

## 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 Adjolahoun; 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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