Such legislative measures will affirm women's status as property rights-bearing individuals in cases of divorce, thereby affirming their agency as decision-making adults.

After explaining how dignity takings occur in marital property division, I explore the notion of dignity restoration by showing how state law is driving change in traditional perceptions of matrimonial property rights. I demonstrate how the arbitral decisions of a government agency mandated to protect the rights of women and children are facilitating a living customary law of matrimonial property. As a concept, living customary law is described in mainstream literature as the flexible norms that govern people's daily lives, but is easier understood as the norms that emerge from people's adaptation of customs to socio-economic changes.<sup>13</sup> These norms

11 Atuahene (n 8) 796.

12 Atuahene 818.

13 AC Diala 'The concept of living customary law: A critique' (2017) 49 *Journal of Legal Pluralism and Unofficial Law* 143.

may be contrasted with customs which people have not adapted to socio-economic changes, which may be described as non-living customary law.<sup>14</sup> I argue that an 'adaptation view' of living customary law is significant for the notions of dignity taking and dignity restoration, since the application of customary law must keep pace with contemporary ideas and attitudes.

The article is informed by semi-structured interviews and focus group discussions with 86 purposively selected female divorcees, their parents, clergy, traditional leaders, non-governmental organisations (NGOs), judges and social welfare officials. These surveys were held between June 2014 and January 2015 in Southern Nigeria, a generally homogenous, predominantly Christian area with a population of approximately 30 million people.<sup>15</sup> The surveys targeted individuals operating in social fields in which the traditional philosophy of customary law denies women's matrimonial property rights. In fact, in some of these social fields women are regarded as properties – that is objects of inheritance through levirate marriage.<sup>16</sup> In the context of this traditional philosophy, they are unable to assert matrimonial property rights. This philosophy, also referred to as non-living customary law, is traceable to the agrarian social settings in which customary law emerged. Two features of this social setting are worth noting for the notion of dignity takings.

First, the concept of 'family' was usually expansive, since it comprised not only spouses and their children, but also uncles, nephews and cousins, all of whom worked as a unit to produce property.<sup>17</sup> Family property was very basic and, other than land, chiefly consisted of communal huts, mats, livestock, economic trees, fishing nets, ritual symbols, kitchen utensils and farming tools. There were no modern gadgets such as cars, refrigerators, computers, television sets and rented apartments. In this close-knit social setting, inheritance was only through the eldest male child, followed by the next senior son, failing which inheritance fell on uncles.<sup>18</sup> This so-called rule of male primogeniture automatically excluded women. It was justified on the need for an authority figure (the family head) to safeguard family assets and ensure the economic maintenance of widows, unmarried daughters and teenage sons.<sup>19</sup> This agrarian social

14 As above; AC Diala 'Judicial recognition of living customary law in the context of matrimonial property rights in South-East Nigeria' PhD thesis, University of Cape Town, 2016.

15 This is an estimated figure. The 2006 national census puts the region's population at 16.4 million.

16 CJ Korieh 'Widowhood among the Igbo of Eastern Nigeria' MA dissertation, University of Bergen, 1996 ch 3.

17 CN Himonga 'Property disputes in law and practice: Dissolution of marriage in Zambia' in A Armstrong & W Ncube (eds) *Women and law in Southern Africa* (1987) 61-66.

18 N Okoro *The customary laws of succession in Eastern Nigeria and the statutory and judicial rules governing their application* (1966) 4-6.

19 As above.

setting birthed the customary law philosophy of non-matrimonial property rights for women, a philosophy similar to *feme covert*. Also called *couverture* or *coverture*, *feme covert* was a legal doctrine in medieval Europe, in which a married woman's legal rights and liabilities were subsumed by her husband's rights. As Blackstone described it,

the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover, she performs everything; and is therefore called ... a *feme covert*.<sup>20</sup>

After encountering this *feme covert*-like philosophy, colonial courts created the official customary law that prevents women from exiting marriage with properties other than their clothes and cooking utensils.<sup>21</sup> Considering contemporary settings of urbanisation, sophisticated forms of household property, and women's contributions to property acquisition through their independent income, adherence to this official customary law during divorce amounts to the infantilisation of women.

The second feature of customary law's agrarian origin is that the woman physically leaves her community after the payment of her bride wealth and joins the husband's family. This movement, which still largely exists, occurs in a manner that makes it clear that she is subordinate to her husband.<sup>22</sup> As Radcliffe-Brown summarised it, 'marriage involves some modification or partial rupture of the relations between the bride and her immediate kin ... and gives the husband and his kin certain rights in relation to his wife and the children she bears'.<sup>23</sup> The woman's relocation to a different family setting brings her within the ambit and control of her husband's property rights in, as explained, a philosophy similar to *feme covert*. Notably, up to the twentieth century, *feme covert* was applied in the Anglo-American legal tradition with an accompanying duty of care from the husband to the wife.<sup>24</sup> In Nigeria, however, even though a man's duty to care for his family is a foundational value of customary law,<sup>25</sup> judges rarely utilise this duty to order maintenance or compensation for women after divorce.<sup>26</sup> Unable to assert matrimonial property rights under customary law, and unprotected by

20 W Blackstone *Commentaries on the laws of England*, Vol 1 (1976) 443-445.

21 SNC Obi et al *The customary law manual* (1977).

22 P Iroegbu *Marrying wealth, marrying poverty: Gender and bride wealth power in an African society: The Igbo of Nigeria* (2007).

23 AR Radcliffe-Brown & D Forde *African systems of kinship and marriage* (1950) 43-51.

24 H Hartog *Man and wife in America: A history* (2000) 146.

25 E Nwogugu *Family law in Nigeria* (2014) 59-60; FDI Jones *Ibo and Ibibo-speaking peoples of South-Eastern Nigeria* (1950) 18; TO Elias *Groundwork of Nigerian law* (1954) 288-289; SNC Obi *Modern family law in Southern Nigeria* (1966) 366-371.

26 Patriarchal perceptions of matrimonial property rights are the main reason for judges' reluctance to invoke this duty of care in Nigeria. See AC Diala 'Legal pluralism and social change: Insights from matrimonial property rights in Nigeria'

Nigeria's legislative framework, women in the process of divorce are routinely robbed of property. This robbery is shrouded in strong, patriarchal gender relations, which denies married women's economic and emotional agency as contributors to matrimonial property acquisition. The result of this denial is disrespect, dependence and legal helplessness in divorcing women, which amounts to infantilisation.

Following this introduction, part 2 of the article applies the notions of dignity taking and dignity restoration to matrimonial property rights. In so doing, I attempt to overcome conceptual barriers to the application of dignity takings to matrimonial property tussles in Nigeria. Thereafter, I problematise the conceptualisation of dignity restoration in context-specific cases involving non-state actors. In part 3 I introduce the Social Welfare Department, a government agency statutorily mandated to protect the interests of women and children. I identify this agency's role in contestations over custody of children, properties brought into marriage by women, and properties acquired during the subsistence of marriage. In part 4 I innovatively analyse the role of the Department in the privileging of gender, class and dignity in matrimonial property. I situate the Department's influence within a legal pluralistic framework, one in which dialogue between customary law and state law manifests in the Department's quasi-judicial orders on marital assets division, the custody of children and child and spousal maintenance. I explore whether these orders contribute to 'dignity restoration' for women previously ignored by the non-living customary law of matrimonial property. In part 5 I conclude by drawing attention to the potential that dialogue between customary law and state law holds for theoretical perspectives on legal integration in Africa.

## 2 Dignity takings in matrimonial property disputes

Applying the notion of dignity takings to matrimonial property disputes in Nigeria could face some conceptual barriers. First, it may be asked whether dignity takings apply to the non-living customary law of matrimonial property, especially in Southern Nigeria. To be clear, two elements are required for a dignity taking to occur. These are 'involuntary property loss plus either dehumanisation or infantilisation'.<sup>27</sup> Underpinning these two elements is the concept of dignity, of which the jurisprudence is well known. It suffices to identify the two core components of dignity: 'equal human worth and autonomy'.<sup>28</sup> The first conceptual barrier may be framed as a

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in C Rautenbach & S Mancuso (eds) *In the shade of an African baobab: Tom Bennett's legacy* (2018) 166-167.

27 Atuahene (n 8) 804.

28 Atuahene 800.



question: Who is responsible for dignity takings in matrimonial property disputes?

## 2.1 Responsibility for dignity takings

It is too simplistic to offer non-state actors as the sole answer. The non-living customary law of matrimonial property epitomises 'the invisible, constant, and normalised oppression of women' in socio-cultural relations.<sup>29</sup> Since the state has appropriated to itself regulatory power over behaviour, it behoves on it to curb all customary law behaviour which demeans, infantilises and dispossesses women of marital property. Most constitutions provide for human rights to bind the state, its agents and private individuals.<sup>30</sup> For example, section 34(1) of the Nigerian Constitution provides that '[e]very individual is entitled to respect for the dignity of his person, and accordingly, no person shall be subject to torture or to inhuman or degrading treatment'. Despite defaulting to the male pronoun, this provision protects a woman's right to dignity, which is violated when she is kicked out of her matrimonial home and robbed of a share in her matrimonial property.<sup>31</sup> Importantly, she is infantilised when her agency is denied over marital property which she bought or helped to acquire with her independent income. For enabling this situation, both the state and the individuals who rob women of matrimonial property are liable.

## 2.2 Is the notion of dignity takings applicable to marriage?

The heading above captures the second conceptual barrier to the application of dignity takings to matrimonial property division under customary law. While dignity takings may not apply to a 'happy' marriage, the same cannot be said for divorce. In an analytic sense, the separation of a married woman's legal status from her husband's is of recent origin under the common law legal tradition. Prior to this separation, the extent to which involuntary property loss constituted dignity taking under the doctrine of coverture was unclear. In his case analysis of coverture in the Anglo-American legal system of the late twentieth century, Hartog rules out coverture as constitutive of dignity taking.<sup>32</sup> He critiques literature arguing that coverture is 'an inevitable consequence of marriage, [which] implicitly infantilized women [and] kept them from being recognized as autonomous adults'.<sup>33</sup> He draws a distinction between marriage as dignity taking and coverture as an aspect of marriage that leads to dignity taking. Citing reasons such as

29 Atuahene (n 10) 180.

30 See, eg, sec 8(2) of the 1996 Constitution of South Africa, and sec 34(1) of the 1999 Constitution of Nigeria.

31 UC Isiugo-Abanihe 'Reproductive motivation and family-size preferences among Nigerian men' (1994) 25 *Studies in Family Planning* 149 at 154.

32 H Hartog 'Coverture and dignity: A comment' (2016) 41 *Law and Social Inquiry* 833.

33 Hartog (n 32) 835.

love, choice and the cultural respect conferred by marriage, he argues that marriage does not automatically 'produce a loss of dignity ... [and is also] the antithesis of an "extraordinary" taking'.<sup>34</sup> However, his focus was on coverture within an ongoing marriage, not as a divorce doctrine in a society where non-living customary law denies women's matrimonial property rights. Importantly, the twentieth century Anglo-American legal tradition he analysed did not deny divorced women maintenance or compensation rights. Indeed, Hartog admits that invocations of 'coverture would include many separated wives ... suing to require husbands to support them, to provide for their "necessaries"'.<sup>35</sup> Although 'suing to require husbands to support them' indicates some sort of agency, it hints at action against an infantilised property rights regime. My concern here is with something much more invidious. One aspect of the problem is a philosophy of customary law which regards divorcing women as unworthy of benefiting from property division, irrespective of their contribution to the acquisition of marital property. The other aspect is a total absence of a legal platform for redressing this situation. This combination of official/non-living customary law and an indifferent legal framework often results in a multi-pronged humiliation of homelessness, property theft and disrespect of women's agency over their contributions to property acquisition. To be clear, these contributions are made through women's independent income and emotional support to their husbands. Such an unreasonable philosophy clearly infantilises women and, in some cases, could even be dehumanising. In any case, the rich jurisprudence on domestic abuse shows that dignity takings can occur in subsisting marriages.

One may argue that dignity takings do not apply to matrimonial property because some women elect not to contest property during divorce. In other words, it may be argued that the element of involuntary property dispossession is not present. This argument, however, cannot be sustained when one fully considers the structural barriers and unequal power relations within which matrimonial property rights are asserted and denied. As Pils's study of evictions in China shows, dignity takings also occur when state structures restrict citizens from mobilising to assert their rights, or when state structures erect insurmountable barriers that promote property dispossessions.<sup>36</sup> Many divorcees told me that they did not bother to contest marital property, not because they did not want to, but because it would be in vain. As a long-divorced woman wryly summarised it, 'I had not gotten that idea that it [matrimonial property rights] operates in Nigeria or even in Africa. So, I thought it was only the Europeans that have that.'<sup>37</sup> Arguably, women's defeatism is induced or exacerbated by their legally insecure status, while their emotional and financial

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34 As above.

35 Hartog (n 32) 837.

36 E Pils 'Resisting dignity takings in China' (2016) 41 *Law and Social Inquiry* 888.

37 Interview with a divorced school principal on 29 July 2014 in Owerri.

distress negates the voluntariness of their property loss. In fact, the heartrending circumstances surrounding divorce in Southern Nigeria epitomise the demeaning socio-cultural position of women under customary law. The denial of women's matrimonial property rights, therefore, qualifies as a dignity taking worthy of dignity restoration. In this sense, should dignity restoration be state-driven, or could it be initiated by non-state actors such as family members, community leaders and women themselves? This question is significant for the scholarly conceptualisation of dignity restoration.

### 2.3 Problematic conceptualisation of dignity restoration

Dignity takings and dignity restoration originally were used in a vertical sense – that is in the sense of state-initiated property disposessions, usually justified by legislation or public purpose. Unlike the South African context of dispossession within a state-sanctioned apartheid system, the non-living customary law of matrimonial property in Southern Nigeria is practised largely by non-state actors. However, given the total absence of state regulation of customary marriage and its proprietary consequences, these actors arguably behave with practically no legal restraint, and in contravention of the right to human dignity. In this sense, if dignity takings apply to their conduct, should dignity restoration be the exclusive preserve of the state and its agents? Regrettably, the present conceptualisation of dignity restoration indicates state-centricity as it includes the element of process.<sup>38</sup>

Atuahene defines dignity restoration as 'a remedy that seeks to provide dispossessed individuals and communities with material compensation through processes that affirm their humanity and reinforce their agency'.<sup>39</sup> She identifies restitution, redistribution, reparations and restoration as the constitutive elements of dignity restoration.<sup>40</sup> These elements are, as she affirmed, 'process-oriented terms'.<sup>41</sup> In my view, however, process is not suitable for involuntary property losses perpetrated by non-state actors. The requirement of process in the definition of dignity restoration obviously flows from the state-centric nature of its original conceptualisation. Fortunately, Atuahene admits that the occurrence of dignity restoration 'is context specific and contingent on a host of factors'.<sup>42</sup> In what follows, I show why the conceptualisation of dignity restoration should be stripped of its requirement of process.

By requiring process, the conceptualisation of dignity restoration implies system, procedure, or mechanism, all of which are attributes of the state. Arguably, process implies verticality – that is a hierarchical

38 Atuahene (n 8) 57.

39 Atuahene (n 10) 818.

40 Atuahene 802.

41 As above.

42 Atuahene (n 10) 814.

relationship. There is no reason why dignity restoration should not be given a horizontal slant to accommodate the increasing realisation that private actors' violations of human rights demand asymmetric solutions.<sup>43</sup> Such solutions could circumvent and complement the slow, bureaucratic officialdom of the state. Accordingly, dignity restoration in many cases may best be implemented by non-state actors such as family members, friends, arbitrators and community leaders. Indeed, divorcing women's resistance to property deprivation could constitute dignity restoration, in line with Pils's case study showing how acts of resistance against dignity taking could be a form of dignity restoration.<sup>44</sup> In the foregoing context, I redefine dignity restoration as 'a remedy that seeks to provide dispossessed individuals and groups with material compensation in a manner that affirms their humanity and reinforces their agency'. I now turn to an innovative analysis of the role of a Nigerian government agency in dignity restoration for divorcing women.

### 3 Welfare Department and dignity restoration

The first time an informant stated that 'some relatives referred me to Welfare', it did not strike me as important. I knew 'Welfare' is the colloquial term for the Nigerian Social Welfare Department, but I assumed that the Department's role was conciliatory, not adjudicatory. However, when two other informants mentioned 'Welfare', I was compelled to investigate.

The Welfare Department traces its origins to missionary activities and colonial policies.<sup>45</sup> At the federal level, it operates as a parastatal under the Ministry of Women Affairs and Social Development. Elsewhere its name varies.<sup>46</sup> It has offices in almost every municipality in Nigeria, and functions with a policy guide.<sup>47</sup> Although it is mandated to promote the interests of women and children, the depth of its involvement in matrimonial property disputes is noteworthy. In January 2015 I visited their offices in two municipalities, observed their dispute resolution mechanisms, and held individual interviews and focus group discussions with their directors, deputies and 11 other officials.

43 M Thornton 'The cartography of public and private' in M Thornton (ed) *Public and private: Feminist legal debates* (1995) 2; I Currie & J de Waal *The Bill of Rights handbook* (2005) 41.

44 Pils (n 36).

45 O Ayodele & PA Edewor 'Sociology and social work in Nigeria: Characteristics, collaborations and differences' (2013) 16 *African Sociological Review* 48.

46 Eg, it is called Ministry of Social Welfare and Rehabilitation in Rivers State.

47 This guide is known as 'Social Development Policy for Nigeria', a document adopted in October 1989 and revised in 2004.

### 3.1 Procedures of the Welfare Department

From my interaction with divorcees, the Welfare Department is the first port of call when families, churches or friends of quarrelling couples fail to resolve matrimonial disputes. There are several reasons for women's resort to the Department. The key reasons are helplessness in the face of the traditional philosophy of matrimonial property or non-living customary law, faith in the strong, coercive shadow of state law, and, of course, the success stories of other divorcees. Curiously, women rarely seek police protection because of strong patriarchal perceptions of women's rights and the police's reputation for corruption. It goes without saying that recourse to the Department is made in the context of marriage under both customary law and state law, in this case the Marriage Act.<sup>48</sup> These double marriages are common in Nigeria, mainly due to the lack of statutory protection for customary marriages and the failure by non-living customary law to recognise women's matrimonial property rights.<sup>49</sup> This non-recognition encourages normative shopping – that is, reliance on another legal order to utilise its perceived benefits.<sup>50</sup> Thus, the Welfare Department stands at an important intersection between customary law and state laws of marriage. As some of the Department's senior officials explained in a focus group discussion, the following describes their dispute resolution procedure:<sup>51</sup>

They [disputants] first write a statement as a report. After that, we issue an invitation letter to the respondent. Then we fix – two weeks or three weeks hearing date. On that day, the parties are expected to come with their witnesses. The report of the complainant will be read out openly to the floor to discuss. After that, we ask the respondent whether the statement is right or not. When he accepts, the case will start. After the first hearing ... we may decide to adjourn to calm the situation.

When a matrimonial dispute is not resolved, the Department proceeds to make varying separation-related orders. An official summarised it as follows:

48 The Marriage Act, Cap 218, Laws of the Federation of Nigeria 1990; Cap M6, LFN 2004.

49 M Onoka *Family law* (2003) 143; O Agbede 'Recognition of double marriage in Nigerian law' (1968) 17 *International and Comparative Law Quarterly* 735; AC Diala 'Legal pluralism and social change: Insights from matrimonial property rights in Nigeria' in C Rautenbach & S Mancuso (eds) *Festschrift of Thomas Bennett* (2018); *Ohochuku v Ohochuwu* (1960) 1 ALL ER 253; *Jadesimi v Okotie Eboh* (1996) 2 NWLR 128 147-148.

50 ES Nwauche 'Legal pluralism and access to land in Nigeria' in H Mostert & TW Bennett (eds) *Pluralism and development: Studies in access to property in Africa* (2012) 59-60 70; A Griffiths 'Reconfiguring law: An ethnographic perspective from Botswana' (1998) 23 *Law and Social Inquiry* 587.

51 Focus group discussions held with 14 officials on 13 and 14 January 2015 in Owerri. The arbitration procedure was explained by Mr Chidi Ucheghara, Senior Social Welfare Officer, Ms Antonia Nwambara, Assistant Social Welfare Officer, and a female official who spoke anonymously on 14 January 2015. The quotes of officials who requested anonymity are used without referencing.

[If a case] is not resolved amicably and they didn't agree to stay together, we may ask the man to pay something to the woman as compensation. Then, if they have issues – ie children – that are underage, we will ask the man to take care of the children. That is school, feeding, and health wise. Then the man will secure accommodation for them, because they have to live somewhere ... they cannot just be thrown out ...

The courts treat the decisions of the Department as arbitral awards and, when required, judges summon its officials to give evidence. Although they have no formal enforcement powers, when the need arises Department officials use force to protect the best interests of children:

Where they [couple] don't take our advice, they can go to a higher level like taking it to court ... But in some cases that they don't need to go to court and the man does not want to adhere to our instructions like paying maintenance for the upkeep of the children ... after carrying out investigation and we find out that the man just does not want to provide for the children's upkeep, we use the police to get the man to comply.

Other than ordering maintenance and custody of children, the Welfare Department also makes compensation orders in favour of women. The nature of these orders is dependent on the circumstances of the case concerned. The Department's activities indicate it as an agent of dignity restoration.

### 3.2 Dignity restoration agents?

It is not clear whether the activities of the Department fit the present conceptualisation of dignity restoration. As explained, dignity restoration is a remedy for dignity takings, which occurs in contexts of property dispossession that involve the 'dehumanisation or infantilisation of the dispossessed'.<sup>52</sup> While dehumanisation denotes disrespect or non-recognition of a person's humanity, infantilisation denotes the restriction of an adult's autonomy and full capacity for independent action. In other words, infantilisation involves the treatment of an otherwise fully rational and capable adult as a minor. For divorcing women who are infantilised in the course of matrimonial property division, 'providing material compensation is not enough because they lost more than their property – they were also deprived of their dignity'.<sup>53</sup> Accordingly, they require dignity restoration beyond mere material compensation. While the activities of the Welfare Department clearly provide material compensation in a reasonably respectful or dignity-restoring manner, the element of process is not met. For a start, the Department intervenes in matrimonial property disputes on invitation. Also, it has no formal mechanism for handling matrimonial property disputes. They merely act on the best interests of children principle, from which they extrapolate or submerge a best interests of women principle.

<sup>52</sup> Atuahene (n 8) 796.

<sup>53</sup> As above.

Accordingly, their arbitral awards are made on a case-by-case basis, which potentially leaves their decisions open to abuse by corrupt officials. In effect, Department officials do not adjudicate with a dignity-restoration mindset. In other words, they do not set out to redress divorcing women's property dispossession with a view to remedying the non-living customary law philosophy that infantilises women. In the context of the present conceptualisation of dignity, therefore, dignity restoration in the Department's arbitral orders may be regarded as accidental. The cases below demonstrate the complex circumstances of dignity takings, which make it difficult for process to be an element of dignity restoration.

### 3.3 Manifestations of dignity taking

To understand the circumstances of dignity takings in matrimonial property disputes, I must first explain marriage gifts, which constitute a key aspect of property tussles. Marriage gifts are items given to the bride at the time of her marriage to assist her transition into the marital journey. These items are not to be confused with the gifts brought by a groom as part of the requirements of bride wealth.<sup>54</sup> In the past, marriage gifts consisted exclusively of cooking utensils and items of adornment such as jewellery, clothes and sandals. They presently include modern gadgets such as cars, refrigerators, television sets, dishwashers and furniture.

There are two broad categories of marriage gifts. The first category comprises items given to a bride by her parents and extended family. The second category comprises gifts given to the couple by their friends. This category may also include gifts given to the bride by her friends specifically or generally for her comfort. Examples are cars, laptop computers, household furniture, kitchen utensils, business equipment, and items of adornment such as clothes and jewellery. As explained below, this second category presents problems during marriage dissolution, given the difficulty of determining whether such gifts are meant for the couple or only for the comfort of the woman. The following representative stories from pseudonymised informants reveal how divorcees, traditional leaders, NGOs, priests and Welfare Department officials treat women's matrimonial property rights in and outside the courts in Southern Nigeria.<sup>55</sup> Importantly, they show the cultural, legal and psychological issues within which unequal power relations and dignity takings occur.

#### 3.3.1 Quality of legal services

Janet and John married in 1992. They had four children. John, a businessman, accused Janet of infidelity. Janet, a civil servant, accused him of violent domestic abuse. John eventually chased her away from

54 J Osom 'Moral implication of high bride-price in Nigeria: Annang case survey' PhD thesis, Pontificia Universitas Lateranensis, 1989 34.

55 In all these stories, I have protected the identity of informants with pseudonyms.

their matrimonial home and petitioned for divorce in a customary court. Initially, both parties were not legally represented. Janet told the court she wanted custody of her children, even though she did not want the marriage to be dissolved. She briefed her lawyer to claim her marriage gifts and seek maintenance for herself and her children. She later requested compensation for the furniture she had acquired, her contributions to the house they built in the village, and the 200 000 naira she contributed to the purchase of their car.<sup>56</sup> Due to her lawyer's incompetence, her motion, although properly filed, was not argued. Thus, it was struck out and judgment was granted in favour of John, including custody of their children. The court also issued an order restraining Janet from bearing John's surname. Following family advice 'to wait and see if the [love] charm used to bewitch [John] would fall away', Janet did not appeal the judgment. She also did not approach the Welfare Department. Seven years on she is still waiting and has recovered no properties from the marriage.

### 3.3.2 Disparate power relations

Sarah was forced by her parents to marry Samuel in 1999 after she had fallen pregnant. They had two children. Samuel's family gave Sarah a parcel of land as a marriage gift. With her family's help, she set up a catering business, and helped Samuel to acquire household property such as a refrigerator and a television set. She also contributed significantly in building a three-bedroomed house. In 2008 Samuel accused her of prostitution and violently evicted her from their matrimonial home. A few days later Sarah returned to her matrimonial home with her brother to take her business materials. She did not take her clothes and items of adornment as she hoped to reconcile with her husband. A year later Samuel remarried and sent their two children to work as domestic helpers in the city. Following a vicious custody battle involving alleged kidnappings and the use of armed vigilantes, Sarah petitioned their local Welfare Department, who awarded her custody. Samuel refused to comply with the order, allegedly using a combination of threats, bribery and intimidation to avoid enforcement of the custody order. Sarah then petitioned for divorce and custody in a customary court. Samuel showed up with a marriage certificate and claimed that he had undergone a statutory law marriage with Sarah. The court declined jurisdiction, stating that a customary marriage became subsumed in a later statutory marriage. Eventually, Sarah remarried and used direct conciliation to obtain custody of her children. Largely due to Samuel's violent nature and the non-living customary law of matrimonial property, neither Sarah nor her family members contested the couple's household properties. In fact, Sarah never returned to take her clothes, and Samuel's new wife allegedly started wearing them.

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56 At the time of this interview (January 2015), one US dollar = 160 naira.



### 3.3.3 Futility of formal law

Gift, a high school teacher, married Gerald, a civil servant, in 2001. They had a child. In 2008 co-habitation stopped after Gerald had used a machete to evict her from their matrimonial home. Three months later Gift returned with her brother, attempting to retrieve her belongings and her baby's clothes. They were unsuccessful as Gerald had changed the locks. Gift later picked up some of her belongings from a neighbour's house where Gerald had dropped them. He looted Gift's shop, claiming that everything they owned belonged to him. Following the failure of several family reconciliation efforts, Gift headed to the Welfare Department.

Gerald initially refused to appear, eventually being compelled by the police to appear. Welfare officials awarded custody of the (then) three year-old baby to Gift. They ordered Gerald to provide accommodation for Gift and pay 6 000 naira as monthly maintenance for the baby. He refused to heed the decision and on several occasions tried to kidnap the baby. In 2011 Gift petitioned for marriage dissolution, custody and maintenance of the child. She did not request maintenance for herself as she loathed Gerald and believed that she could take care of herself. Gerald failed to contest the petition, had judgment given against him, and refused to comply with the court order for maintenance. Gift did not enforce the judgment. In her words, 'I cannot force him to train [educate] his own child.'

### 3.3.4 Litigation fatigue and resource constraints

Grace's parents forced her to marry Greg in 1996. They had four children. In 2006 Greg instructed her to leave the city and return to her parents in the village as he wanted to bring back his first wife. Grace, who was unaware that Greg had married two women before her, refused to leave. Several unsuccessful family mediations occurred. Church officials advised Greg to secure accommodation for Grace and educate her children. One morning in 2008, Greg used a lorry and a van filled with police officers to forcefully repatriate Grace to her parents' house. A month later Grace reported him to the Welfare Department, who made the same orders as the church. Greg agreed to obey the order by a certain date. In the meantime, Grace went to the city and 'rescued' her children who were being ill-treated by Greg's first wife.

A few days prior to the deadline of the Department's order, Greg petitioned for divorce and custody in a customary court. Assisted by a human rights lawyer, Grace successfully counter-claimed for custody, payment of her children's tuition, monthly maintenance of 100 000 naira for the children, monthly maintenance of 50 000 naira for herself, and 5 000 000 naira 'damages' for 'untold hardship' and 'deceit'. Following intense litigation, the court granted Grace's extraordinary claims for dignity restoration.

Greg appealed, lost, and appealed again. The case stalemated. The human rights lawyer moved on. Tired of the emotional, physical and financial drain of litigation, Grace reached an out of court settlement, wherein Greg agreed to fund the children's education and Grace agreed to abandon all other claims. She took only her 'personal belongings' out of the marriage.

### 3.3.5 Self-restoration of dignity

At the age of 15 Sandra's parents forced her to marry Simon, a wealthy businessman in his fifties. The couple resided in Simon's two-storey building in a peri-urban area and had three children. Simon had earlier married two women at different times and 'driven them away' after some years. For nearly a decade he allegedly used Sandra as a slave, while failing to fulfil the financial promises he had made to her parents, which notably included building them a house. Emboldened by age, socialisation and education, Sandra began resisting her husband's abuse. Problems ensued. A now aged Simon accused her of infidelity, theft and cruelty, and attempted to use a rifle to evict her from their matrimonial home. She seized the rifle and instead evicted him. He petitioned for divorce in a customary court and the reclaim of their matrimonial residence. He obtained judgment allegedly by fraud, and Sandra's lawyer quashed it on appeal. While the matter was being retried at another customary court, Simon died. Family members divided his estate according to 'kitchens'.<sup>57</sup> They gave Sandra the two-storey building she was occupying with her children. Simon's two widows received his other properties, notably buildings. During her interview Sandra admitted that the widows would have received no properties if they had no male child. She decided to 'take matters' into her own hands mainly because of her education, socialisation, and Simon's unfulfilled promises to her parents.

### 3.3.6 Family involvement in dignity restoration

Linda, a teacher, married Linus, a lecturer, in 1991. Both hailed from the same town and lived in the city. The marriage produced two boys and a girl. After 12 years Linus's repeated domestic assaults on Linda compelled the couple to live apart. Linda obtained access to their children with the help of the Welfare Department. Unable to reconcile the parties at one final family meeting attended by 12 persons, the couple were permitted to separate. The families ordered Linus to regularly pay 'something for the upkeep of the kids ... especially for their schooling'. They made no order for Linda's maintenance, nor did she demand it. Similarly, they did not order a division of the couple's car, house and household furniture. Linda merely took her 'personal

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57 Division according to kitchens or 'houses' means division of a deceased's estate according to the number of his wives, especially those with a male child. See, generally, DSP Cronje & J Heaton *South African family law* (2010) 210-211.

effects – boxes, dresses, [and] some of the kitchen utensils’. After a period of refuge in her uncle’s house, she obtained her own apartment. Unlike Linus, she never remarried and still bears his surname. Following their non-judicial divorce, she never claimed matrimonial property, even after Linus died four years later.

### 3.4 Dignity restoration in matrimonial property disputes

The circumstances in which many women leave their matrimonial homes in the above stories obviously discourage them from contesting marital property. More than anything else, the unequal power relations evident in these stories, coupled with women’s loss of their matrimonial home, contribute to dignity takings. There are emotional, cultural and even religious values attached to property, including matrimonial property. In the case of the matrimonial home, these values sometimes outweigh economic values. As Atuahene argues, ‘a home is more than a physical structure; it is a claim to a specific space that places a person in proximity to particular people with whom they form relationships’.<sup>58</sup> The question is whether dignity restoration applies to matrimonial property disputes in Nigeria. I argue that it applies if the element of process is removed from the definition of dignity restoration. Women’s dignity may be restored through property division, monetary compensation and, above all, the legislative recognition of women’s matrimonial property rights. While process may be involved in some of these measures, it need not be a requisite element of dignity restoration.

In the remainder of the article I reveal the shadow of state law in the privileging of gender, class, and dignity in matrimonial property division. In so doing, I draw attention to the adaptive influence of state law on social fields involving customary law.

## 4 Dignity restoration in the shadow of legal pluralism

As hinted in part 3, other than customary courts and the 1999 Nigerian Constitution, I did not know that a state organ such as the Welfare Department was influential in people’s application of customary law.<sup>59</sup> In what follows I analyse the creative ways in which the Department is involved in dignity restoration for divorced women dispossessed of property by the non-living customary law of matrimonial property.

### 4.1 Use of receipts

Obviously, the means through which dignity restoration can be achieved are not just context-specific but also debatable. The contexts include ‘the political and economic power of the victims, the level of

<sup>58</sup> Atuahene (n 10) 172.

<sup>59</sup> Indeed, my original interview plan did not include the Welfare Department.

political will among powerbrokers'<sup>60</sup> and, in this article, the legal framework. The first key tool in the Department's recovery of marriage gifts and properties bought by women are purchase receipts. This reliance on receipts as evidence of matrimonial property contribution is influenced by judicial trends.<sup>61</sup> In Janet's case above, the judges ruled that it was insufficient for her to allege contributions to matrimonial property without tendering evidence. Traditional rulers, clergy and staff of NGOs affirmed that women may claim matrimonial property with receipts showing that the property was bought in their own name. The problem, as a female Department official said, is that 'when making receipts, [women] use their husband's surname. When there is any dispute, the husband will now claim the property.' The use of receipts is because non-living customary law regards women's property rights as derived from their husbands.<sup>62</sup> A Department official expressed it as follows:

In [non-living] customary law, the woman is a loser as far as divorce is concerned. She goes home almost empty-handed. The man owns the property except where the woman bought certain things with her own money. In such a case, she has to prove that those things really belong to her because the [non-living] customary law says that the man owns the woman and all her property. If she has no receipts, the community [extended family] may, out of pity, grant some part of what the woman is asking for ...

There is near unanimity among my informants that a divorcing woman should exit marriage with the properties she received as marriage gifts from her parents. However, she generally forgoes properties received from friends in her marital name, unless her husband or family members allow her to take them. This is regardless of whether these properties were given by her own friends. Since they bear the marital name, usually the man's family name, they are presumed to belong to the man. In this clear denial of women's agency in marital property acquisition, the Department makes significant interventions, as I explain below.

The couple is usually asked to list their properties and provide evidence of acquisition. Where the purchase receipt of a marriage gift, or indeed any matrimonial property, discloses that it was acquired in the woman's name during the subsistence of the marriage, the Department decides in the woman's favour. An official, Mr Emeka Okpara, explained it as follows:<sup>63</sup>

60 Atuahene (n 8) 814.

61 Eg, in *Onwuchekwa v Onwuchekwa* (1991) 5 NWLR (Pt 194) 739, the Court of Appeal held that a wife must tender 'sufficient proof' such as 'receipts' showing her contribution to matrimonial property. See also *Amadi v Nwosu* (1992) NWLR (Pt 241) 273; (1992) LPELR-442 (SC).

62 In *Onwuchekwa* (n 61), the Court of Appeal surprisingly confirmed an *Isuikwuato* (Abia State) custom, which holds that a wife and her properties are owned by her husband.

63 Interview conducted on 13 January 2015 in Owerri.

First, we ask them to list the property. If it is property that should come with receipts, for instance, like cars, houses, and land, in that type of case, we will ask them to produce receipt. If that receipt has only that person's name, then it automatically belongs to that person. But if it is written to the woman's name, we will give it to her, because definitely, it is her that bought the thing with her money.

Where the property is acquired in the couple's name, usually the man's name or family name, the Department is inclined to rule equitably, or in the woman's favour. Their decision is influenced by factors such as income capacity, the quantum of properties, custody of the children, and fault. An official in a focus group discussion stated without contradiction:

If it is joint property, we check the numbers – for example foam [mattress] – if the woman is seeking to separate from the man, you don't say 'go and lie on the floor'. You check the number of the foams. If it is two, let me say for instance, you give the woman one and the man will collect one. And more especially if ... the children are under age, you don't allow the children to sleep on the floor ... Even if the foam is one, you give the children that foam ... because the child is our main priority in handling matrimonial matters.

This official's statement reveals the influence of the best interests of the child principle in the Department's arbitral decisions. This principle, which forms part of the foundational values of customary law,<sup>64</sup> is the second key element in matrimonial property division after divorce.

#### 4.2 Children's connection

Department officials make special efforts to uphold the best interests of the child in their decisions on custody. This is in furtherance of legislation such as the Child Rights Act of 2003 and the Children and Young Persons Act of 1943, as variously amended in the eastern, western and northern regions of Nigeria. The Department's efforts are also a recognition of the foundational value of customary law which holds that a man must care for his family. In this light, the best interests of the child principle demonstrates resonance between customary law and state law. As two officials put it, 'we [also] rely our judgments on the law of the land – that is the customary law ... the Igbo tradition values children – whether male or female child'.<sup>65</sup>

Although the traditional philosophy of customary law ascribes custody to men, the best interests of the child principle is shifting this philosophy. In explaining this shift, Mr Chidi Ucheghara stated:<sup>66</sup>

In customary law, the man and the woman both own the children. But custody depends on the age. If the child is like zero to six years, custody

64 See n 14.

65 Interviews with Mr Emeka Okpara, Social Welfare Officer, and a female official who spoke anonymously at Owerri on 13 January 2015.

66 Interview with Mr Chidi Ucheghara, Senior Social Welfare Officer on 14 January 2015 at Owerri.

will be awarded to the mother. But if the child is up to twelve years, the child *can be* under the custody of his father.

The stress on the phrase 'can be' shows that custody is no longer the automatic preserve of men. Given the huge clientele of the Welfare Department, it is obvious that

their attitude to custody is contributing to the emergence of a living customary law of child custody. One may then ask, 'What about childless couples?' The next section discusses the motivations behind the Department's dignity restoration attitude to childless divorcees.

### 4.3 Dignity restoration for childless women

Ordinarily, non-living customary law does not recognise maintenance for divorced women except, as seen above, through the duty to care for children. Indeed, some of my divorcee informants seemed surprised at the possibility of obtaining maintenance. Others credit the Welfare Department for its increasing orders relating to maintenance. For the Department the issue is not whether divorced women are entitled to maintenance. The issue is whether their orders should be termed compensation or maintenance. This dilemma is an aspect of the gendered and psychological realities of divorce. For the Department, maintenance is a regular sum paid to a spouse by the other. Conversely, compensation is a lump sum paid by a spouse to enable the other to set up a business or make up for the financial loss caused by the divorce. Compensation obviously is a muted recognition that divorce in Southern Nigeria usually involves involuntary property loss which requires remedial action.

Furthermore, the Department's compensatory orders acknowledge unequal power relations between men and women. Maintenance implies an element of control on the part of the person providing it. As an official explained, 'If you say maintenance, that means you will even house her, and monitor the house. If she brings a man there, you will know and go there to throw the man away.' A key reason why the Department prefers compensation to maintenance is the incredible emotional distress involved in divorce cases. Several informants affirmed that they would never accept maintenance from their former husband as it would prevent them from having 'proper closure'.<sup>67</sup> Some only accept maintenance on behalf of their children because they cannot raise the children on their own. They generally prefer not to ask for any financial relief unless they cannot help it. Indeed, a study found only three judicial decisions in which women demanded compensation after divorce.<sup>68</sup> In Grace's case study above, she termed it 'damages' for 'untold hardship' and 'deceit'.

67 Obiora's probe of attitudes towards financial awards during divorce suggests that women 'found it contradictory to supplicate for help from former husbands who had maltreated and/or betrayed them'. See LA Obiora 'Kindling the domain of social reform through law: A case study' (1995) 13 *Third World Legal Studies* FN 65.

68 Diala (n 14).

Department officials take the issue of compensatory orders seriously. If a man refuses to comply with an order of compensation, they could use law enforcement agents to enforce it, or assist the woman to institute court proceedings. Remarkably, compensatory orders are made irrespective of whether children are involved. Mr Okpara explained it as follows:<sup>69</sup>

If the woman is without a child or children, you don't pay any maintenance to her. But rather, we advise the man to compensate the woman so that the woman will use the money to be maintaining herself. If you ask the man to be maintaining the woman, it then means that you are asking the man to be controlling the woman because he who pays the piper, dictates the tune ... If you have advised the man to pay compensation and he refuses to pay it, you now apply force to take it.

The amounts of compensatory orders made by the Department are usually dependent on the circumstances of the divorce. These circumstances include the financial status of the couple; the extent of the woman's contribution to the matrimonial property; the party at fault in the divorce; the length of the marriage; and the possibilities of the woman remarrying. Mr Mbawuiké Richard explained:<sup>70</sup>

If the man was instrumental to the dissolution of that marriage, under customary law, there is nothing that binds the man to maintain the woman. She just goes. But here in Social Welfare Department, we ask the man to compensate the woman – give her some money. The sum is dependent on the status of the man. So, we ask the man to give the woman a sum, which she can use to rehabilitate herself.

The most striking aspect of the Department's interventions in matrimonial property disputes is the context-specific nature of its decisions. Their case-by-case approach, which resembles common law judges' approach,<sup>71</sup> makes it difficult for process to form an essential element of the definition of the dignity restoration. In the concluding part of this article I argue that the Department's activities demonstrate dialogue between state law and customary law, which aids the emergence of a living customary law of matrimonial property in Southern Nigeria.

## 5 Significance of state law's dialogue with customary law

In non-judicial divorce, the Welfare Department increasingly orders men to give financial compensation to women. Its compensatory orders are dependent on the circumstances of each case, notably fault, the woman's contribution to the matrimonial property, and the earning status of the parties. Not only do they routinely award

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69 Interview held on 13 January 2015 in Owerri.

70 Interview held on 14 January 2015 in Owerri.

71 Diala (n 14).

custody to women, but these officials also order men to pay maintenance for the children. For deviating from the non-living customary law of matrimonial property, these orders, which have a multiplier effect on normative behaviour in social fields, constitute adaptations of customs to socio-economic changes.

People's adaptations to socio-economic changes produce living customary law when individuals in a social field attach a sense of obligation to new practices or adaptations of existing practices.<sup>72</sup> Instructively, Welfare Department officials usually belong to the same normative social field as estranged couples. They therefore act with full awareness of the non-living customary law of matrimonial property. Their deviations rightly acknowledge the dissonance between the agrarian origins of matrimonial property rights and the application of these rights in modern conditions. They recognise that women contribute to the acquisition of matrimonial property through their independent income. They also recognise that marriage gifts have moved beyond kitchen utensils to include modern gadgets such as houses, cars, televisions and refrigerators. Significantly, these gadgets are not only bought by the woman's family, but also by the couple's friends. The Department's interventions therefore are positive steps towards dignity restoration for divorced women. Their interventions are also significant for legal pluralism in Nigeria.

As explained in part two, there are no statutory regulations of customary law rules of succession, marriage and divorce in Nigeria. There is also no provision in the matrimonial legal framework for marriage in community of property.<sup>73</sup> Because of these legislative *lacunae*, 'the creation of a [customary law] marriage has no immediate effect on the parties' property rights'.<sup>74</sup> My informants unanimously affirmed that 'a woman is a loser' under the customary law of divorce. The word 'loser' is usually used in humiliating contexts in Nigeria. It accurately depicts the legal situation of women, who have little financial protection after divorce, irrespective of the type of their marriage and the extent of their contributions to matrimonial property.<sup>75</sup> Unfortunately, the Nigerian Supreme Court is yet to recognise women's beneficial interests in matrimonial property.<sup>76</sup> As it has been severally held in divorce proceedings, women cannot lead evidence of jointly-owned properties by showing acts of ownership

72 Diala (n 13) 150-151.

73 Community of property denotes a marriage of equal property benefits and loss.

74 G Woodman 'Judicial development of customary law: The case of marriage law in Ghana and Nigeria' (1977) 14 *University of Ghana Law Journal* 127.

75 E Chianu 'The horse and ass yoked: Legal principles to aid the weak in a world of unequals' Inaugural Lecture, University of Benin, 2007 153-154.

76 In *Onwuchekwa* (n 61) the Court of Appeal held that a wife must show 'sufficient proof' of her contribution to matrimonial property. See also *Amadi v Nwosu* (1992) NWLR (Pt 241) 273; (1992) LPELR-442 (SC).



such as paintings and improvements.<sup>77</sup> In fact, judges used to regard women as inheritable chattel, while legislative *lacunae* encourage men to dispossess women of their matrimonial property contributions.<sup>78</sup> Since non-living customary law regards married women's property rights as subsumed in those of their husbands, Nigeria's non-regulation of matrimonial property robs divorced women of a legal platform to contest property.<sup>79</sup> The absence of this legal platform encourages involuntary property loss and infantilisation, the core elements of dignity takings.

The significance of dignity takings in matrimonial property is accentuated by women's tendencies to acquire property in their partners' names because of their desire to marry or remain married. As studies elsewhere indicate,<sup>80</sup> this tendency is not peculiar to Nigeria. From my interactions with divorcees, women appear to be more committed to marriage stability than men, thereby preventing them from taking measures to safeguard their financial wellbeing in case of divorce. This situation makes it imperative for Nigeria's legal framework to provide for matrimonial property rights. In the same way involuntary property loss 'can deprive people of dignity',<sup>81</sup> the legislative affirmation of matrimonial property rights can restore women's dignity as individuals with full agency and equal partners in the marriage enterprise. Similarly, judicial or administrative actions, which affirm women's rights to matrimonial property, constitute dignity affirmation. Accordingly, the property division and compensatory orders of the Welfare Department demonstrates dignity restoration for divorced women.

Furthermore, the Department's adjudicatory orders reveal dialogue between state law and customary law. This dialogue is significant for legal pluralism because living customary law emerges from people's adaptation of customs to socio-economic changes.<sup>82</sup> An adaptation viewpoint fits the notion of dignity takings in matrimonial property, since the application of customary law must keep pace with contemporary ideas and attitudes. Notions of equality, mutual respect and autonomy are inconsistent with the non-living customary law of

77 The Court reasons that such improvements do not divest the property of its original character of family ownership. See, eg, *Rabiu v Absi* (1996) 7 NWLR (Pt 462) 505 SC (69-70).

78 *Aileru v Anibi* (1952) 20 NLR 45; *Akinnubi v Akinnubi* (1997) 2 NWLR (Pt 486) 144; *Folami v Cole* (1990) 2 NWLR (Pt 133) 445; *Amusa v Olawumi* (2002) 12 NWLR (Pt 780) 30.

79 Eg, see A Oyajobi 'Better protection for women and children' in A Kalu & Y Osinbajo (eds) *Women and children under the Nigerian law* (1990) 29; PO Kuye 'Rights of women under customary law' in Y Osinbajo & A Kalu (eds) *Towards a restatement of Nigerian customary laws* (1991).

80 See, eg, AM Richardson 'Women's inheritance rights in Africa: The need to integrate cultural understanding and legal reform' (2004) 11 *Human Rights Brief* 19-22; LH Fincher *Leftover women: The resurgence of gender inequality in China* (2014) 3.

81 Atuahene (n 10) 173.

82 Diala (n 13).

matrimonial property. When this law is applied without consideration for changing forms of household property and women's independent income, dignity takings occur. Given the notoriety of double marriage and the large number of women who patronise the Department,<sup>83</sup> their compensatory and child custody orders are positive normative influences on the customary law of matrimonial property. As shown below, these influences question an antipodal approach to legal pluralism and, simultaneously, encourage legal integration.

### 5.1 Inspiration for legal integration

More than a century has passed since legal transplants occurred in Nigeria and other post-colonial societies. In this period, however, no significant effort has been made to develop a jurisprudence which blends customary law 'with modern Western law and institutions in an appropriate mix'.<sup>84</sup> Customary law is still perceived as inherently antithetical to state law, especially the Bill of Rights.<sup>85</sup> However, this need not be so, given that customary law is flexible, adapts to changing social and economic conditions, and possesses foundational values which inform and guide its flexibility.

My field encounters in Southern Nigeria reveal similarities between the foundational values of customary law and some aspects of state law. For example, the family head's duty of care under customary law resonates with the duties of an intestate administrator. The value of humanness under customary law resonates with the right to human dignity under state law. The need to preserve the ancestral home arguably resonates with state laws on cultural heritage. The value of collective liability under customary law resonates with liability under Anglo-Saxon law, which eventually morphed into state law.<sup>86</sup> In the context of legal integration, therefore, customary law's values of humanness and duty of care to the family can be extrapolated into legislation not only recognising women's matrimonial property rights, but also the spousal right to maintenance or compensation after divorce. Such recognition would affirm women's dignity as equal partners in the marriage enterprise. This is where the Welfare Department provides a model for legal pluralistic dialogue.

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83 More than two-thirds of the interviewed divorcees passed through Social Welfare mediation. Nearly all others had contemplated using their services.

84 D Weisbrot 'Papua New Guinea's indigenous jurisprudence and the legacy of colonialism' (1988) 10 *University of Hawaii Law Review* 30-31.

85 The disdainful treatment of customary law by colonial authorities probably contributes to its subordinate status in African legal systems.

86 F Pollock & FW Maitland *The history of English law before the time of Edward I* (1895); TF Plunkett *Concise history of the English law* (1956) (showing how security, justice, oaths, marriage, wardship and succession were all regulated by the law of kinship).

## 6 Conclusion

The Nigerian government indirectly contributes to the denial of women's matrimonial property rights by failing to statutorily regulate the proprietary consequences of a customary marriage. This failure brings the state within a complicit human rights relationship with customary law actors who deny women's matrimonial property rights, dispossess them of property, deny their economic and emotional agency, and thereby infantilise them. I have argued that these tripartite elements amount to dignity takings.

I have also argued that the requirement of process in the definition of dignity restoration hinders remedial measures for women humiliated by the non-living customary law of matrimonial property division. These measures may be best implemented in an asymmetric manner devoid of process. Accordingly, I have redefined dignity restoration as a remedy that seeks to provide dispossessed individuals and groups with material compensation in a manner that affirms their humanity and reinforces their agency. The removal of process from the definition of dignity restoration accommodates the context-specific nature of property dispossession perpetrated by non-state actors.

Even though the conflict of laws in Africa encourages an antipodal approach to legal pluralism in mainstream scholarship, I have focused on dialogue between state law and customary law. I have shown how a government agency, the Social Welfare Department, is influencing normative behaviour through arbitral orders that contravene traditional perceptions of the customary law of matrimonial property. In prosecuting its statutory mandate to promote the best interests of women and children, the Department routinely awards custody of children to women using the best interests of the child principle. It also divides matrimonial property and orders men to pay maintenance or compensation to their estranged spouses. Given the *lacunae* in Nigeria's legal framework on the proprietary consequences of marriage, these arbitral orders could constitute dignity restoration in the sense I have defined it. The Department's quasi-judicial orders demonstrate the dialogic intersection of state law and customary law on normative behaviour in social fields. These intersections bode well for legal integration in Nigeria.

## Recent developments

### Human rights developments in the African Union (January 2017-September 2018)

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#### Summary

*The African Human Rights Decade (2017-2027) did not get off to a good start. The African Commission on Human and Peoples' Rights has been facing a backlash from the African Union Executive Council since granting observer status to the Coalition for African Lesbians in 2015, which has escalated to a level where the independence of the Commission is at stake. While the number of cases decided by the Commission has dropped steadily, its other monitoring roles and its role as a norm setter remain important. Many cases are pending before the African Court on Human and Peoples' Rights. However, almost all the contentious cases are against the few states that have made a declaration allowing direct access to the Court. The limited access to the Court is also as a result of its own jurisprudence. Thus, the opportunity of NGOs to submit requests for advisory opinions was severely limited by the Court in the SERAP case. The increased hostility of states towards the African human rights system demonstrates that many states are sensitive to human rights criticism.*

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*The future will tell whether states will take further steps to weaken the system, for example through their choice of appointments to the monitoring bodies, or disengagement, or whether they will finally take action to meet their rhetoric and strengthen the system they started to build more than three decades ago.*

**Key words:** *African Union; African Commission; African Court; backlash; case law*

## 1 Introduction

The African Union (AU) Assembly in July 2016 decided to

enhanc[e] efforts aimed at entrenching and reinforcing a deeper understanding of the culture of human and peoples' rights, in particular the rights of women, and their promotion and popularisation amongst the African peoples by declaring the next ten years as 'the Human and Peoples' Rights Decade in Africa'.<sup>1</sup>

As with the African Youth Decade (2009-2018) that is coming to an end in 2018, it may be difficult to see concrete results from these initiatives. The same applies to previous thematic years such as the 2016 African Year for Human Rights with a focus on the rights of women, the 2017 thematic year on Harnessing the Demographic Dividend through Investments in Youth, and the 2018 African Anti-Corruption Year.

These thematic years and decades may play some role in highlighting issues. However, developments in AU member states and by AU institutions themselves make it difficult to take seriously a commitment to end human rights violations and corruption. As so often in the past, human rights form part of a rhetorical game played by African leaders where they, on the one hand, wish to be viewed as taking human rights seriously but, on the other, despise what they view as outside interference. In this game, they sometimes forget the important institutions they, themselves, have created at the national, sub-regional and regional level to be watchdogs over their behaviour, in accordance with rules that they have agreed to.

An important development in the period under review was the re-admittance of Morocco as a member of the AU in January 2017. Morocco left the continental organisation, the Organisation of African Unity (OAU), in 1984, following the admittance to the OAU of the Sahrawi African Democratic Republic (Western Sahara). The dispute over Western Sahara has not been resolved and it remains to be seen

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1 Declaration by the Assembly on the theme of year 2016, Assembly/au/decl.1(xxvii)rev.1 para 2.

what role Morocco will play in the AU over the coming years.<sup>2</sup> It is worth noting that, apart from the AU Constitutive Act, Morocco had as of September 2018 not ratified any other AU treaties, including the African Charter on Human and Peoples' Rights (African Charter) to which all other 54 AU member states are party.<sup>3</sup> The number of ratifications of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol) remains at 30 and no new states have made a declaration under article 34(6) allowing for direct access to the Court.

During the period under review the AU made some progress towards economic integration which for decades has been high on the African agenda.<sup>4</sup> A Protocol on an African Continental Free Trade Area was adopted, even though much work remains to be done before it will be operationalised.<sup>5</sup> A Protocol on the Free Movement of Persons, Right of Residence and Right of Establishment was also adopted. As of September 2018 only Rwanda had ratified the Free Movement Protocol. This is in line with Rwanda's liberal visa policy which allows citizens of all countries to obtain a 30-day visa upon arrival with no requirement of prior application.<sup>6</sup> It is likely to take many years before Africa as a whole will reach the same level of free movement as achieved in some of the sub-regional organisations such as the East African Community and the Economic Community of West African States (ECOWAS).

The focus of the article is on the work of the main human rights bodies of the AU, namely, the African Commission Human and Peoples' Rights (African Commission); the African Court on Human and Peoples' Rights (African Court); and the African Committee on the Rights and Welfare of the Child (African Children's Committee). The article also refers to the work of the AU Peace and Security Council (PSC); the Pan-African Parliament (PAP); the Advisory Board on Corruption; the AU Commission; and of AU electoral observation missions. It further considers the role played by the highest decision-making organs in the AU, the Executive Council and the Assembly of Heads of State and Government which, for good and bad, have in

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2 Morocco has been active in getting Western Sahara off the agenda of the Peace and Security Council after having been elected to a member in April 2018; see <https://www.dailymaverick.co.za/article/2018-09-11-au-limits-its-role-in-western-sahara-crisis/> (accessed 24 September 2018).

3 However, it should be noted that Morocco was one of 20 states attending the African Commission's session in May 2017.

4 See eg Treaty Establishing the African Economic Community (adopted in 1991, entered into force in 1994).

5 Agreement Establishing the African Continental Free Trade Area, adopted 21 March 2018.

6 [https://www.migration.gov.rw/fileadmin/templates/pdf\\_files/communique/public\\_announcement/public\\_announcement\\_-\\_new\\_visa\\_regime\\_final.pdf](https://www.migration.gov.rw/fileadmin/templates/pdf_files/communique/public_announcement/public_announcement_-_new_visa_regime_final.pdf) (accessed 24 September 2018). See also <http://www.peaceau.org/uploads/661-psc-comm-23-02-2017free-movement-of-people-final.pdf> (accessed 24 September 2018).

recent years taken an increased interest in human rights issues, and the role of the Permanent Representatives' Committee (PRC), the powerful body consisting of the member states' ambassadors to the AU.

The article is structured as follows: In the first place the various human rights developments, positive and negative, highlighted by the African Commission, the African Children's Rights Committee, the PSC and AU electoral monitoring bodies are discussed. Thereafter two themes, corruption and women's rights, are discussed. The article further discusses the backlash against the AU human rights monitoring bodies, in particular the African Commission. Finally, the decisions and judgments on individual complaints of the Commission, the Committee and the Court are discussed.

## 2 Human rights developments in Africa

In its Activity Reports the African Commission highlights positive and negative developments in relation to human rights in Africa. With regard to positive developments, the Commission tends to focus on the ratification of international instruments and the adoption of national laws. With regard to national judgments, the Commission highlighted the declaration of unconstitutionality of criminal defamation in Kenya; the annulment of the Kenyan election results; the declaration of the mandatory death penalty as unconstitutional in Kenya; and an ECOWAS Court of Justice judgment on criminal libel. The African Commission further highlighted the release of schoolgirls who had been kidnapped by Boko Haram in Nigeria. With regard to executive action, the Commission highlighted the moratorium on the death penalty in The Gambia; the commuting of death sentences in Tanzania, Nigeria, Mauritania and Sudan; the pardoning of prisoners in Ethiopia and Zimbabwe; and the release of petty offenders in Nigeria. The Commission further highlighted the peaceful transfer of power in The Gambia; the peaceful elections in Ghana, Egypt, Liberia and Sierra Leone; and the publication of an election date in the Democratic Republic of the Congo (DRC).<sup>7</sup>

A positive assessment of elections in Africa was made by the electoral observation missions fielded by the AU. The AU and its predecessor, the OAU, has since 1989 been fielding electoral observation missions (EOMs) across the continent.<sup>8</sup> In the period under review, the AU sent observer missions to Angola,<sup>9</sup> Djibouti,<sup>10</sup>

7 43rd Activity Report para 35.

8 CC Aniekwe & SM Atuobi 'Two decades of election observation by the African Union: A review' (2016) 15 *Journal of African Elections* 25.

9 <https://au.int/en/pressreleases/20170828/african-union-election-observation-mission-23-august-2017-general-elections> (accessed 24 September 2018).

10 [https://au.int/sites/default/files/pressreleases/33865-pr-declaration\\_preliminaire\\_djibouti\\_2018\\_f.pdf](https://au.int/sites/default/files/pressreleases/33865-pr-declaration_preliminaire_djibouti_2018_f.pdf) (accessed 24 September 2018).

Equatorial Guinea,<sup>11</sup> Sierra Leone<sup>12</sup> and Zimbabwe, among others.<sup>13</sup> The preliminary statement of the EOMs are generally very positive. Some of the more critical comments, such as those in relation to the lack of female candidates in many elections, are easily obtained from a desk review. It is a matter of concern that generally only the preliminary statements of the EOMs are easily accessible online while the final reports are not easily accessible. The African Charter on Democracy, Elections and Governance (African Democracy Charter) provides that the reports should be made available to the state concerned but makes no provision in relation to publication.<sup>14</sup>

The PSC noted in August 2018 that Togo was the first country to submit its report on the implementation of the African Democracy Charter, and called on other states to do the same.<sup>15</sup> It is worth noting that the Chairperson of the AU Commission had already congratulated Togo on the submission of its report in March 2017.<sup>16</sup> The Democracy Charter entered into force in 2012 and has been ratified by 32 AU member states.<sup>17</sup> Under article 49 of the African Democracy Charter, states are required to report to the AU Commission every second year on their progress in implementing the Charter. The procedure by which the AU Commission will examine the reports submitted under the African Democracy Charter remains unclear.

One of the positive aspects of the African Commission's work is its normative development of the law under the African Charter. Thus, during the time under review some of the most important normative developments by the Commission were its adoption of Guidelines for the Policing of Assemblies by Law Enforcement Officers in Africa; the General Comment on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment under article 5 of the African Charter; and Guidelines on Combating Sexual Violence and its Consequences. The Commission also adopted a Joint General Comment with the African Children's Committee on Child

11 <https://au.int/en/newsevents/20171112/12th-november-2017-parliamentary-election-republic-equatorial-guinea> (accessed 24 September 2018).

12 <https://au.int/en/pressreleases/20180402/preliminary-statement-aueom-2018-run-presidential-elections-republic-sierra> (accessed 24 September 2018).

13 [https://au.int/sites/default/files/pressreleases/34682-pr-aueom\\_preliminary\\_statement\\_-\\_zimbabwe\\_2018.pdf](https://au.int/sites/default/files/pressreleases/34682-pr-aueom_preliminary_statement_-_zimbabwe_2018.pdf) (accessed 24 September 2018).

14 See also *Guidelines for African Union electoral observation and monitoring missions* (2002), <https://www.eisa.org.za/pdf/au2002guidelines.pdf> (accessed 24 September 2018).

15 <http://www.peaceau.org/en/article/communique-of-the-791st-psc-meeting-on-the-theme-peace-security-prosperity-and-embracing-the-value-of-democracy-and-governance-is-the-african-charter-on-democracy-elections-and-governance-adequate> (accessed 24 September 2018).

16 <https://au.int/en/pressreleases/20170327/togo-first-au-member-state-submit-state-report-african-charter-democracy> (accessed 24 September 2018).

17 In the period under review, Algeria, Comoros, Equatorial Guinea, Liberia, Madagascar and Mozambique deposited their instruments of ratification.



Marriage. The African Children's Committee further adopted its General Comment 5 on 'State party obligations under the African Charter on the Rights and Welfare of the Child (article 1) and systems strengthening for child protection'.

Among the areas of concern the African Commission highlighted in its Activity Reports were the non-ratification of human rights instruments and low levels of state reporting. Substantive issues were slavery in Libya; the extension of the death penalty in Mauritania; the shutdown of media houses in Kenya despite court orders; the prohibition on the education of pregnant girls and young mothers; discrimination against persons with HIV in Tanzania; the eviction of indigenous peoples in Tanzania, Ethiopia and Kenya; discrimination against people with albinism in Tanzania, Uganda and other parts of Africa; conflict-related violations (including internal displacement) in Togo, the DRC, South Sudan, Somalia, Niger, Mali, Burkina Faso, Nigeria and Egypt; the impact of natural disasters in Niger and Sierra Leone; and hunger in Nigeria, South Sudan and Somalia. Other issues include the impact of epidemics such as cholera in the DRC and laws criminalising abortion 'despite the high rates of maternal mortality resulting from unsafe abortion'; the drowning of migrants in the Mediterranean; xenophobic attacks in South Africa; harassment of human rights defenders in Cameroon, Burundi, Eritrea, Sudan and South Sudan; states of emergency and torture in Ethiopia and Tunisia; inadequate conditions of detention; lack of transparency in relation to concessionary contracts; and poor regulation of extractive industries.<sup>18</sup>

Conflict prevention is high on the AU agenda as also reflected in the work of the Peace and Security Council.<sup>19</sup> That peace and security are viewed broadly to include human rights is clear from the agenda items of the PSC. For example, a meeting in August 2018 was dedicated to the issue of child marriage in Africa which has been placed high on the AU's human rights agenda.<sup>20</sup> The inclusion of human rights discussions on the agenda of the PSC is in line with the movement away from viewing security in a narrow sense to broader notions of human security.

The AU views criminal justice as sometimes coming into conflict with conflict prevention.<sup>21</sup> In particular, the continental organisation maintains that the International Criminal Court (ICC) should not

18 43rd Activity Report of the African Commission para 36.

19 <http://www.peaceau.org/en/page/42-psc> (accessed 26 September 2018).

20 <http://www.peaceau.org/uploads/psc.789.-press-statement.ending.child.marriage.14.08.pdf> (accessed 26 September 2018).

21 See eg Decision on the International Criminal Court, Assembly/AU/Dec.672(XXX) para 4: 'Takes note of the sovereign decision made by the Republic of Burundi to withdraw from the ICC effective October 27th, 2017, and condemns the decision by the ICC to open an investigation into the situation prevailing in the Republic of Burundi as it is prejudicial to the peace process under the auspices of the East African Community, and constitutes both a violation of the sovereignty of Burundi and is a move aimed at destabilising that country.'

indict African leaders as it did with the Presidents of Sudan and Kenya (the latter indictment was later withdrawn). Despite calls by the AU Assembly for ratification of the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol),<sup>22</sup> which would provide the African Court of Justice and Human Rights with criminal jurisdiction, by September 2018 no state had ratified this Protocol.

### 3 Corruption

2018 was declared by the AU the Year of Winning the Fight Against Corruption. The African Union Convention on Preventing and Combating Corruption, adopted in 2003, entered into force in 2006 and had as of September 2018 been ratified by 40 states. The main institutional mechanism set up under the Convention is the African Advisory Board on Corruption (AUABC). In June 2018 a member of the AUABC, Daniel Batidam, resigned, noting as follows:<sup>23</sup>

After witnessing several instances and degrees of bad governance, including the abuse of entrusted power (or corruption), lack of probity, accountability, transparency and integrity at the Secretariat of the AUABC and some departments of the AU Commission itself over a period of three years now, while all efforts at seeking redress have yielded no results, I have decided on grounds of principle that enough is enough.

It may be that the AU has finally taken some action against financial misappropriation. In its decision on the report of the Permanent Representative Committee's report, the AU Executive Council in July 2018 expressed its 'deep concern over the findings contained in the Report of the Board of External Auditors',<sup>24</sup> and requested the AU Commission 'to take punitive action against staff and to report to the Executive Council on any required actions to be taken against elected officials found guilty of financial malpractices'.<sup>25</sup> Despite expressing 'serious concern over the malpractices within the AUABC',<sup>26</sup> the Advisory Board was allocated a budget of US \$3 million for 2019, close to 10 times the allocation to the African Children's Committee and half of the allocation given to the African Commission.<sup>27</sup> This is despite the Advisory Board arguably having accomplished little of

22 Decision on the International Criminal Court, Assembly/AU/Dec.672(XXX).

23 Letter from Daniel Batidam to the Chairperson of the AUABC dated 8 June 2018, <http://en.rfi.fr/africa/20180616-official-quits-au-anti-corruption-body-over-multiple-irregularities-african-union> (accessed 26 September 2018). See also in relation to this and alleged corruption within PAP, <https://www.dailymaverick.co.za/article/2018-07-05-as-pan-african-parliament-undergoes-urgent-audit-its-president-seeks-protection-against-sa-media-harassment/> (accessed 26 September 2018).

24 EX.CL/Dec.1008(XXXIII) para 5.

25 Para 6(v).

26 EX.CL/Dec.1016(XXXIII) para 1.

27 EX.CL/Dec.1020(XXXIII).

note in its more than a decade of existence. As of September 2018 the two main items highlighted on the website of the Board is the UNECA Regional Anti-Corruption Programme for Africa (2011-2016) and the Advisory Board's Strategic Plan (2011-2015).<sup>28</sup>

## 4 Women's rights

The AU is in the process of developing a gender strategy for the next decade.<sup>29</sup> The strategy aims at 'bringing together all the existing commitments and aligning them to Agenda 2063 and the Sustainable Development Goal (SDG) Agenda 2030'.<sup>30</sup>

In a memorandum dated January 2018 to the AU Commission Chairperson, Moussa Faki Mahamat, 37 female AU staff members said that they were 'totally appalled by the entrenchment of professional apartheid against female employees in the Commission as manifested in the Peace and Security department'. After a media report about the memorandum, the Chairperson of the AU Commission denied that he had received it but ordered an investigation noting that he 'will not allow discrimination against women under [his] watch'.<sup>31</sup> By September 2018 the report of the investigation had not been published.<sup>32</sup>

To achieve progress on women's rights, the composition of the human rights monitoring bodies is also important. In early 2017 Ms Bensaoula Chafika (Algeria) and Ms Chizumila Rose Tujilane (Malawi) replaced Mr Fatsah Ouguergouz (Algeria) and Mr Duncan Tambala (Malawi) as judges of the African Court, thereby reaching the required gender parity for the first time in its history with five female judges and six male judges on the bench.<sup>33</sup> Both Ms Chafika and Ms Tujilane are judges in their home countries. Ms Tujilane was the ombudsman of Malawi from 2010 to 2015. With the election of three new judges in July 2018, there are now six females and five males on the bench. The new judges are Ms Imani Aboud (Tanzania), Ms Stella Isibhakhomen Anukam (Nigeria) and Prof Blaise Tchikaya (Congo).<sup>34</sup>

28 <http://www.aunticorruption.org/auac/en> (accessed 26 September 2018).

29 [http://genderlinks.org.za/wp-content/uploads/2017/10/augenderstrategydrafttwo\\_\\_mmmclm\\_112017.pdf](http://genderlinks.org.za/wp-content/uploads/2017/10/augenderstrategydrafttwo__mmmclm_112017.pdf); <https://au.int/en/pressreleases/20180510/african-union-calls-ministers-responsible-gender-and-women%e2%80%99s-affairs-more> (accessed 2 October 2018).

30 Strategy draft 2 iv.

31 <https://twitter.com/ebbakalondo/status/993461942718287873> (accessed 2 October 2018).

32 <https://www.thereporterethiopia.com/article/au-delays-release-investigative-reports> (accessed 2 October 2018).

33 <http://www.african-court.org/en/index.php/news/press-releases/item/127-two-new-judges-appointed-to-the-african-court-on-human-and-peoples-rights> (accessed 3 October 2018).

34 <https://ilg2.org/author/jdawuni/> (accessed 3 October 2018).

This clearly strengthens the 'social legitimacy' of the Court,<sup>35</sup> and may lead to an increased interest among women's rights non-governmental organisations (NGOs) to bring women's rights cases before the Court. The African Commission has for some time had a majority of women members. As of September 2018, six of the 11 commissioners were women.<sup>36</sup> The African Children's Committee has seven female members and four male members.<sup>37</sup>

## 5 Backlash

In its Strategic Plan 2015-2019, the African Commission identified six external threats that affected its work, namely, (i) non-compliance with recommendations; (ii) slow response by states to requests by the Commission; (iii) limited visibility; (iv) armed conflict; (v) poverty and its link to under-utilisation of the Commission; and (vi) the creation of new mechanisms leading to less funding for existing ones. It is clear that to these threats must be added the backlash by the AU policy organs, which clearly threatens the independence of the African Commission.

In April 2015 the African Commission granted observer status to the Coalition of African Lesbians (CAL). This decision was not well received by the AU policy organs, and in June 2015 the Executive Council called on the African Commission to withdraw this observer status.<sup>38</sup> In November 2015 a request for an advisory opinion to the African Court on the legitimacy of the Executive Council decision was submitted by CAL and the Centre for Human Rights, University of Pretoria. The request was dismissed by the Court in 2017 due to a lack of standing of the two NGOs that had brought the case.<sup>39</sup> The issue no longer being under consideration by the African Court, the African Commission was required to make a decision on the Executive Council's 2015 request to withdraw the observer status of CAL. In its Activity Report to the January 2018 Summit the Commission noted that the decision to grant CAL observer status was 'properly taken' and that it was the duty of the Commission to protect the rights in the African Charter 'without any discrimination because of status or other circumstances'.<sup>40</sup> The Executive Council responded to the report by expressing concern over the Commission's non-compliance

35 N Grossman 'Sex on the bench: Do women judges matter to the legitimacy of international courts?' (2012) 12 *Chicago Journal of International Law* 647. See also J Dawuni *International courts and the African woman judge: Unveiled narratives* (2018).

36 <http://www.achpr.org/about/> (accessed 3 October 2018).

37 <https://acerwc.africa/the-experts/> (accessed 3 October 2018).

38 For a discussion, see M Killander 'Human rights developments in the African Union during 2015' (2016) 16 *African Human Rights Law Journal* 532.

39 *Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians*, Application 002/2015 (2017).

40 Para 51.

with its 2015 request to the Commission to withdraw CAL's observer status.<sup>41</sup> To address 'various concerns' with the African Commission, the Executive Council decided that a retreat between the Permanent Representatives' Committee (PRC) and the African Commission should be organised. The retreat was held from 4 to 6 June 2018 in Nairobi, Kenya. By this time, the Commission had already deliberated on the Executive Council's reiterated request to withdraw CAL's observer status. In its 44th Activity Report, the African Commission notes that at its 62nd ordinary session in May 2018 it decided that it

has to abide by and apply due process in order to ensure legality, compliance with the African Charter and its juridical mandate. Accordingly, the Commission will forthwith institute a process for judicially determining the request to withdraw NGO observer status from CAL. The Commission will report its final determination on this matter in its next Activity Report.<sup>42</sup>

The African Commission presumably was severely criticised at the retreat. In its decision on the outcome of the retreat, the Executive Council took its harshest stance yet against the Commission and included a number of decisions threatening the independence of the Commission.<sup>43</sup> The decision of the Executive Council included the revision of the criteria for NGO observer status to be in line with the (restrictive) criteria for accreditation with the AU, and that the revised criteria should be adopted by the AU policy organs and not by the Commission itself. The Executive Council further called on the African Commission to 'withdraw the accreditation of the Coalition for African Lesbians (CAL) NGO by 31st December 2018 at the latest, in accordance with previous decisions of AU Policy Organs'.

On 8 August 2018 CAL received a letter of notification from the African Commission informing the organisation that its observer status with the African Commission had been revoked by the Commission in compliance with the Executive Council's 2016 and 2018 decisions.<sup>44</sup> The decision to withdraw CAL's observer status had been taken at the 24th extraordinary session of the Commission held from 30 July to 8 August 2018. At this session the Commission also established three-member committees to consider a code of conduct for commissioners and to prepare a document on the interpretative mandate of the Commission in line with the Executive Council's July decision.

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41 EX.CL/Dec.995(XXXII) para 3.

42 44th Activity Report para 43.

43 For a discussion, see J Biegon 'The rise and rise of political backlash: African Union Executive Council's decision to review the mandate and working methods of the African Commission', <https://www.ejiltalk.org/the-rise-and-rise-of-political-backlash-african-union-executive-councils-decision-to-review-the-mandate-and-working-methods-of-the-african-commission/> (accessed 4 October 2018).

44 <https://www.cal.org.za/2018/08/17/women-and-sexual-minorities-denied-a-seat-at-the-table-by-the-african-commission-on-human-and-peoples-rights/> (accessed 4 October 2018).

Egypt, which will chair the AU in 2019, has taken the lead in attacks against the African Commission, according to Biegon.<sup>45</sup> This may be related to the large number of cases against Egypt submitted to the Commission. With the AU Summit in January 2019 and the 64th ordinary session of the Commission in April-May 2019 set to be held in Egypt, it remains to be seen whether further attacks on the Commission's independence will ensue. Egypt's leading role in the attacks against the Commission's independence should be seen in the context of the actions taken by the Egyptian government to further limit civil society space.<sup>46</sup>

Backlash is not only an issue for the African Commission. The African Court has seen its powers curtailed by Rwanda's withdrawal of its article 34(6) declaration allowing direct access to the Court after the exhaustion of local remedies.<sup>47</sup> A controversial judgment by the African Court could lead the policy organs of the AU to suffocate it if an aggrieved state would take the lead and others follow. This is what led to the SADC Tribunal's demise and the access restrictions to the East African Court of Justice.<sup>48</sup> However, it should be noted that it is often not sufficient that one state is aggrieved, as illustrated by The Gambia's attempts under President Jammeh to curtail the powers of the ECOWAS Community Court of Justice.<sup>49</sup>

The backlash against the independence of the regional human rights institutions goes against the idea underlying the declaration of the AU Assembly in June 2016 regarding 2017-2026 as the 'Human and People's Rights Decade in Africa'. In the declaration, the members of the AU reiterated their

unflinching determination to promote and protect human and people's rights and all basic freedoms in Africa and the need for the consolidation and the full implementation of human and peoples' rights instruments and relevant national laws and policies as well as decisions and recommendations made by the AU organs with a human rights mandate.<sup>50</sup>

The Assembly further called on the AU Commission 'to ensure the independence and integrity of AU organs with a human rights mandate by providing adequate financing and shielding them from

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45 Biegon (n 43).

46 <https://www.amnesty.org/download/documents/afr0173842017english.pdf> (accessed 4 October 2018).

47 For a discussion of the withdrawal and the Court's judgment on the date when the withdrawal took effect, see M Nyarko & A Jegede 'Human rights developments in the African Union during 2016' (2017) 17 *African Human Rights Law Journal* 304.

48 KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East and Southern Africa: Causes and consequences' (2016) 27 *European Journal of International Law* 293.

49 As above.

50 Assembly/AU/Décl.1(XXVII) Rev 1 para 4.

undue external influence'.<sup>51</sup> Lack of finances, in particular resulting in inadequate staffing of the Commission Secretariat, remains a challenge, although there are some signs of improvement.<sup>52</sup> However, 'independence' and 'undue external influence' should not only be viewed in the context of alleged undue influence by donors and NGOs, but also the need for the Commission to be able to undertake its mandate without undue influence from the AU policy organs. This interpretation is in line with the quotation above on the need for full implementation of the 'decisions and recommendations made by the AU organs with a human rights mandate'.<sup>53</sup>

It is perhaps symptomatic of a lack of real commitment that despite various consultations, an African Human Rights Action Plan 2017-2026, as foreseen by the Assembly decision, had at the time of writing not been adopted and the website dedicated to the project has not been updated.<sup>54</sup>

Perhaps the most important measure to ensure independent and effectively functioning regional human rights bodies is to ensure that their members fulfil the criteria for membership as set out in the founding treaties and other decisions of the AU. Members of the African Commission should, according to the African Charter, be chosen 'from amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights'.<sup>55</sup> Three new commissioners were appointed in 2017, namely, Mr Hatem Essaïem (Tunisia); Ms Maria Teresa Manuela (Angola); and Prof Remy Ngoy Lumbu (DRC). Commissioner Essaïem is a career diplomat who has been the Tunisian ambassador to Lebanon, the United Arab Emirates, Oman and Iran.<sup>56</sup> Maria Teresa Manuela is Deputy Attorney-General of Angola.<sup>57</sup> Since the appointment procedure is not transparent, it is difficult to determine whether the new appointees fulfil the criteria in the African Charter. The only new member with clearly-documented human rights experience is the new commissioner from the DRC, Remy Ngoy Lumbu, who is a professor of human rights law at the University of Kinshasa.<sup>58</sup>

51 Decision on the report on the joint retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR), EX.CL/Dec.1015(XXXIII).

52 44th Activity Report of the African Commission para 40.

53 See also the acknowledgment of the important role played by donors, para 15.

54 <http://www.africahuripplan.org/> (accessed 4 October 2018).

55 Art 31(1) African Charter.

56 <http://www.businessnews.com.tn/la-tunisie-elue-a-la-commission-africaine-des-droits-de-lhomme-et-des-peuples,520,73341,3> (accessed 4 October 2018).

57 <http://www.peaceau.org/en/resource/90-organ-peace-security-council> (accessed 4 October 2018).

58 <https://www.digitalcongo.net/article-en/595e242248d13a0004c2c414/> (accessed 4 October 2018). Dr Lumbu completed his doctorate in human rights law at the Université de Louvain, Belgium, in 2007 with a thesis on establishing an individual

The election of an ambassador and a deputy attorney-general is disturbing, particularly if indicative of a future trend. Since 2005 the AU's note verbale calling for nominations of members for the human rights monitoring bodies has requested that nominees be independent from government.<sup>59</sup> Members with close links to government have been the exception since the 2005 note verbale, and the African Commission has in recent years consisted of a mix of legal practitioners, judges, staff of NGOs, academics and leaders of independent national institutions such as national human rights institutions and electoral commissions.<sup>60</sup> An exception is Mumba Malila from Zambia who became a commissioner in October 2006. At the time he was the Chairperson of the Human Rights Commission of Zambia. However, already in December 2006 he was appointed Attorney-General of Zambia, a post which he held until December 2009 and then again from September 2011. He served on the African Commission until November 2011, including as Vice-Chairperson from 2009 to 2011.<sup>61</sup>

## 6 Jurisprudence of the AU human rights institutions

### 6.1 African Court on Human and Peoples' Rights

The African Court held a number of public hearings and delivered five rulings on admissibility; five rulings on requests for advisory opinions submitted by various NGOs; four rulings on requests for provisional measures;<sup>62</sup> 13 judgments on the merits; and three judgments on the interpretation of previous merits decisions. The following paragraphs provide brief reviews of some of these decisions.

Of the five rulings on admissibility, four were declared inadmissible for non-exhaustion of local remedies.<sup>63</sup> Local remedies were deemed to have been exhausted in the fifth admissibility ruling (*Gombert v*

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communication mechanism under the International Covenant on Economic, Social and Cultural Rights, <https://dial.uclouvain.be/pr/boreal/en/object/boreal%3a4697/datastreams> (accessed 4 October 2018).

59 F Viljoen 'Promising profiles: An interview with the four new members of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 237.

60 M Killander & A Abebe 'Human rights developments in the African Union during 2010 and 2011' (2012) 12 *African Human Rights Law Journal* 200-201.

61 <https://www.linkedin.com/in/mumba-malila-sc-97538049/> (accessed 4 October 2018).

62 *Leon Mugesera v Republic of Rwanda*, Application 012/2017 (Order For Provisional Measures, 2017); *Dexter Eddie Johnson v Republic of Ghana*, Application 016/2017 (Order For Provisional Measures, 2017); *General Kayumaba Nyamwasa & Six Others v Republic of Rwanda*, Application 016/2015 (Order For Provisional Measures, 2017); *Alfred Agbesi Woyome v Republic of Ghana*, Application 001/2017 (Order For Provisional Measures 2017).

63 *Fidele Mulindahabi v Republic of Rwanda*, Application 008/2017 (2017); *Diakite Couple v Republic of Mali*, Application 009/2016 (2017); *Rutabingwa Chrysanthé v Republic of Rwanda*, Application 022/2015 (2018); *Mariam Kouma & Ousmane Diabate v Republic of Mali*, Application 040/2015 (2018).



*Côte d'Ivoire*).<sup>64</sup> The facts giving rise to the *Gombert* case relate to a dispute between two private companies represented by the two principal shareholders of each of the companies. It was contended that local remedies had not been exhausted because the initial dispute was between two private individuals and the violations were not raised as an issue against the state. The Court, however, concluded that even though the initial dispute was a private dispute and not directly against the respondent state, the applicant had gone through the judicial process of the respondent state and brought the alleged violations of his right to a fair trial to the attention of the state during this process, thereby exhausting local remedies. Indeed, it would be unreasonable to expect an applicant who has raised pertinent issues at various stages of a trial to be told by the African Court to go back and exhaust local remedies. However, the case was declared inadmissible on the basis that it had already been settled by the ECOWAS Court.

In terms of its advisory jurisdiction, the African Court for the first time had the opportunity to consider a request for an advisory opinion submitted by an NGO in the *SERAP* case.<sup>65</sup> The Court had to decide whether the Socio-Economic Rights and Accountability Project (SERAP) is an African organisation recognised by the AU to clothe it with standing to request an advisory opinion from the Court. SERAP argued that the 'non-restrictive' use of the word 'organisation' in article 4 of the Court's Protocol suggests that the drafters contemplated both African inter-governmental organisations and NGOs. SERAP further argued that since it is an NGO registered in Nigeria and having been granted observer status before the African Commission, an organ of the AU, it was an African organisation recognised by the AU in terms of article 4 of the Court Protocol and, therefore, had standing to petition the Court for an advisory opinion.<sup>66</sup> SERAP's application was supported by Zambia<sup>67</sup> and Cape Verde,<sup>68</sup> but opposed by Nigeria and Uganda.<sup>69</sup>

The Court held that the term 'organisation' as used in article 4 of the Protocol covers both intergovernmental organisations and NGOs given that where the drafters of the Protocol wanted to limit its application to intergovernmental organisations, they expressly provided so, as they did in article 5 of the Protocol.<sup>70</sup> The Court further held that an NGO qualifies as an African organisation 'if [it is] registered in an African state, has structures at the sub-regional,

64 *Jean-Claude Roger Gombert v Republic of Côte D'Ivoire*, Application 038/2016 (2018).

65 Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP), 001/2013, Advisory Opinion, 26 May 2017, para 3. The Centre for Human Rights, University of Pretoria, submitted an *amicus* brief.

66 Request by SERAP (n 65) paras 4-6.

67 Request by SERAP para 27.

68 Request by SERAP paras 30-31.

69 Request by SERAP paras 25-26 & 28-29.

70 Request by SERAP paras 46-47.

regional or continental level, or undertakes its activities beyond the territory where it is registered, as well as any organisation in the diaspora recognised as such by the African Union'.<sup>71</sup> The Court consequently declared that SERAP was an African organisation in terms of article 4 of the Protocol.<sup>72</sup>

However, on the issue of recognition by the AU, the Court held that article 4 of the Protocol draws a clear distinction between the AU and its organs and, therefore, 'only African NGOs recognised by the African Union as an international organisation with its own legal personality are covered by this article, and may bring a request for Advisory Opinion before the Court'.<sup>73</sup> The Court justified this conclusion by citing article 5 of the Court Protocol, which expressly includes observer status granted by the African Commission as the basis for NGOs to seize the contentious jurisdiction of the Court against countries that have made the article 34(6) declaration.<sup>74</sup> Consequently, the Court concluded that since the drafters of the Protocol did not expressly include observer status granted by the African Commission as one of the bases for recognition of NGOs qualified to submit requests for advisory opinions, it could not be implied against the express provisions of the Protocol. The Court concluded that recognition by the AU may be proved by way of observer status before or a memorandum of understanding concluded with the AU.<sup>75</sup> Since SERAP did not have observer status before or MOU with the AU, the application was declared inadmissible for lack of personal jurisdiction.

The Court has subsequently applied this precedent to four other requests for advisory opinion brought by various NGOs and dismissed all for want of personal jurisdiction. These requests raised pertinent issues, including the independence of the African Commission;<sup>76</sup> the negative impact of mining on local communities;<sup>77</sup> unconstitutional changes of government;<sup>78</sup> and the registration of marriages.<sup>79</sup>

On a positive note, it is important that the Court rejected the argument by Uganda that only intergovernmental organisations

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71 Request by SERAP para 48.

72 Request by SERAP paras 49-51.

73 Request by SERAP para 53.

74 Request by SERAP para 54.

75 Request by SERAP para 64.

76 Request for Advisory Opinion by the Centre for Human Rights of the University Of Pretoria & The Coalition of African Lesbians, Application 002/2015 (2017). See discussion above on the backlash against the African Commission following the granting of observer status to CAL.

77 Request for Advisory Opinion by L'Association Africaine de Defense des droits de L'homme, Application 002/2016 (2017).

78 Request for Advisory Opinion by Rencontre Africain pour la Defense des droits de L'homme, Application 002/2014 (2017).

79 Request for Advisory Opinion by the Centre for Human Rights – University of Pretoria, Federation of Women Lawyers – Kenya, Women's Legal Centre, Women Advocates Research and Documentation Centre & Zimbabwe Women Lawyers Association, Application 001/2016 (2017).

qualify to request an advisory opinion from the Court. Such a conclusion would have completely closed the door to NGOs and would have rendered the advisory jurisdiction of the Court almost redundant since most cases before the Court have been presented by NGOs. Second, it is also important that the Court rejected arguments by Nigeria that only NGOs from states that have made the article 34(6) declaration should be allowed to petition the Court for an advisory opinion. This argument clearly has no basis since the advisory jurisdiction of the Court is not exercised against any state in particular.

However, the textual interpretation adopted by the Court, as in its previous advisory decision on a request submitted by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), raises concerns over how far the Court is willing to go to protect human and peoples' rights on the continent. As one commentator notes, a purposive interpretation by the Court, taking into consideration the complementary role of the Court in the interpretation of the African Charter as envisaged by the Protocol, provided an avenue for the Court to include NGOs with observer status before the Commission as part of the organisations contemplated by article 4 of the Protocol.<sup>80</sup> This restrictive interpretation adopted by the Court means that even though the possibility exists, it is less likely that NGOs will have the opportunity to access the Court's advisory jurisdiction. This is because the AU has stringent and arguably unreasonable requirements for granting observer status to African NGOs, including the fact that they generate at least two-thirds of their funding from their membership.<sup>81</sup> This requirement is paradoxical, given that many African states rely on donor support and the AU itself has the bulk of its budget financed by development partners.<sup>82</sup>

The majority of the merits judgments delivered by the Court relate to the right to fair trial, which in the recent past has featured prominently on the Court's cause list, but also include new areas of human rights, such as indigenous peoples' rights, rights to citizenship and women's rights.

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80 A Jones 'Form over substance: The African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion' (2017) 17 *African Human Rights Law Journal* 321.

81 Criteria for granting African Union observer status to non-governmental organisations (NGOs), para 7, Report of the PRC and legal experts on various legal matters, EX.CL/195 (VII), Annex IV, <http://www.peaceau.org/uploads/ex-cl-195-vii-e.pdf> (accessed 21 October 2018), adopted by the AU Executive Council in July 2005, EX.CL/Dec. 230 (VII).

82 African Union 'Financing of the Union: by Africa for Africa' <http://www.theeastafrican.co.ke/sponsored/financing-of-the-union-by-africa-for-africa/4358802-4685156-vdy982/index.html> (accessed 26 September 2018); African Union 'Financial reforms at the African Union lead to massive cuts to the union's budget' <https://au.int/en/pressreleases/20180706/financial-reforms-african-union-lead-massive-cuts-union-s-budget> (accessed 26 September 2018).

In *Ingabirie Victorie Umuhoza v Rwanda*,<sup>83</sup> the leader of one of the opposition parties, *Forces Démocratiques Unifiées (FDU Inkingi)*, was sentenced by the Supreme Court to 15 years' imprisonment. The applicant's conviction was based on statements that highlighted crimes that were committed during the Rwandan genocide, not only against Tutsis but also against Hutus. The second set of statements were criticisms of government officials. The applicant, therefore, approached the African Court citing violations of her rights to equal protection of the law, fair trial and freedom of expression contrary to articles 3, 7 and 9 of the African Charter and commensurate provisions of the International Covenant on Civil and Political Rights (ICCPR).

On the merits, the Court held that the right to a fair trial of the applicant had been violated by the failure of the High Court to allow the applicant's legal team to cross-examine her co-accused who testified against her, and denying the applicant access to documents which were used against her at the trial.<sup>84</sup> On the issue relating to the crime of 'negation and minimisation of genocide' and the right to freedom of opinion and expression, the Court held that such a restriction on freedom of expression served a legitimate purpose given the context of Rwanda in terms of the sensitive issue of the genocide.<sup>85</sup> However, on the facts, the Court agreed with the applicant that there was nothing in her statements that suggested that she sought to negate or minimise the genocide.<sup>86</sup> On her criticisms of the government, the Court held that while some of the remarks may be offensive and discredit the integrity of the government and public officials in the eyes of citizens, these are expected in a democratic society and should be tolerated.<sup>87</sup>

The decision in this case is an important affirmation of the Court's decision in *Konaté v Burkina Faso*,<sup>88</sup> where the Court emphasised the need to ensure that restrictions to the right to freedom of expression in a democratic society should be as minimal as possible and proportionate to the purpose sought to be achieved by the limitation or restriction. However, after the judgment Rwanda has adopted additional legislation curtailing freedom of expression. For instance, in October 2018 it was reported that Rwanda's revised Penal Code criminalises 'any writings or cartoons that "humiliates" lawmakers, cabinet members, or security officers'.<sup>89</sup> With regard to Ms Ingabire, it was reported in September 2018 that she had been released through

83 Application 003/2014 (2017).

84 Paras 97-98.

85 Para 158.

86 Para 159.

87 Para 161.

88 *Lohé Issa Konaté v Burkina Faso*, Application 004/2013 (2014).

89 <https://qz.com/africa/1410418/rwanda-bans-cartoons-that-humiliate-government-officials/> (accessed 2 October 2018).

a presidential pardon after having served eight years of her 15-year sentence.<sup>90</sup>

The recurring theme in the remainder of the fair trial cases (all against Tanzania) relates the right to free legal aid which the Court held (applying its previous decision in *Abubakari v Tanzania*<sup>91</sup>) to be an important component of the right to fair trial where the accused is facing serious criminal charges, and consequently the failure of the respondent state to provide free legal aid in such circumstances is a violation of the applicant's right to a fair trial.<sup>92</sup> There was only one case in which the Court found no violation.<sup>93</sup> The Court also held that a delay in providing or failure to provide an applicant with witness statements or copies of a criminal judgment against the applicant,<sup>94</sup> and the failure of the respondent state to facilitate the attendance of witnesses called by an accused person who is in custody, constituted a violation of the right to a fair trial.<sup>95</sup> Another pertinent finding of the Court was to the effect that proof of rape should not be limited to the medical report that the victim has been raped but also confirmation that the offence was committed by the accused person, such as through DNA tests, where possible. The Court in this case ordered the respondent state to reopen a criminal trial because previous trials before the domestic courts were in violation of the applicant's right to a fair trial.<sup>96</sup>

One other issue worth noting in the new fair trial cases relates to the fact that the Court seems to have improved on its remedial orders. Notably, in previous cases, after the Court had refused to order the release of the applicants from prison even though it found that their right to a fair trial had been violated and reopening the case would occasion an injustice, it made the rather vague order that the respondent state should take the necessary measures to remedy the violation. This prompted Tanzania to return to the Court to seek clarification about what measures it could take to ensure satisfaction of the order. Consequently, in recent cases, while the Court did not specifically order the release of the applicants, it included in the

90 BBC News 'Victoire Ingabire: Rwanda frees 2 000 people including opposition figure' <https://www.bbc.com/news/world-africa-45532922> (accessed 2 October 2018).

91 *Mohamed Abubakari v United Republic of Tanzania*, Application 007/2013 (2016).

92 *Kennedy Owino Onyachi & Charles John Mwanini Nkoka v United Republic of Tanzania*, Application 003/2015 (2017); *Christopher Jonas v United Republic of Tanzania*, Application 011/2015 (2017); *Thobias Mang'ara Mango & Shukurani Masegenya Mango v United Republic of Tanzania*, Application 005/2015 (2018); *Amiri Ramadhani v United Republic Of Tanzania*, Application 010/2015 (2018); *Diocles William v United Republic of Tanzania*, Application 016/2016 (2018); *Anaglet Paulo v United Republic of Tanzania*, Application 020/2016 (2018); *Kijiji Isiaga v United Republic of Tanzania*, Application 032/2015 (2018).

93 *George Maili Kemboge v United Republic of Tanzania*, Application 002/2016 (2018).

94 *Owino & Nkoka; Mango & Mango; Nguza Viking (Babu Seya) & Johnson Nguza (Papi Kocha) v United Republic of Tanzania*, Application 006/2015 (2018).

95 *Diocles William v United Republic of Tanzania*, Application 016/2016 (2018).

96 As above.

remedial order that the measures the respondent state could adopt to satisfy the order included the release of the applicants from prison custody. The Court, therefore, should be commended for improving on its remedial orders and providing more guidance to the respondent state on the measures that may be taken to satisfy the order.

In *APDF & IHRDA v Mali*<sup>97</sup> the Court for the first time had an opportunity to pronounce itself on the provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). The Court held that the Persons and Family Code of the respondent state had several provisions that were in contravention of the African Women's Protocol and the African Charter on the Rights and Welfare of the Child (African Children's Charter), notably violations of the minimum age of marriage, consent to marriage, rights to inheritance and harmful cultural practices.<sup>98</sup> The Court rejected the respondent state's argument that the law on minimum age of marriage should be seen in the context of the social, cultural and religious realities of Mali, as it serves no purpose to enact laws that would be difficult to implement.<sup>99</sup>

*Anudo v Tanzania*<sup>100</sup> involved allegations by the applicant that the respondent state had illegally revoked his citizenship and deported him to Kenya even though he had a Tanzanian birth certificate and both his parents were Tanzanians. The Court held that even though the right to nationality is not expressly guaranteed under the African Charter or ICCPR, it is guaranteed by article 15 of the Universal Declaration of Human Rights (Universal Declaration) which, according to the Court, is recognised as forming part of customary international law.<sup>101</sup> In this regard, the Court noted that even though the determination of citizenship and revocation lies within the sovereignty of states, this cannot be arbitrarily determined and must be done in accordance with international law to avoid statelessness. The Court also noted that since it was the respondent state that was challenging the citizenship of the applicant, the burden of proof was on the state to prove the contrary.<sup>102</sup> Consequently, the Court held that since the respondent state did not deny the nationality of the applicant's parents and refused to conduct a DNA test to confirm the paternity of the applicant, as requested by the applicant's father, the deprivation of the applicant's citizenship was arbitrary and in violation of article 15(2) of the Universal Declaration. The Court also held that the

97 *Association Pour Le Progres Et La Defense Des Droits Des Femmes Maliennes (APDF) & Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali*, Application 046/2016 (2018).

98 Para 9.

99 Para 66.

100 *Anudo Ochieng Anudo v United Republic of Tanzania*, Application 012/2015 (2018).

101 Para 66.

102 Para 80.

respondent was in violation of article 13 of ICCPR for arbitrarily expelling the applicant from its territory,<sup>103</sup> and further that arbitrarily expelling the applicant without the possibility to appeal to national courts was a violation of his right to be heard contrary to articles 7(1)(a), (b) and (c) of ICCPR.<sup>104</sup> The Court, therefore, ordered the respondent state to amend its laws to provide individuals with judicial remedies in the event of a dispute over citizenship and to restore the applicant's rights by allowing him to return to Tanzania.<sup>105</sup>

*African Commission v Kenya*<sup>106</sup> relates to the eviction in 2009 of the Ogiek indigenous community by the Kenya Forestry Services from the Mau Forest. The case was first filed before the African Commission in 2009 by the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRGI) on behalf of the Ogiek Community. The African Commission submitted the case to the Court on account of the lack of response from the respondent state when the Commission ordered provisional measures against it.

The Court held that the Ogiek, being an indigenous community, had the right to occupy, use and enjoy their ancestral lands.<sup>107</sup> Even though the Court agreed that this right was not absolute and may be restricted in the public interest in terms of article 14 of the African Charter, such measures must be necessary and proportional.<sup>108</sup> The Court, therefore, rejected the respondents' arguments that evicting the Ogiek from the forest was necessary to preserve the natural ecosystem as the evidence showed that the main causes of environmental degradation in the Mau Forest was the encroachment by other groups, government's excision for settlements and ill-advised logging concessions, rather than the presence of the Ogiek.<sup>109</sup> The Court thus found the respondent state in violation of the right to property of the Ogiek in violation of article 14 of the African Charter.<sup>110</sup> The Court further held that the right to non-discrimination, freedom of religion, culture, free disposal of natural resources and the right to development had been violated. The Court held that rather than evict the Ogiek from the forest for public health reasons, there were less restrictive measures that the respondent could have taken to ensure the enjoyment of their rights while maintaining law and order and public health. Such measures could include sensitisation about public health requirements on burying the dead and collaboration towards maintaining religious sites.<sup>111</sup>

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103 Paras 100-106.

104 Paras 107-115.

105 Paras 132 (viii) & (ix).

106 *African Commission on Human and Peoples' Rights v Republic of Kenya*, Application 006/2012 (2017).

107 Para 128.

108 Para 129.

109 Para 130.

110 Para 131.

111 Paras 164-167.

The Court further issued three interpretation judgments.<sup>112</sup> In two of the interpretation judgments, *Thomas* and *Abubakari*, the Court clarified that its order that Tanzania must take all appropriate measures was intended to offer the state 'room for evaluation to enable it to identify and activate all the measures that would enable it to eliminate the effects of the violations established by the Court'.<sup>113</sup> The Court further clarified that it did not conclude in the merits decisions that the applicants' request to be released from prison were unfounded, but merely that it could only make such an order directly if there were specific and compelling circumstances which, in the opinion of the Court, the applicants had not established.<sup>114</sup> On the issue of how to remedy the violations, the Court clarified that "'all necessary measures" included the release of the applicant and any other measure that would help erase the consequences of the violations, establish and restore the pre-existing situation and re-establish the rights of the applicant[s]'.<sup>115</sup>

In the third interpretation judgment, occasioned by a request from Côte d'Ivoire, the application was declared inadmissible on the basis that it sought the Court's opinion on how to implement the judgment rather than clarifying the operative provision of the judgment.<sup>116</sup>

The fact that the Court has had to issue three interpretation judgments successively should be a cause for concern to the Court and arguably an indication that the Court's remedial orders do not have sufficient clarity to ensure that states found in violation know what remedial measures to adopt.

## 6.2 African Commission on Human and Peoples' Rights

The African Commission was seized of at least 39 communications, issued provisional measures in at least 15 communications, declared at least five communications admissible and decided two communications on merits.<sup>117</sup> Only one of the two communications decided on the merits, *Patrick Okiring and Agupio Samson (represented by Human Rights Network and ISIS-WICCE) v Republic of Uganda*,<sup>118</sup> was publicly available. The complainants alleged that they had been arrested together with other individuals in 2004 on suspicion of being members of an armed group working to overthrow the Ugandan

112 *Alex Thomas v United Republic of Tanzania*, Application 001/2017 (Interpretation Judgment, 2017); *Mohamed Abubakari v United Republic of Tanzania*, Application 002/2017 (Interpretation Judgment, 2017); *Actions Pour La Protection Des Droits De L'homme (APDH) v Republic of Côte D'Ivoire*, Application 003/2017 (Interpretation Judgment, 2017).

113 Common para 35 of both judgments.

114 Common para 36 of both judgments.

115 Paras 39 & 38 of *Thomas* and *Abubakari* respectively.

116 *APDH*, para 18.

117 See 42nd, 43rd and 44th Activity Reports of the African Commission <http://www.achpr.org/activity-reports/> (accessed 4 October 2018).

118 Communication 339/2007 (2017).



government. They were, however, neither charged nor brought before a court of law. Approximately one year later, in 2005, they were charged together with the leader of Uganda's main opposition party, Kizza Besigye, with treason and concealment of treason. Even though the High Court granted them bail, they were not released and were charged the next day with the offence of terrorism before the General Court Martial on the same facts as those presented before the High Court. Two constitutional petitions were filed to respectively challenge the legality of the concurrent trials and the refusal to release them on bail in breach of the High Court ruling. The Constitutional Court ruled that their continued detention and the trial before the Court Martial were illegal and ordered their release, but this was not complied with. Following the Constitutional Court ruling, a warrant was issued to the Commissioner of Prisons to produce the accused persons before the High Court to have their bail processed, but this was ignored. The Attorney-General subsequently filed an application for review of the High Court's bail decision, but this was rejected by the Court. Mr Okiring and Mr Samson were subsequently charged with new offences and granted bail, whereupon Mr Okiring was released after having satisfied the bail requirement. The state claims that Mr Samson has also been released but there is no information on his whereabouts. The complainants alleged violations of the right to dignity and freedom from torture, the right to liberty and the right to a fair trial contrary to articles 5, 6 and 7 of the African Charter.

On the allegations of torture, the African Commission held that the complainants had neither presented evidence to substantiate this, nor was it indicated that complaints of torture had been brought to the attention of the respondent state and that nothing had been done about it. The Commission, however, held that the subsequent arrest and detention of the victims after they had been granted bail were arbitrary, unlawful and in violation of the right to liberty, contrary to article 6 of the African Charter. The Commission also held that the trial of the victims, who were civilians, before a court martial, and the denial of access to lawyers were in violation their right to a fair trial. The Commission further found the respondent in violation of its obligation to guarantee the independence of courts in terms of article 26 of the Charter for its failure to comply with the bail orders and constitutional declarations of the courts.

Mr Okiring and Mr Samson were part of the original claimants in the *Katabazi* case before the East African Court of Justice (EACJ). However, they withdrew from this case before the EACJ handed down its judgment on 1 November 2007. The African Commission, therefore, held that the case was admissible as it had not been considered by another international body. It is not clear why it took the Commission almost a decade longer than the EACJ to hand down its decision.

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

The African Children's Committee delivered two rulings on admissibility in the cases of *Sohaib Emad v Egypt*<sup>119</sup> and *Ahmed Bassiouny v Egypt*,<sup>120</sup> both of which were declared inadmissible for failure to exhaust local remedies. In *Sohaib Emad*, a case dealing with the arrest of a minor, the respondent state objected to the jurisdiction of the Committee on the basis that it had entered a reservation on articles 44 and 45 of the African Children's Charter from which the African Children's Committee derives its individual communications mandate. However, the Committee held that the reservation was not compatible with the object and purpose of the Children's Charter and thus contrary to article 19(c) of the Vienna Convention on the Law of Treaties. The Committee refused a request for provisional measures on the grounds that the complainant had not provided evidence of a situation of gravity or urgency that would result in irreparable harm in violation of the rights provided for in the Children's Charter. On admissibility, the Committee ruled that the applicant had neither exhausted local remedies nor provided any cogent reasons why an exception to the rule must be allowed in this case, except casting aspersions on the judiciary of the respondent state. The case, therefore, was declared inadmissible for a failure to exhaust local remedies. The Committee's refusal of the request for provisional measures is an interesting conclusion given the fact that the complainant had indicated that both his knees were swollen and that he only had access to painkillers at the detention centre. The right to health is one of the rights that are protected by the Children's Charter and the deterioration of the complainant's health clearly may result in irreparable harm.

*Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania*<sup>121</sup> was submitted on behalf of two victims of slavery. The complainants alleged that Said and Yarg were born in 2000 and 2003 respectively to a mother from Mauritania's Haratine slave class. As a result, the children automatically became slaves of the El Hassine family. The boys worked seven days a week herding camels and doing domestic chores. They were called slaves in the El Hassine family rather than by their given names, were only allowed to eat leftovers and did not attend school like the other children of the household.<sup>122</sup> Said escaped in 2011 and went with his aunt to file a case at the police station against the El Hassine family, some of whom were charged with the crime of practising slavery and depriving the boys of education. Some members of the family and the mother of the boys were convicted

119 Communication 008/com/002/2016 (Decision on Admissibility 001/2017).

120 Communication 009/com/001/201 (Decision on Admissibility 002/2017).

121 Communication 007/com/003/2015 (Decision 003/2017).

122 Paras 5-6.

and sentenced to various prison sentences ranging from a maximum of two years and a fine of \$1 500 for the slave owner to the lowest of a two-year suspended sentence and a fine of \$300 for his brothers. Said was awarded compensation of \$2 500 and Yarg \$700. The complainants alleged that despite the unsatisfactory decision of the court, no appeal was pursued by the prosecutor and the slave owner was released on bail after four months.<sup>123</sup> An appeal hearing requested by the lawyer of the complainants was repeatedly postponed. The whereabouts of the slave owner, who appears to be in breach of his bail conditions, is unknown. The complainant alleged that the respondent state was in violation of the obligation of state parties (article 1) as well as the rights to non-discrimination (article 3); best interests of the child (article 4); survival and development (article 5); education (article 11); leisure (article 12); protection from economic exploitation (article 15); protection against harmful practices (article 16); and prevention of the sale, trafficking in and abduction of children (article 29), contrary to the African Children's Charter.<sup>124</sup> The Children's Committee undertook a fact-finding mission to familiarise itself with the situation in the respondent state.<sup>125</sup>

On admissibility, the Committee ruled that since the appeal had been pending before the Court of Appeal for four years without any progress, the local remedies were unduly prolonged and ineffective, which is not in the best interests of the child and, therefore, need not be exhausted by the complainants. On the merits, the Committee held that the obligations of member states under article 1 of the Children's Charter encompassed a duty to adopt legislative, administrative and other measures, including the obligation to act with due diligence to prevent violations or ensure that appropriate redress is afforded to victims. A state that is found to condone violations has not fulfilled its due diligence obligations. The Committee concluded that even though the respondent had enacted legislation criminalising slavery, there was little evidence that it had actually taken steps to enforce the law. The Committee cited, for instance, the fact that the criminal prosecution had been triggered by the aunt of the victims, that the slave owner was sentenced to only two years' imprisonment, which is below the minimum sentence required by the anti-slavery law, and that the appeal against the sentence of the slave owner had been pursued by the victims' lawyer and not the public prosecutor. The Committee also found the respondent in violation of the right of the victims to non-discrimination, on account of its failure to exercise due diligence when the violations were brought to its attention. The Committee further found the respondent in violation of all the rights alleged to have

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123 Paras 7-10.

124 Para 12.

125 Para 4.

been violated by the complainants, except the sale of and trafficking in children.

In *Institute for Human Rights and Development in Africa & Finders Group Initiative on behalf of TFA (a minor) v Cameroon*,<sup>126</sup> the complainants alleged that a 10 year-old girl had been raped multiple times in 2012. The attention of the respondent state was drawn to this violation through a report to the police. The police requested that the victim be sent to the hospital for a medical examination, which confirmed the allegations. The victim led the police to the house of the suspect, who was an influential figure in the community. The victim was not allowed into the house to identify the suspect. It was further alleged that a subsequent identification parade had been organised by the police at which, due to a combination of heavy disguise worn by the accused and intimidation of the victim by the lawyers for the suspect, the victim was unable to identify him. Evidence was submitted to the examining magistrate after three months and were summarily dismissed for not disclosing any case against the suspect. Requests to the examining magistrate for a copy of the ruling to enable representatives of the victim to pursue an appeal were denied on the grounds that only the state could appeal against the decision. One of the representatives of the victim and the victim's aunt were subsequently charged with defamation on the basis that a text message sent by the victim's aunt on a radio show highlighting the victim's plight was orchestrated to defame the examining magistrate, imputing that he was corrupt. The complainants alleged that the failure of the respondent state to properly investigate the crime and to prosecute the accused amounted to a violation of the obligations of the state (article 1), the right to non-discrimination (article 3) and protection against child abuse and torture (article 16) of the African Children's Charter. The Committee agreed with the applicants and found the respondent state in violation of its obligation under article 1 for failing to thoroughly investigate the crime and provide a remedy to the victim; a violation of the right to non-discrimination on account of rape being a form of gender-based violence and gender discrimination; and a violation of its obligation to protect children against child abuse for failing to act with due diligence to protect the rights of the victim. The African Children's Committee consequently ordered the respondent state to ensure the prosecution of the perpetrator, to provide compensation of 50 million CFA to the victim, and to undertake other structural changes such as enacting and implanting legislation on violence against women, and educating the police, prosecutors, judges and other government officials on the protection of children's rights.

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126 Communication 006/com/002/2015 (Decision 001/2018).

## 7 Conclusion

The AU and its member states have committed themselves to respecting human rights. This includes having established independent bodies to monitor their own human rights performance. The decisions on the activity reports of these bodies, the African Commission, the African Court and the African Children's Committee, abound with commitments to support them and comply with decisions, including on provisional measures.<sup>127</sup> However, as illustrated in this article, some states clearly feel that the human rights bodies are interfering too much and seek ways to undermine them. Most states are hesitant to sign up to further scrutiny as illustrated by the stagnant number of ratifications of the Court Protocol and only eight states having made a declaration allowing for direct access to the Court.<sup>128</sup> Indeed, almost all cases that have been decided by the Court have been against states that have made the article 34(6) declaration, illustrating that the Court must put in place a plan on how to deal with a potential substantial increase in cases should more states ratify the Court Protocol and make the article 34(6) declaration. Indeed, Morocco's seeming hesitation to ratify the African Charter may be illustrative of the fact that a number of AU member states have become increasingly hostile to the system that they started to build more than three decades ago. It remains to be seen what changes another decade, a human rights decade no less, will bring.

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127 See eg Decision on the 44th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec.1014(XXXIII), para 9; Decision on the 2017 Activity Report of the African Court on Human and Peoples' Rights, EX.CL/Dec.994(XXXII)Rev.1, para 9.

128 Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Tanzania and Tunisia. It should be noted that five of these states are members of ECOWAS and individuals or NGOs in these states could thus choose to submit cases to the ECOWAS Community Court of Justice which has a clear human rights mandate. The East African Court of Justice, of which Tanzania is a member, has a more limited rule of law mandate.

## Recent developments

### In default: *African Commission on Human and Peoples' Rights v Libya*

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#### Summary

*This article examines the judgment in the case of African Commission on Human and Peoples' Rights v Libya before the African Court on Human and Peoples' Rights. It argues that as the first judgment to be delivered in default, it serves as an intriguing foundation, and one that will often be revisited as the African Court takes on more and more cases. The article examines the procedures leading to the African Court taking the step of issuing judgment in default, the procedure itself and its future application. The article also examines the nature of the transfer by the African Commission to the African Court and how this may provide guidance in relation to future transfer cases. The article further examines the African Court's findings under article 6 (right to personal liberty and protection from arbitrary arrest) and article 7 (right to a fair trial) of the African Charter.*

**Key words:** *human rights; African Court on Human and Peoples' Rights; African Commission on Human and Peoples' Rights; right to fair trial; right to liberty*

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# 1 Introduction

This article focuses on the first judgment in default of the African Court on Human and Peoples' Rights (African Court). The article examines the judgment in detail, setting out the reasons for rendering it a default decision and reviewing the unique fact pattern that led to the decision as well as the more general context of judgments in default. The article will seek to draw lessons from this case and examine whether it may be seen as a once-off or may herald more of the same from the African Court.

On 3 June 2016 the African Court handed down judgment in the case of *African Commission on Human and Peoples' Rights v Libya*.<sup>1</sup> The judgment is notable for several reasons: It is the first judgment to be rendered in default pursuant to Rule 55 of the African Court Rules; it raises interesting issues on the transfer of cases between the African Commission on Human and Peoples' Rights (African Commission) and the African Court; and it is the first time the African Court has decided a case brought by the African Commission on its merits. The unique context in which the judgment was rendered also is of note, since behind the rather case-generic name lies the fact that the judgment concerns the detention of Saif al-Islam Kadhafi (Kadhafi) the son of former Libyan leader Muammar Gaddafi.<sup>2</sup> Over the past few years Kadhafi has been subjected to a game of legal tug-of-war between the International Criminal Court (ICC) and Libya over who should try him for crimes allegedly committed in Libya during his father's rule. This tug-of-war occurred while Kadhafi reportedly languished in the custody of a Libyan armed group not affiliated with, and purportedly out of the reach of, the Libyan government.<sup>3</sup> The power play between Libya and the ICC certainly attracted a great deal of interest among

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1 App 002/2013 3 June 2016 (Judgment) <http://en.african-court.org/images/Cases/Judgment/Judgment%20Appl%20%20002-2013%20African%20Commission%20v%20Libya-%20Engl%20.pdf> (accessed 30 October 2018). See also separate opinion of Judge Fatsah Ouguergouz on Admissibility of the Application App 002/2013 3 June 2016 (Ouguergouz opinion) <http://en.african-court.org/images/Cases/Dissenting-Separate%20Opinions/Opinion%20Commission%20africaine%20c%20Libye%20dissenting%20opinion%2016%20June%202016.pdf> (accessed 30 October 2018).

2 Saif al-Islam Kadhafi's surname is subject to several iterations, eg, the ICC uses 'Gaddafi'; see <https://www.icc-cpi.int/libya/gaddafi>. The African Court's judgment analysed here uses the spelling 'Kadhafi' which will be adopted throughout the article.

3 The article does not conduct a close examination of the *Kadhafi* case before the ICC, but instead focuses on the African Court judgment. By way of background, in 2013 and 2014 the ICC decided that Kadhafi should be transferred to The Hague, The Netherlands, the seat of the ICC, to be tried on charges of murder and persecution as crimes against humanity relating to the Libyan uprising in 2011. Despite this ruling, at the time of writing Kadhafi has yet to be transferred to the ICC to stand trial. For a detailed review of the *Kadhafi* case before the ICC, see <https://www.icc-cpi.int/libya/gaddafi> (accessed 30 October 2018).

scholars.<sup>4</sup> This situation has also created most of the headlines in the general media.<sup>5</sup> However, running in parallel has been the African Court's active engagement over a number of years in the protection of Kadhafi's rights pursuant to the African Charter on Human and Peoples' Rights (African Charter) and the International Covenant on Civil and Political Rights (ICCPR). The judgment analysed in the article is the culmination of this process and points to several issues that may still be live before the African Court as well as the ICC. The article is particularly relevant given the lack of scholarly analysis of the African Court's powers to issue default judgments and its procedure to date. With the African Court receiving an increasing number of applications the likelihood of future scenarios in which its default judgment procedure can be applied will only increase. The case also merits a detailed analysis as, at the time of writing, it is one of only two cases the African Court has accepted resulting from a transfer from the African Commission. Again, the African Court's increasing activity brings a significantly greater possibility of future African Court-African Commission transfers, requiring this case to be examined in detail to assist when dealing with future transfer cases.

The article begins by setting out the background to the case, which is essential to understand the reason why the African Court elected to render a judgment in default. It then examines the preliminary procedure, perhaps best understood as the African Court's attempts to engage Libya. The article will then examine the African Court's judgment in default, assessing the default procedure itself as well as the rest of the judgment on the merits. It finally provides some analysis and conclusions.

## 2 Background

In February 2011, following similar events across the Middle East and the North African region, civilian demonstrations began in Libya against the regime of Muammar Gaddafi, Saif al-Islam Kadhafi's father. It is alleged that Libyan state policy designed at the highest level was aimed at deterring and quelling demonstrations by any

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4 See eg C Stahn 'Libya, the International Criminal Court and complementarity: A test for "shared responsibility"' (2012) 10 *Journal of International Criminal Justice* 325; NN Jurdi 'The complementarity regime of the International Criminal Court in practice: Is it truly serving the purpose? Some lessons from Libya' (2017) 30 *Leiden Journal of International Law* 199; M Ellis 'Beyond a flawed trial: ICC failures to ensure international standards of fairness in the trials of former Libyan regime members' (2017-2018) 33 *American University International Law Review* 75.

5 See eg 'Saif al-Islam Gaddafi case: ICC calls for arrest of ex-Libya leader's son' *BBC News* 14 June 2017 <https://www.bbc.co.uk/news/world-africa-40278385> (accessed 30 October 2018); 'Libya: Gaddafi son Saif al-Islam in contact with ICC' *BBC News* 28 October 2011 <https://www.bbc.co.uk/news/world-africa-15496608> (accessed 30 October 2018).



means, including the use of lethal force.<sup>6</sup> In furtherance of this policy it is claimed that from 15 February 2011 until at least 28 February 2011 the Libyan security forces carried out attacks throughout Libya against civilians taking part in demonstrations against Muammar Gaddafi's regime, killing and injuring as well as arresting and imprisoning hundreds.<sup>7</sup> Although not in an official position, Kadhafi was his father's unspoken successor and the most influential person within his inner circle. It is alleged that Kadhafi enjoyed the powers of a *de facto* Prime Minister, exercising control over crucial sectors of Libya's state apparatus, including finances and logistics. It is alleged that Kadhafi, along with his father, conceived a plan to deter and quell civilian demonstrations against the regime by all means, and that both made an essential contribution to implement this plan.<sup>8</sup> Acting on these allegations the ICC Pre-Trial Chamber issued warrants of arrest against Kadhafi for the crimes of murder and persecution as crimes against humanity.<sup>9</sup> Kadhafi was arrested in Libya on 19 November 2011 and placed under detention in the city of Zintan.<sup>10</sup> During this detention it was alleged that Kadhafi was kept in isolation, without access to his family, friends or a lawyer.<sup>11</sup> It is further alleged that Kadhafi was not charged with an offence or brought before a court.<sup>12</sup> These conditions of detention and the failure of due process formed the basis of Kadhafi's claim before the African Court.

### 3 Preliminary procedure

The following section on procedure is lengthy, but is necessary in order to demonstrate the attempts made by the African Court to engage with Libya and Libya's non-cooperation that led to judgment in default.

On 2 April 2012 Kadhafi lodged a communication before the African Commission alleging violations of article 6 (Right to personal liberty and protection from arbitrary arrest) and article 7 (Right to a fair trial) of the African Charter.<sup>13</sup> It appears that on 18 April 2012, as requested by Kadhafi's representatives, the African Commission issued an order for provisional measures pre-empting any irreparable harm

6 See *The Prosecutor v Saif Al-Islam Gaddafi* ICC-01/11-01/11 ICC, Case Information Sheet, ICC-PIDS-CIS-LIB-01-011/15\_Eng (ICC Gaddafi Case Information Sheet) <https://www.icc-cpi.int/libya/gaddafi/Documents/GaddafiEng.pdf> (accessed 30 October 2018).

7 As above. These attacks particularly occurred in Tripoli, Misrata and Benghazi as well as in cities near Benghazi such as Al-Bayda, Derna, Tobruk and Ajdabiya.

8 See ICC Gaddafi Case Information Sheet (n 6).

9 See *Prosecutor v Saif Al-Islam Gaddafi*, Decision on the non-compliance by Libya with requests for cooperation by the Court and referring the matter to the United Nations Security Council, 10 December 2014, ICC-01/11-01/11 para. 2.

10 Judgment (n 1) para 7.

11 As above.

12 As above.

13 Judgment paras 4 & 9.

to Kadhafi, which Libya ignored despite reminders from the African Court.<sup>14</sup> On 8 January 2013 the African Commission submitted an application to the African Court seeking provisional measures.<sup>15</sup> On 28 February 2013 the African Court was seized of the matter.<sup>16</sup> The timing here is important. It appears that the African Commission applied to the African Court for provisional measures prior to a formal transfer of the case. Although the judgment itself lacks specific detail, it appears that the African Court may have required a formal transfer of the case before it would consider issuing provisional measures, since only on 15 March 2013, two weeks after officially being seized of the case, the African Court ordered provisional measures.<sup>17</sup>

The African Court's provisional measures, in effect, appear as another attempt to force Libya to refrain from all judicial proceedings that would impinge on Kadhafi's African Charter rights. These included familiar calls to cease all judicial proceedings, to allow him access to a lawyer of his own choice and visits from family, and to refrain from any action that may affect Kadhafi's physical and mental integrity and health.<sup>18</sup> Libya again ignored the order, failing to report on its compliance within the time allotted.<sup>19</sup>

Following the African Court's issuance of provisional measures, numerous attempts were made to cajole Libya into either complying with its provisional measures order or engaging on the merits of the allegations. These attempts included requiring Libya to file its report on compliance, which Libya failed to do.<sup>20</sup> The African Court then, *proprio motu*, gave Libya another 15 days in which to comply. Despite

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14 Judgment para 8. These provisional measures appear to have been ordered by the African Commission, rather than the African Court, despite the judgment stating that the 'Court' issued the April 2012 provisional orders. This reading is backed up by the African Court's later Order for Provisional Measures which confirms that the African Commission ordered provisional measures in April 2012. See *African Commission on Human and Peoples' Rights v Libya* App 002/2013 Order for Provisional Measures 15 March 2013 para 3 (Provisional Measures Order) [http://en.african-court.org/images/Cases/Orders/ORDER%20OF%20PROVISIONAL%20MEASURES\\_002-2013\\_English\\_\\_African\\_Commission\\_on\\_Human\\_and\\_Peoples\\_Rights\\_v\\_Libya.pdf](http://en.african-court.org/images/Cases/Orders/ORDER%20OF%20PROVISIONAL%20MEASURES_002-2013_English__African_Commission_on_Human_and_Peoples_Rights_v_Libya.pdf) (accessed 30 October 2018).

15 Pursuant to art 5(1) of the African Court Protocol, Rule 29(3) of the Rules of the Court and Rule 3 of the Commission's Rule of Procedure. See Judgment para 5. It should be noted that the judgment later refers to the receipt of this application on 31 January 2013 as 'an application from the applicant against the respondent', but this appears to be the order for provisional measures and not the initial application. See Judgment (n 1) para 12.

16 Pursuant to Rule 34 of the African Court Rules. See Judgment (n 1) para 3.

17 Pursuant to art 27(2) of the Protocol and Rule 51(1) of the Court Rules. See Provisional Measures Order (n 14). See also Judgment (n 1) paras 6(i), 10 & 15.

18 See Provisional Measures Order (n 14) para 20.

19 Judgment (n 1) para 17; Provisional Measures Order (n 14) para 20(1). See also Judgment (n 1) para 15. The African Court sent the provisional order to Libya and the Chairperson of the AU Commission pursuant to Rule 51(3) of the Court Rules and gave Libya 15 days to report back.

20 Judgment para 17.

this extension, Libya again failed to comply.<sup>21</sup> Libya's inaction led the African Court to report Libya to the Assembly of Heads of State and Government of the African Union through the Executive Council pursuant to Rule 51(4) of the Court Rules.<sup>22</sup> The Executive Council in turn issued several decisions, urging Libya to work with the African Court and to comply with its orders.<sup>23</sup> Despite getting the Executive Council involved, Libya continued to ignore both the African Court's orders and the Executive Council's decisions.<sup>24</sup> This period of attempted engagement by the African Court demonstrates the level to which it engaged with Libya, and is important in understanding the African Court's subsequent decision to render judgment in default.

On 29 May 2013, however, Libya finally responded to the African Court's orders, albeit by addressing a *note verbale* to the Legal Counsel of the African Union, rather than to the African Court itself.<sup>25</sup> In this *note verbale* Libya failed to advance a defence of its actions, and instead 'merely forwarded' a number of documents to the African Court and Kadhafi.<sup>26</sup> Having finally received a response from Libya the African Court Registrar forwarded the letter of the Legal Counsel of the African Union Commission, including Libya's *note verbale*, to Kadhafi whereupon he was given 30 days to file observations.<sup>27</sup> Kadhafi subsequently requested a one-year extension of the deadline to file his brief.<sup>28</sup>

In a further letter, dated 12 August 2013, Kadhafi's representatives raised the imminent threat of Kadhafi's execution and requested urgent intervention by the African Court.<sup>29</sup> In response, the African Court's Registrar granted the request for a one-year extension to respond to the merits of the case 'in view of the nature of the matter and the remedies sought'.<sup>30</sup>

Moving forward 12 months, on 28 February 2014 Kadhafi filed an 'interlocutory application' regarding Libya's failure to implement the African Court's provisional measures order of 15 March 2013.<sup>31</sup> On the same day he also submitted an 'application to institute proceedings' which outlined the facts; the nature of the matter; the

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21 As above.

22 Judgment para 18. Reports were made at the Executive Council's 24th, 25th, 26th, 27th and 28th ordinary sessions.

23 Judgment para 18. For details of the AU Executive Council's reports and decisions, see Judgment (n 1) fnn 2-7.

24 Judgment para 18.

25 A copy of the *note verbale* was received by Kadhafi on 17 June 2013 and by the African Court on 9 July 2013. See Judgment para 19.

26 Judgment para 19. The documents included comments from Libya and case papers from Kadhafi's case such as pre-trial detention orders; Attorney-General decisions; letters from the prosecution; and minutes of hearings.

27 Judgment para 20.

28 Judgment para 21.

29 Judgment para 22.

30 Judgment para 23.

31 Judgment para 24.

proof of exhaustion of local remedies; the alleged violations; the admissibility of the application; and the remedies sought, stipulating in response to the merits in line with the African Court's 12-month extension.<sup>32</sup>

Perhaps surprisingly Libya did respond to this latest round of litigation, affirming that it had submitted its report on the implementation of the 15 March 2013 provisional measures order, and that the Libyan Office of the Public Prosecutor was 'very keen and determined' to ensure that Kadhafi would receive a fair and just trial. Libya stated that it was ready to cooperate with 'any legal institution' on the conditions of Kadhafi's detention, perhaps also in recognition of the ongoing ICC case, and that it would allow trial observation of his case in Libya.<sup>33</sup> What this communication did not contain, however, was any reference to Libya's compliance with the African Court's provisional measures order. Crucially, at its 33rd ordinary session the African Court found that Libya's response did not represent the report on compliance it had requested.<sup>34</sup>

Following this important decision the African Court Registrar by a *note verbale* dated 6 June 2014 informed Libya that it had noted Libya's failure to respond to the two applications and that, *proprio motu*, it was granting Libya another 15 days to respond to the substantive allegations.<sup>35</sup> This communication may be seen as a final effort by the African Court to get Libya to properly engage on the substantive issues in the case. It may also be seen as clear evidence that the African Court was not to be placated through vague assertions and irrelevant information; it required specific submissions from Libya, which it did not receive.

Following these efforts, by a further letter to Libya dated 16 June 2014 the African Court first mooted the possibility of rendering judgment in default. The African Court Registrar specifically made it clear that the African Court had noted that Libya still had not responded to the interlocutory application or the application on the merits at its 33rd ordinary session, and that in the absence of a proper response the African Court would be compelled without further notification to apply the provisions of Rule 55 of the African Court Rules regarding judgment in default.<sup>36</sup> The African Court Registrar once again drew Libya's attention to its non-compliance but via a different route, namely, in a letter dated 14 July 2014 to the Deputy Director of Judicial Affairs in the Libyan Ministry of Foreign Affairs and International Cooperation, with copies sent to the Libyan Embassy in

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32 Judgment para 25. The African Court's Registry then forwarded copies of both the 'interlocutory application' and the 'application to institute proceedings' to Libya indicating, perhaps rather optimistically, given Libya's conduct thus far, that Libya had 30 days to submit its response. See Judgment (n 1) para 26.

33 Judgment para 27.

34 Judgment para 28.

35 Judgment para 29.

36 As above.

Ethiopia.<sup>37</sup> These additional attempts to get Libya to engage once again met with silence.

Moving forward another 12 months, however, by a letter dated 18 March 2015, addressed to Kadhafi and copied to Libya, the African Court Registry confirmed that Libya had not responded to the application on the merits or the interlocutory application, and that at its 36th ordinary session in March 2015 the African Court had pointed Kadhafi to Rule 55 of the Court's Rules, with a view to initiating a procedure in default within 30 days.<sup>38</sup> The African Court's approach here is worth noting, since it appears that the African Court wrote to Kadhafi and prompted him to consider a judgment in default.

In a letter dated 16 April 2015 Kadhafi informed the African Court of his intention to initiate judgment in default proceedings.<sup>39</sup> By a letter dated 15 May 2016 Kadhafi duly filed an application for judgment in default.<sup>40</sup> Given the slow pace of the proceedings thus far, the speed with which a judgment in default went from being mooted by the African Court in March 2015 to a formal notice of application of judgment in default being served on Libya in July 2015 may be seen as the African Court finally having lost patience with Libya's inaction.

In July 2015, around the same time the African Court was informing Libya of Kadhafi's application for judgment in default, it was reported that the Assize Court of Tripoli had sentenced Kadhafi to death *in absentia* in spite of the African Court's various orders.<sup>41</sup> 'Highly concerned' about these reports, on 10 August 2015 the African Court issued a second provisional measures order in which it declared that Kadhafi's execution would be a violation of international obligations under the African Charter, the African Court Protocol and other human rights instruments ratified by Libya, and once again the Court ordered Libya to take necessary measures to preserve Kadhafi's life.<sup>42</sup> The African Court's second provisional measures order also required Libya to ensure that Kadhafi received a fair trial in accordance with internationally-recognised standards, including a trial by an independent judiciary, access to counsel and to allow his family and witnesses to attend the trial.<sup>43</sup> The African Court further ordered Libya to arrest and prosecute those illegally holding Kadhafi.<sup>44</sup>

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37 Judgment para 31.

38 Judgment para 32.

39 Judgment para 33.

40 Judgment para 34. The African Court Registry responded to this application by sending confirmation in a letter dated 3 July 2015 pursuant to Rule 35(3) of the African Court Rules notifying Libya of Kadhafi's application for judgment in default. See Judgment (n 1) para 35.

41 Judgment para 36.

42 Judgment para 37.

43 As above.

44 As above.

Running in tandem with the Libya-African Court dynamic was the continued role of the African Commission. In particular, the African Commission continued to make further submissions to the African Court, including a 28 February 2014 application urging the African Court to enforce its 15 March 2013 provisional measures order,<sup>45</sup> and on the same date an application requesting the African Court to rule that Libya had violated articles 6 and 7 of the African Charter.<sup>46</sup> Later, on 15 May 2015 the African Commission brought a further application requesting the African Court to render judgment in default, coming two months after the African Court had written to Kadhafi raising the possibility of an application for judgment in default.<sup>47</sup> It is notable that the African Commission's actions appear to occur apart from those of Kadhafi, demonstrating a level of separation between parties which runs throughout the litigation. Nevertheless, Libya's stance, or rather lack of it, at some point had to result in the African Court taking seriously the urgings by the African Commission and Kadhafi to deliver its first ever judgment in default.

This decision may well have been hastened by the news in July 2015 that the Assize Court of Tripoli had sentenced Kadhafi to death *in absentia*. Certainly, the African Court took these reports on the imposition of the death penalty seriously enough to issue a second order for provisional measures. During these extremely lengthy preliminary stages, it is also important to recall that the ICC was attempting to bring Kadhafi to The Hague to stand trial for crimes against humanity. These parallel efforts are of interest in understanding the somewhat confusing situation surrounding Kadhafi's detention, and may have had some, albeit peripheral, effect on the African Court's final decision to render judgment in default. In particular, the ICC's ongoing efforts to secure Kadhafi's presence for trial exposes details of Kadhafi's detention which are at the heart of this case. For example, on 20 August 2015 the Libyan government indicated to the ICC that 'Mr Libya Gaddafi continues to be in custody in Zintan and is presently "unavailable" to the Libyan state'.<sup>48</sup> Similarly, the ICC Prosecutor argued that Libya confirmed its inability to execute the request for arrest and surrender of Mr Kadhafi, since he remained beyond the reach of the Libyan state, and in the custody of

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45 Judgment para 6(i).

46 Judgment para 6(ii).

47 Judgment para 6 (iii). Somewhat bizarrely, it appears that the Registry received this application well over two months after it was dated ('an Application dated 15 March 2015, received at the Registry on 28 May 2015'). It is also worth noting that the judgment states that this application was in fact dated 15 May 2015 (para 11) which would seem to be a more sensible timeline for receipt from the African Court Registry.

48 See *Prosecutor v Saif Al-Islam Gaddafi* Order to the Registrar with respect to the 'Request for an order directing the Registrar to transmit the request for arrest and surrender to Mr al-'A jami AL-'ATIRI, Commander of the Abu-bakr al-Siddiq Battalion in Zintan, Libya' 2 June 2016 ICC-01/11-01/11 para 1.

'Zintan militia', again appearing to confirm the allegations found in Kadhafi's African Commission application.<sup>49</sup>

## 4 Judgment in default

### 4.1 The difficulty of judgment in default

As mentioned above, this complex timeline led to the African Court's first judgment in default. It is worth noting at this stage that the downside to judgments in default perhaps is twofold. First, the sense that in the case of judgment in default the non-engagement of the necessary party leads a court to attempt to render justice in the absence of crucial submissions from one side. Put simply, the natural scenario of 'Applicant v State' becomes either 'Applicant v No One', or 'No One v State'. Therefore, the sense of a court having to balance submissions when there are none from one side is acute.<sup>50</sup> Second, the necessary absence and non-engagement of a party leaves the implementation of a judgment in default in obvious jeopardy. What are the chances of a judgment being implemented by a party that has failed to engage in any of the pre-judgment phases of a case? However, despite these reservations, the concept of a regional human rights court rendering a judgment in default is not unique to the African Court. For example, the Inter-American Court of Human Rights previously rendered judgments in default.<sup>51</sup> The African Court Rules, however, are unique in their inclusion of detailed provisions on default judgments. The Inter-American Court of Human Rights' Rules of Procedure briefly mention procedure in default, but not judgment in default specifically.<sup>52</sup> The Rules of the Court of the European Court of Human Rights set out several provisions for non-compliance by

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49 Order to the Registrar (n 48) para 3.

50 The role of a court in default cases is discussed by Judge Ouguergouz in his separate opinion. See eg Ouguergouz opinion para 28 (as to how the African Court approached submissions in this default case) and para 30 (as to how the Inter-American Court of Human Rights approached submissions in default cases). Judge Ouguergouz further considered the absence of a party in proceedings in his dissenting opinion in the procedural stages of the *Ingabire Victoire Umuhoza* case. See *Ingabire Victoire Umuhoza v Republic of Rwanda* App 003/2014 18 March 2016 Dissenting Opinion of Judge Fatsah Ouguergouz paras 22, 30, 32 & 33.

51 Eg *Constitutional Court v Peru* IACHR (31 January 2001) Ser C Doc 71 Rev 1 and *Ivcher-Bronstein v Peru* IACHR (6 February 2001) Ser C 74 Rev 1. See Ouguergouz opinion paras 4 & 30 for further discussion of these cases. The International Court of Justice has also on occasion rendered judgment in default pursuant to Rule 53(2) of the Statute of the International Court of Justice.

52 See Rule 27 of the Inter-American Court of Human Rights Rules of Procedure ('(1) When a party fails to appear in or continue with a case, the Court shall, on its own motion, take such measures as may be necessary to complete the consideration of the case. (2) When a party enters a case at a later stage of the proceedings, it shall take up the proceedings at that stage.') <http://hrlibrary.umn.edu/iachr/rule1-97.htm> (accessed 30 October 2018).

states, but do not detail judgment in default provisions.<sup>53</sup> By contrast, the African Court derives its power to render a judgment in default explicitly from Rule 55 of the African Court Rules. Rule 55 of the African Court Rules states:<sup>54</sup>

Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the application of the other party, pass judgment in default after it has satisfied itself that the defaulting party has been duly served with the application and all other documents pertinent to the proceedings. Before acceding to the application of the party before it, the Court shall satisfy itself that it has jurisdiction in the case, and that the application is admissible and well founded in fact and in law.

In considering the judgment in default, it is worth noting at the outset that the African Commission's application appears to be the same as its application back in 2012, which will be discussed further below. However, to summarise, Kadhafi, and subsequently the African Commission, requested judgment in default, asking the African Court to find that Kadhafi's article 6 and article 7 African Charter rights had been violated, and to grant a series of relief measures, including access to lawyers of his choice and visits by his family.<sup>55</sup>

#### 4.2 Application of Rule 55 of the African Court Rules

In applying Rule 55 of the African Court Rules, the African Court set out a three-limbed test: (i) proper service of all documents; (ii) jurisdiction; and (iii) admissibility of application.<sup>56</sup> First, in relation to the proper service of documents, the African Court considered that both the African Commission and African Court Registrar had communicated all proceedings to Libya and had made extensive attempts to engage with Libya.<sup>57</sup> The African Court also found that Libya had 'failed to defend its case' as, whilst it had communicated two *notes verbale*, it had consistently failed to present its defence despite the numerous extensions of deadlines granted by the African Court.<sup>58</sup>

As far as the second limb of jurisdiction is concerned, the African Court went through the familiar personal, material, temporal and territorial jurisdiction issues found in Rule 39(1) of the African Court

53 Eg Rule 44.A.1 (duty to cooperate with the Court Rules); Rule 44.B.1 (failure to comply with an order of the Court); Rule 44.C.2 (failure to participate effectively), European Court of Human Rights Rules of the Court.

54 See Rule 55 of the African Court Rules. See also Judgment (n 1) para 40.

55 Judgment para 38.

56 Compare Ouguerouz opinion.

57 Judgment (n 1) paras 41 & 42.

58 Judgment para 42. These elements are used on a consistent basis by the African Court to assess jurisdiction in all cases. See eg *Ingabire Victoire Umuhoza* (n 50) paras 52-58.



Rules, and conducted an 'exhaustive' examination.<sup>59</sup> For personal jurisdiction, the African Court noted that the African Commission was one of the institutions that could submit a case to the African Court.<sup>60</sup> The African Court also confirmed that it had personal jurisdiction over Libya, since Libya had ratified the African Charter and signed the African Court Protocol.<sup>61</sup> Importantly, the African Court spelled out that in instances where a case is transferred between the African Commission and the African Court, the issue of whether a member state has signed the article 34(6) declaration, which allows individuals and non-governmental organisations (NGOs) with observer status direct access to the African Court, does not arise.<sup>62</sup> This finding confirms a possible alternate route for applicants attempting to bring cases before the African Court where the member state has not signed the article 34(6) declaration. An applicant can submit a case to the African Commission and then request the Commission, or perhaps hope that it elects to transfer the case to the African Court and that the African Court accepts it. What is lacking in the judgment, however, is any discussion on which tests or standards are used by either the African Commission or African Court for transferring cases.<sup>63</sup>

Also of interest, perhaps forestalling any arguments by Libya that it has no authority or influence over the conditions of Kadhafi's detention, is the fact the African Court recognised that a 'revolutionary brigade' rather than the Libyan government itself had detained Kadhafi.<sup>64</sup> The African Court, however, held that despite the likelihood that Kadhafi's detention was indeed by a non-governmental authority, Libya nevertheless was responsible for the group's actions and omissions, since Libya remains under a continuing duty to ensure the application of the rights on its territory guaranteed under the African Charter.<sup>65</sup> Citing the Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, the African Court found that a person's acts in a form of authority shall be considered as an act of state if the group

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59 Judgment paras 44-60. The African Court noted that it had determined that it had *prima facie* jurisdiction in March 2013 when it issued provisional measures, but reiterated that this decision did not in any way prejudge its competence to examine the merits of the case at the stage of judgment. See Judgment (n 1) paras 45-46. See also Ouguerouz opinion para 31.

60 Judgment para 47. Pursuant to art 5(1) of the African Court Protocol.

61 Judgment para 48. Libya ratified the African Charter on 19 July 1986, and signed the Protocol on 19 November 2003.

62 Judgment para 51 ('As is clearly shown in that article [article 35(6)] read jointly with article 5(3) of the Protocol, the requisite declaration of acceptance of competence is applicable only where individuals and non-governmental organisations bring cases before the Court').

63 Some insight into the African Court to African Commission transfer procedure may be obtained from the African Court's decision in *Femi Falana v The African Commission on Human and Peoples' Rights* App 019/2015 20 November 2015.

64 Judgment para 49.

65 Judgment para 50.

exercising the rights is in fact exercising elements of governmental authority.<sup>66</sup> The African Court further recalled that the ICC had already held that the upheavals in Libya following the toppling of the Gaddafi regime could not excuse Libya's obligations to surrender Kadhafi to the ICC.<sup>67</sup> This decision may well be of significance for future cases. Where AU member states attempt to argue that actions that may violate the African Charter are 'out of their hands', the African Court has made it clear that they remain responsible for the actions of all those within its borders, thus closing a potential culpability vacuum for human rights violations.<sup>68</sup>

On the third limb of admissibility the African Court focused on the common issue of exhaustion of local remedies.<sup>69</sup> It noted that in failing properly to respond to the allegations, Libya had automatically failed to respond to the issue of exhaustion of local remedies.<sup>70</sup> The African Court nevertheless applied the familiar 'availability, effectiveness and sufficiency' test in determining whether local remedies had been exhausted. It noted that Libya's Criminal Procedure Code contained several provisions that in principle govern detention, and the procedure for detainees to complain about their detention.<sup>71</sup> The African Commission maintained that the first year of Kadhafi's detention, however, was governed by the laws of the so-called 'People's Court' which was later declared unconstitutional, and that only after that were the laws prescribed in the Libyan Penal Code made available. However, in practice the accessibility and effectiveness of said measures remained questionable.<sup>72</sup> Recalling that the exhaustion of local remedies primarily is judicial, the African Court noted that local remedies are considered available if a complainant can pursue them without impediment.<sup>73</sup> The African Court further recalled that a remedy is 'effective' if it refers to 'that which produces the expected result, and hence, the effectiveness of a remedy is

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66 As above.

67 Judgment para 50, referring to *The Prosecutor v Saif Al-Islam Gaddafi* Decision (n 9) para 32.

68 The African Court found that all other elements of jurisdiction had been satisfied, and that it therefore had jurisdiction to examine the allegations. See Judgment (n 1) paras 53-60.

69 Judgment para 65. The African Court found that the other elements of admissibility found in Rule 40 of the Court Rules on identity of the applicants, compatibility with the Constitutive Act of the African Union and the Charter, the language used, the nature of the evidence and the principle of *non bis in idem* were not in dispute. See Judgment (n 1) para 64.

70 Judgment para 65.

71 Judgment para 66. In particular, in its 'application instituting proceedings' the applicant cited arts 33, 176 and 177 of the Libyan Criminal Procedure Code.

72 Judgment para 66.

73 Judgment para 67, referring to *Tanganyika Law Society and the Legal and Human Rights Law Centre v the United Republic of Tanzania* App 009/2011; *Reverend Christopher R Mtikila v United Republic of Tanzania* App 011/2011 14 June 2013 para 82.1.

therefore measured in terms of its ability to solve a problem raised by the applicant'.<sup>74</sup>

Taking this into account, the African Court found it 'obvious' that Kadhafi's secret detention meant that he could not access local remedies, even if theoretically they were available under Libyan law.<sup>75</sup> In support, the African Court agreed with the African Commission that Kadhafi was first arraigned under a 'People's Court' which later was held to be unconstitutional by the Supreme Court of Libya.<sup>76</sup> It found that Kadhafi's detention in a secret location, completely isolated from family, friends and access to a lawyer, and sentenced to death *in absentia* all provided grounds to believe that he was prevented from seeking local remedies, and that it therefore was impossible for him to fulfil the usual condition of exhausting local remedies.<sup>77</sup> The African Court therefore found that the requirement of exhaustion of local remedies was not strictly applicable in the instant case given that local remedies were neither available nor effective, and that even if they were, Kadhafi did not have any possibility of using these remedies and, therefore, could not be expected to exhaust local remedies.<sup>78</sup>

Lastly, with regard to the 'reasonable time' requirement to bring a case before the African Court, it found the period of one year from the 'firm conclusion' that Libya had failed to comply with the provisional measures ordered by the African Commission on 18 April 2012 was a reasonable time for the African Commission to lodge its complaint.<sup>79</sup> Accordingly, the African Court found that the matter was admissible.<sup>80</sup>

### 4.3 Judgment on the merits

Having satisfied itself that all three limbs of Rule 55 of the African Court Rules had been met, the African Court went on to consider the merits of the application. In doing so, the standard applied appears to be that of a 'normal' judgment on the merits, although it is worth recalling that the African Court was considering only the submissions by the African Commission and Kadhafi, since Libya had failed to provide concrete responses.

It is also worth noting that the African Court prefaced its analysis of possible breaches of articles 6 and 7 of the African Charter by accepting that derogation from certain rights can be allowed in certain circumstances, but that despite the 'exceptional' political and

74 Judgment para 67, referring to *The Beneficiaries of the Late Norbert Zongo, Abdoulaye Nikiema alias Abiasse, Ernest Zongo and Blaise Ilboudo and the Burkinabe Movement on Human and Peoples' Rights v Burkina Faso* App 013/2011 28 March 2014 para 68.

75 Judgment para 68.

76 Judgment para 69.

77 As above.

78 Judgment para 70.

79 Judgment para 71.

80 Judgment paras 72-73.

security situation faced in Libya, Libya could not use this situation to derogate from Kadhafi's articles 6 and 7 African Charter rights.<sup>81</sup> This decision serves as solid jurisprudence to forestall potential future submissions by AU member states that, given difficult or perhaps extreme circumstances encountered certain rights under the African Charter, such as the right to a fair trial and the right to liberty, may be derogated from.

With regard to article 6 of the African Charter the African Commission argued that Kadhafi was alleged to have been in detention since 19 November 2011 without being brought before any court, putting his life in danger and exposing his physical integrity and health to the risk of irreparable harm.<sup>82</sup> The African Commission submitted that prolonged secret detention not only constitutes a violation of human rights but also can have a knock-on effect on other violations, such as torture, ill-treatment or interrogation without appropriate protection measures.<sup>83</sup> The African Court found that deprivation of liberty can occur only where it conforms to certain recognised international human rights standards, in particular by *proprio motu* looking to article 9 of ICCPR.<sup>84</sup> Using this provision, the African Court agreed with the African Commission that incommunicado detention was a violation of human rights and could lead to the violation of other human rights. It held that Kadhafi's incommunicado detention, without the assistance of a lawyer to challenge his detention, constituted a violation of his right to liberty, and therefore found a violation of article 6 of the African Charter.<sup>85</sup>

As to article 7 of the African Charter, the African Commission argued that Kadhafi had no access to a lawyer or other form of legal representation.<sup>86</sup> Consequently, the Commission contended that Kadhafi did not have the 'benefit of any guarantees' during the preliminary proceedings against him, including his interrogation, or the opportunity to gather evidence in rebuttal of the prosecution's case.<sup>87</sup> The African Commission argued that more than two years had passed and the trial had yet to start. It also submitted that Kadhafi had been unable to see or communicate with his family or the outside world.<sup>88</sup> The African Court once again *proprio motu* turned to ICCPR, and in particular article 14(1), which provides that all persons shall be equal before the law and shall be entitled to a fair hearing.<sup>89</sup> The African Court found that Kadhafi was not afforded these minimum fair trial rights at the time of his arrest, during his detention or at the time

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81 Judgment paras 76 & 77.

82 Judgment para 79.

83 As above.

84 Judgment para 82.

85 Judgment paras 84 & 85.

86 Judgment para 86.

87 As above.

88 Judgment para 87.

89 Judgment paras 89 & 92.

he was convicted.<sup>90</sup> To this end, the African Court noted that Kadhafi had been arraigned before a 'People's Court', which was later found to be unconstitutional, and later sentenced to death in absentia.<sup>91</sup> It considered that every individual arrested or detained for a criminal offence should be brought before a judge with a 'minimum delay' and tried 'within a reasonable time or set free'.<sup>92</sup> It found that in Kadhafi's case he was condemned to death by an 'unknown tribunal', and it was 'quite obvious' that Libya had respected none of the rights set forth in article 7 of the African Charter and, therefore, found Libya in violation.<sup>93</sup>

## 5 Analysis and conclusion

As to the importance of this case it is significant that this is the first judgment in default rendered by the African Court.<sup>94</sup> It should be noted also that this case is called *African Commission v Libya* rather than *Kadhafi v Libya* and, as such, is one of only two cases thus far to be transferred by the African Commission and considered by the African Court.<sup>95</sup>

In terms of the transfer element the reasons the African Commission decided to transfer the case to the African Court are not set out in the judgment. Certainly, Rule 34 of the African Court Rules allows the African Court to accept such cases, but the criteria or analysis of either the African Commission's transfer or the African Court's acceptance of the case remain wanting. It is worth noting, however, that the African Court did confirm that in circumstances where the African Commission brings a case, assessing whether the member state has signed the article 34(6) declaration is not required. This observation could have significant consequences moving forward, as it appears to confirm that applications by individuals or NGOs with observer status before the African Commission from an AU member state that has not signed the article 34(6) declaration can use the African Commission as a route to the African Court, at least in theory. The key question remains of how to persuade the African Commission to transfer the case. What can be derived from this case and the other case involving a transfer from the African Commission to the African Court, *African Commission on Human and Peoples' Rights v Kenya*,<sup>96</sup> is a lack of engagement by the AU member state petitioned, perhaps leading to the African Commission electing to

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90 Judgment para 96.

91 Judgment para 90.

92 Judgment para 91.

93 Judgment para 97.

94 See Ouguerouz opinion para 31.

95 The other transfer case being *African Commission on Human and Peoples' Rights v Republic of Kenya* App 006/2012 26 May 2017 discussed further below.

96 *African Commission on Human and Peoples' Rights v Republic of Kenya* App 006/2012 26 May 2017 (Ogiek case).

move the case on.<sup>97</sup> What is needed, however, are clear guidelines from either the African Commission, the African Court or ideally both on the test or standard to be applied for the transfer of cases between the two. Without this guidance applicants and member states are very much in the dark about how these transfers occur.

The current African Commission-to-African Court scenario also creates the seemingly confusing situation whereby the 'applicant' is the African Commission rather than Kadhafi. It is not entirely clear from the judgment who is making the submissions concerning the violations. For example, was the African Commission able to take instruction from Kadhafi on his treatment in detention? Given the context of this case, not least Kadhafi being held incommunicado, it seems highly unlikely that the African Commission was able to discuss the case with Kadhafi or his legal representative. This highlights practical issues moving forward with similarly transferred cases. For example, is the African Commission 'acting' for Kadhafi? Does the African Commission 'represent' the complainant, or does the African Commission in effect step away from litigating the case once they have transferred it? Some clues may be gleaned from the *Ogiek* case, the other transfer from the African Commission to the African Court.<sup>98</sup> However, with a sample size of only two cases, it remains to be seen how exactly the African Commission and African Court will approach these issues in future. Some clarity on transfer cases could be found simply by filing future cases as 'Complainant v Member State', and mentioning the African Commission in the introduction or mentioning it in the case title, for example 'as transferred from the African Commission'. Alternatively, an applicant's name could be included alongside the African Commission, such as *Commission (Kadhafi) v Libya or African Commission (on behalf of Kadhafi) v Libya*. Any of these changes at least would help to pre-empt future misperceptions if and when the African Court starts to entertain multiple transfers from the African Commission relating to the same member state.

As to the nature of the default judgment itself, what is clear from this judgment is that African Court observers should not expect a flood of similar judgments in default to flow from the African Court, or for applicants to view judgment in default as potentially an easy route. The judgment does not go into any detail about the African Court's thinking on rendering a judgment in default *per se*, but it does go to great pains to set out the many attempts it made over several years to get Libya to comply or, at the very least, to engage with the case. It should be noted also that a case going to judgment in default does not automatically result in a decision in favour of the applicant.

97 For further discussion on the possible reasons for the African Commission electing to transfer cases to the African Court, see O Windridge 'Necessary check points or immovable roadblocks: Accessing the African Court on Human and Peoples' Rights' (2017) 35 *Wisconsin International Law Journal* 458.

98 *Ogiek* case (n 96). In this case the Ogiek people themselves were heard and allowed to make submissions through their counsel. See paras 14, 27 & 29.

Instead, it serves as the path down which the African Court can go in order to consider jurisdiction, admissibility and then, if applicable, the merits of the case. It is perfectly possible for the African Court to find the three limb test of Rule 55 fulfilled, but still find that an applicant's case fails on the merits. In fact, the judgment in default test looks very similar to that ordinarily employed by the African Court in cases where member states engage in a case. Specifically, the African Court's three-limbed test for judgment in default consists of satisfaction of jurisdiction and admissibility as found in all cases considered by the African Court, going so far as to clarify that the consideration of both should be done *proprio motu* even where the state does not raise objections – which seems the very point in judgments in default. Plus a third limb has been bolted on, that all communications were presented to the respondent state. This approach makes sense, but in effect does not mean that the African Court needs to be satisfied of much more than in an ordinary compliance case.

In addition, it should be highlighted that the African Court forestalled attempts by AU member states in the future from disavowing actions of groups it claims are not under its control but operating in its territory. The African Court in effect found that even where a 'group' may not be under the control of the member state, the member state remains under a duty to ensure compliance with the African Charter across its territory, thereby dismissing any arguments of 'we can't do anything about it'.

Turning to the violations of articles 6 and 7 of the African Charter, it is worth noting that the judgment does not provide a substantial analysis. One explanation is, since the African Court found the allegations of incommunicado detention without access to lawyers, lengthy pre-trial detention and a trial *in absentia* factually correct when assessing whether to enter judgment in default, that these allegations amount to fairly obvious violations of articles 6 and 7 of the African Charter. It is interesting to note, however, that as far as articles 6 and 7 of the African Charter are concerned, the African Court looked to ICCPR even though the African Commission did not rely on this. This behaviour appears to be some *proprio motu* interpretative effort by the African Court by referring to other international human rights instruments in order to interpret the African Charter. Also of interest, at least in highlighting the problematic nature of judgment in default, is the fact that the judgment lays bare the apparent lack of updates from the African Commission. It appears from the summarised arguments of the African Commission in the judgment that the African Court was taking the arguments from the African Commission's original application, for example, the statement that 'over two years have lapsed since his arrest, and his trial is yet to start' is clearly a statement several years out of date. The African Court either failed properly to summarise the African Commission's updated application, or the African Commission failed to update the African Court. If the fault lies with the African Court it would seem careless, but it is even more disappointing if the

African Commission failed properly to update the African Court on the constantly-changing situation since its original application, for example, if Kadhafi's conditions of detention had become worse or indeed if he had been released.

Finally, having delivered judgment in default there seems to be nothing preventing the African Court from now considering the awarding of reparations. Any such reparations ultimately need to be fulfilled by Libya itself, and given its shunning of the African Court so far this may well be very unlikely. However, Libya's approach thus far should not serve as a reason for the African Court to decline to consider the issue of reparations. Certainly, on the basis of the judgment alone, there seems a case for awarding Kadhafi reparations for the time he spent in detention in violation of his African Charter rights.



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- First reference to journal articles: eg C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625.
- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34) 243.
- Use UK English.
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  - 3.1
  - 3.2.1
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Position as at 31 July 2018

Compiled by: I de Meyer

Source: <http://www.au.int> (accessed 1 December 2018)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded	Ratified/ Acceded
Algeria	01/03/87	24/05/74	08/07/03	22/04/03	20/11/16	10/01/17
Angola	02/03/90	30/04/81	11/04/92		30/08/07	
Benin	20/01/86	26/02/73	17/04/97	10/06/14*	30/09/05	28/06/12
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97	09/12/14	13/09/12	24/08/11
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	
Central African Republic	26/04/86	23/07/70				
Chad	09/10/86	12/08/81	30/03/00	27/01/16		11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	30/11/16
Congo	09/12/82	16/01/71	08/09/06	10/08/10	14/12/11	
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03*	05/10/11	16/10/13
Democratic Republic of Congo	20/07/87	14/02/73			09/06/08	
Djibouti	11/11/91		03/01/11		02/02/05	02/12/12
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02		27/10/09	
Eritrea	14/01/99		22/12/99			
Ethiopia	15/06/98	15/10/73	02/10/02			05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	10/01/11	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99	25/05/05	
Ghana	24/01/89	19/06/75	10/06/05	25/08/04*	13/06/07	06/09/10
Guinea	16/02/82	18/10/72	27/05/99		16/04/12	17/06/11
Guinea-Bissau	04/12/85	27/06/89	19/06/08		19/06/08	23/12/11

Kenya	23/01/92	23/06/92	25/07/00	04/02/04	06/10/10	
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	23/02/14
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05			23/02/17
Malawi	17/11/89	04/11/87	16/09/99	09/09/08*	20/05/05	11/10/12
Mali	21/12/81	10/10/81	03/06/98	10/05/00*	13/01/05	13/08/13
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03	16/06/17	
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	<b>24/04/18</b>
Namibia	30/07/92		23/07/04		11/08/04	23/08/16
Niger	15/07/86	16/09/71	11/12/99	17/05/04		04/10/11
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	01/12/11
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03	25/06/04	09/07/10
Sahrawi Arab Democratic Rep.	02/05/86			27/11/13		27/11/13
São Tomé and Príncipe	23/05/86					
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04	
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06	
Sierra Leone	21/09/83	28/12/87	13/05/02		03/07/15	17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
South Sudan		04/12/13				13/04/15
Sudan	18/02/86	24/12/72	30/07/05			19/06/13
Swaziland	15/09/95	16/01/89	05/10/12		05/10/12	
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06*	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	21/10/05	24/01/12
Tunisia	16/03/83	17/11/89		21/08/07	<b>23/08/18</b>	
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08		02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	
<b>TOTAL NUMBER OF STATES</b>	<b>54</b>	<b>46</b>	<b>48</b>	<b>30</b>	<b>40</b>	<b>32</b>

\* Additional declaration under article 34(6)

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