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Please note that the editors will only consider submissions that have not already been submitted for publication or published elsewhere. Submissions should be no longer than 10 000 words (footnotes included).

For further information, see 'Guidelines for Contributors' after the last contribution in this Journal. Also see <http://www1.chr.up.ac.za/index.php/ahrlj-contributors-guide.html> for detailed style guidelines.



## Editorial

### Marking 20 years of the *AHRLJ*

In 2020, the *African Human Rights Law Journal* (*AHRLJ* or *Journal*) celebrates 20 years since it first was published. The *AHRLJ* is the only peer-reviewed journal focused on human rights-related topics of relevance to Africa, Africans and scholars of Africa.

It is a time for celebration. Since 2001, two issues of the *AHRLJ* have appeared every year. Initially published by Juta, in Cape Town, South Africa, in 2013 it became as an open-access journal published by the Pretoria University Law Press (PULP). PULP is a non-profit open-access publisher focused on advancing African scholarship.

The *AHRLJ* contains peer-reviewed articles and 'recent developments', discussing the latest court decisions and legal developments in the African Union (AU) and regional economic communities. It contains brief discussions of recently-published books. With a total of 517 contributions in 40 issues (436 articles and 81 'recent developments'; not counting 'book reviews'), on average the *AHRLJ* contains around 13 contributions per issue. The *AHRLJ* is accredited with the International Bibliography of the Social Sciences (IBSS) and the South African Department of Higher Education, Science and Innovation, and appears in a number of open access portals, including AfricanLii, the Directory of Open Access Journals and SciELO.

Over the 20 years of its existence, many significant articles appeared in the *AHRLJ*. According to Google Scholar the most-cited articles that have appeared in the *Journal* over this period are

(i) T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532-559 (with 273 citations); (ii) D Cornell and K van Marle 'Exploring ubuntu: Tentative reflections' (2005) 5 *African Human Rights Law Journal* 195-220 (with 97 citations); (iii) S Tamale 'Exploring the contours of African sexualities: Religion, law and power' (2014) 14 *African Human Rights Law Journal* 150-177 (with 85 citations); K Kindiki 'The normative and institutional framework of the African Union relating to the protection of human rights and the maintenance of international peace and security: A critical appraisal' (2003) 3 *African Human Rights Law Journal* 97-117 (with 59 citations); and T Kaime 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5 *African Human Rights Law Journal* 221-238 (with 54 citations).

This occasion allows some perspective on the role that the *Journal* has played over the past 20 years. It is fair to say that the *AHRLJ* contributed towards strengthening indigenous African scholarship, in general, and human rights-related themes, specifically. Before the *Journal* there was no academic 'outlet' devoted to human rights in the broader African context. Both in quantity and in quality the *Journal* has left its mark on the landscape of scholarly journals.

The *AHRLJ* has provided a forum for African voices, including those that needed to be 'fine-tuned'. Different from many other peer-reviewed journals, the *AHRLJ* has seen it as its responsibility to nurture emerging but not yet fully-flourishing talent. This approach allowed younger and emerging scholars to be guided to sharpen their skills and find their scholarly voices.

The *AHRLJ* has evolved in tandem with the African regional human rights system, in a dialogic relationship characterised by constructive criticism. When the *Journal* was first published in 2001, the Protocol on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) was not yet in force. Over the years the *Journal* tracked the evolution of the African Court on Human and Peoples' Rights (African Court) from a faltering start, through a phase when it increasingly expressed itself in an emerging jurisprudence, to the current situation of push-back by states signalled by the withdrawal by four states of their acceptance of the Court's direct individual access jurisdiction. The same is largely true for the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). It was in 2001 that the AU elected the first members of this Committee. It first met in 2002, and its first decade or so was lackluster. The Committee examined its first state report only in November 2008, and decided its first communication in

March 2011. Articles by authors such as Mezmur and Sloth-Nielsen, who also served as members of the Committee, and Lloyd, placed the spotlight on the work of the Committee. Initially, these articles primarily served to describe and provide information that otherwise was largely inaccessible, but over time they increasingly provided a critical gaze and contributed to the constructive evolution of the Committee's exercise of its mandate. By 2011 the African Commission on Human and Peoples' Rights (African Commission) was already quite well established, but it also underwent significant growth over the subsequent 20-year period. Numerous articles in the *Journal* trace and analyse aspects of this evolution.

Contributions in the *Journal* also cover most of the AU human rights treaties and soft law standards. A number of issues contain a 'special focus' section dealing with a thematic issue of particular relevance or concern, such as the focus on the Protocol to the African Charter on the Rights of Women (2006 no 1); '30 years of the African Charter' (2011 no 2); and 'sexual and reproductive rights and the African Women's Protocol' (2014 no 2).

The scope of the *Journal* extends beyond the supranational dimension of human rights. Over the years many contributions explored aspects of the domestic human rights situation in countries such as the Democratic Republic of the Congo, Eswatini, Ethiopia, Lesotho, Malawi, Mauritius, Nigeria, South Africa, Tanzania, Uganda and Zimbabwe. From time to time the specific focus sections also veered towards domestic human rights protection. See for instance the focus on 20 years of the South African Constitution (2014 no 2); on 'adolescent sexual and reproductive rights in the African region' (2017 no 2); on 'the rule of law in sub-Saharan Africa' (2018 no 1); and on 'dignity taking and dignity restorations' (2018 no 2).

### **Acknowledgment, appreciation and thanks**

A journal not only consists of pages in print; it is the result of people's initiative, dedication, hard work, talent and time.

The founding editors of the *AHRLJ* are Christof Heyns, Annelize Nienaber and Frans Viljoen. Christof stood down in 2009. Annelize's role, over the entire period, in ensuring felicitous language use deserves special mention. Frans remains the editor-in-chief. Tshepo Madlingozi joined the editorial team in 2008, and served until 2019. Magnus Killander became an editor in 2009, after many years of assisting the editorial team. Solomon Ebobrah joined as editor in 2011. In 2020 Usang Maria Assim joined the editorial team. For the

'special focus' sections, the editorial team collaborated with 'guest editors' who largely took responsibility for the editorial process and content of these sections.

Even if the *Journal* succeeded because of teamwork, two individuals have to be singled out: the PULP Manager, Lizette Hermann, and the *Journal* Manager, Isabeau de Meyer. Lizette's professionalism is without bounds, her tireless dedication and unflappable attitude makes her a treasured and stalwart member of the *Journal* team. The *Journal* has been extremely privileged to have Isabeau as editorial manager. Schooled in law and languages, Isabeau proved to be a perfect fit for this position. She has been the *Journal's* spine. As we know, a book's spine is the vertical edge connecting the pages. Without a spine a book or a journal physically falls apart. In a human being the spine encloses the spinal cord and provides support for the thorax and abdomen. Isabeau has been the backbone of the *Journal* team, bringing the energy, commitment and attention to detail that made the uninterrupted publication of the *Journal* possible, and guaranteed the quality control of its content.

The editors also thank the members of the international editorial board who, through their association with the *Journal*, endowed it with added luster and credibility. Last, but not least, a warm 'thank you' to the student assistants, many of whom were master's and doctoral candidates at the Centre.

### **This issue**

Marking the special 20-year juncture, this also is a very special issue of the *Journal*. The *Journal* consists of three sections.

The first is a special focus section that assesses the implications of the COVID-19 pandemic regulations for human rights and the rule of law in Eastern and Southern Africa. Professor Charles Manga Fombad is the editor of this part of the journal. In a separate editorial, he sets out the context and overriding themes that are included. This section contains ten articles. The *Journal* thanks Professor Fombad for his meticulous control of the editorial processes of this part of the *Journal*. He was assisted by Tresor Makunya and Lukman Abdulrauf. We also thank and acknowledge the Konrad Adenauer Stiftung's Rule of Law for Sub-Saharan Africa division for its support of the conference at which drafts of the articles that are published here were presented, and for its support of this publication.

The second part contains another special focus section. It deals with children's rights under the theme 'The African Children's Charter at 30: reflections on its past and future contribution to the rights of children in Africa'. It contains an editorial by Dr Nkatha Murungi and four articles. This special focus section is the first in a two-part special focus on children's rights. The remainder of the articles will appear in the first issue of the *Journal* in 2021.

The third part of this issue contains articles on a variety of topics, in line with the usual approach of the *Journal*.

Two of these articles deal with aspects of the judgments of the African Court. Jonas ponders the important question of the domestic effect of the African Court's judgments, not only in respect of the respondent state in a particular case, but also as far as other state parties to the African Court Protocol are concerned. Kombo analyses one of the Court's judgments (APDF and IHRDA v Mali), and criticises the Court's superficial engagement with the vexing issue of derogation from rights. The omission of an explicit derogation clause has long been a matter of contention in academic scholarship. In Kombo's view, the Court allowed to pass by an opportunity to provide more clarity on this issue. The compatibility of the declaration of a 'state of emergency' has been propelled into focus during COVID-19. Adopting Resolution 447 on upholding human rights during situations of emergency and in other exceptional circumstances (ACHPR/Res 447 (LXVI) 2020), the African Commission earlier this year tasked its Focal Point on Human Rights in Conflict Situations in Africa to 'develop a normative framework in the form of Guidelines on adhering to human and peoples' rights standards under the African Charter when declaring states of emergency or disaster', taking account of the relevant Protocols to the African Charter and standards of the African Commission.

Although the *Journal* focuses on the African human rights system, it welcomes contributions comparing aspects of African human rights with other regions, in particular the European and Inter-American human rights systems. Drawing on a comparison between Africa and Europe, Heikkilä and Mustaniemi-Laakso explore vulnerability as a human rights variable.

Three contributing authors, all from countries in the Southern African Development Community, focus on aspects related to human rights and democracy at the national level. 'Nyane and Maqakachane argue for a progressive approach to standing in public interest cases in Lesotho. Nyathi and Ncube examine human rights and rule of

law implications of the 2017 military *coup* in Zimbabwe. Mahadew provides a critical assessment of the Children's Bill of Mauritius.

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, especially the anonymous reviewers. For this particular issue, we extend our genuine gratitude to our anonymous reviewers who so generously gave of their time, expertise and insights: Adem Abebe; Deji Adekunle; Akinola Akintayo; Victor Ayeni; Ashwanee Budoo; Christian-Aimé Chofor Che; Ebenezer Durojaye; Alex Ekeke; Dayo Fagbemi; Charles Fombad; Ademola Jegede; Ilze Grobbelaar-Du Plessis; Sharon Hofisi; Abdi Jibril; Lloyd Kuveya; Emma Lubaale; Monica Mayrhofer; Admark Moyo; Susan Mutambasere; Michael Nyarko; Rita Ozoemena; Christa Rautenbach; Itumeleng Shale; and Nsongurua Udombana.

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## Editorial introduction to special focus: Assessing the implications of COVID-19 pandemic regulations for human rights and the rule of law in Eastern and Southern Africa

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As in the case of most countries in the world, African countries rapidly responded to the threats posed by the COVID-19 virus. Many countries, with South Africa in the lead, introduced drastic measures designed to bring the pandemic under control. This comes at a particularly difficult time for Africa which is faced with increasing threats of an authoritarian resurgence.<sup>1</sup> The suspension of laws and the introduction of several measures necessary to deal with the spread of the virus necessarily concentrates power in the hands of politicians and other officials. Many autocratic regimes can seize this opportunity to grab more power for themselves, to silence their critics and to undermine the rule of law, feeling secure in the knowledge that the world is too occupied with attempts to fend off the ravages caused by the virus to take notice.

There thus is enormous potential for democracy to be threatened and for human rights and the rule of law to be undermined. Powers,

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1 See further CM Fombad 'Reversing the surging tide towards authoritarian democracy in Africa' in CM Fombad & N Steytler (eds) *Democracy, elections and constitutionalism in Africa* (forthcoming, 2021).

such as those given to the security forces to monitor and enforce the restrictions requiring everyone to 'stay at home' during the period of lockdown, are not always fully understood or obeyed. The potential for conflict between citizens and the security forces is real. Law enforcement officials not only have guns and the authority of the state to use force when necessary, but allegedly have used these powers in an abusive manner that has resulted in the loss of lives in several African countries such as Kenya, Nigeria and South Africa.

Because of the very nature of the pandemic, the traditional checks that normally ensure that emergency powers are not abused have not been able to function properly. Many countries have had to adopt emergency measures regarding the functioning of their judicial systems that allow their courts to remain operational only to a limited extent. The strict requirement of social distancing and restrictions on the number of persons who can meet has meant that parliaments all over the continent have not been able to meet except, in a few countries, virtually. They therefore have not been able to exercise the oversight powers that are needed to ensure that the executive and other government officials do not abuse the extraordinary powers that have been conferred on them to deal with the pandemic.

The 'stay at home' restrictions have had deleterious consequences for the poor, the low-income earners and the millions who rely on informal activities to eke a living for themselves. The prolonged periods of lockdown have added many more to the millions of people on the continent who are never sure of where the next meal would come from. This has created not only high social stress but the risk of a high unemployment rate and the collapse of many African economies.

Given the fact that the virus will not disappear overnight, there are reasons to begin probing on what lessons can be learnt from this experience in order to prepare for the future. The risk that these emergency powers could be used in a manner that will undermine the gains made in the last three decades to recognise and protect human rights, promote constitutionalism and respect for the rule of law is real.

Although there is some willingness to endure many of the sacrifices needed to enable the government to deal with the enormous challenges posed by the pandemic, the risks that these measures pose to Africa's fragile democracies and the rule of law cannot be ignored lightly. In fact, states of emergency have for many years been used in many African countries as a pretext for repressive and authoritarian rule and practices. There thus is a well-founded fear that some of

the excesses that we see today during the implementation of these emergency measures may endure and become a new way of life.

For example, in South Africa one of the extreme measures taken to deal with the bubonic plague of 1899 to 1901 was the forceful ejection of all blacks from the city of Cape Town to the country's first black township, KwaNdabeni.<sup>2</sup> When the plague was over, life never returned to normal as a new social order, based on racial segregation, had been installed. In Togo a law has recently been enacted that allows the President to rule by decree until parliament revokes these powers.<sup>3</sup> Given that his party controls parliament, are we sure that this law will be revoked? In Zimbabwe peddlers of 'falsehoods' or 'fake news', which often means those who make embarrassing disclosures or criticise the government, face 20 years' imprisonment.<sup>4</sup> In many countries the huge sums set aside as relief cash or for food parcels have been diverted by the ruling elites or selectively distributed to areas that support the government. The serious economic deprivation that is likely to result from the measures being taken to control the spread of the virus, particularly the prolonged periods of lockdown, will leave people poorer, sicker and more angry.

It is becoming clear each day that the struggle to deal with this deadly microbe will be a marathon and not a sprint. Bill Gates wrote: 'When historians write the book on the COVID-19 pandemic, what we've lived through so far will probably take up only the first third or so. The bulk of the story will be what happens next.' He added: 'In a few weeks' time, many hope, things will return to the way they were in December. Unfortunately, that won't happen.'<sup>5</sup> Gates rightly points out that what happens next is of critical importance because life will never be the same again. How can we ensure that the limited gains in democracy, constitutionalism and respect for the rule of law will remain intact in the post-COVID-19 era? How can we ensure that

2 See C Oliver-Ewans 'The implications of the abolition of influx control legislation in the Western Cape', [https://open.uct.ac.za/bitstream/handle/11427/22412/thesis\\_hum\\_1992\\_oliver\\_ewans\\_ceridwen.pdf?sequence=1&isAllowed=y](https://open.uct.ac.za/bitstream/handle/11427/22412/thesis_hum_1992_oliver_ewans_ceridwen.pdf?sequence=1&isAllowed=y) (accessed 10 September 2020).

3 See F Nabourema 'Dictators love lockdown', <https://africanarguments.org/2020/04/21/dictatorships-love-lockdown-coronavirus-togo/> (accessed 10 September 2020).

4 See 'Autocrats see opportunity in disaster' *The Economist*, <https://www.economist.com/leaders/2020/04/23/autocrats-see-opportunity-in-disaster> (accessed 10 September 2020).

5 See 'The world after COVID-19: Bill Gates on how to fight future pandemics' *The Economist* 23 April 2020, [https://www.economist.com/by-invitation/2020/04/23/bill-gates-on-how-to-fight-future-pandemics?utm\\_campaign=the-economist-today&utm\\_medium=newsletter&utm\\_source=salesforce-marketing-cloud&utm\\_term=2020-04-23&utm\\_content=article-link-5](https://www.economist.com/by-invitation/2020/04/23/bill-gates-on-how-to-fight-future-pandemics?utm_campaign=the-economist-today&utm_medium=newsletter&utm_source=salesforce-marketing-cloud&utm_term=2020-04-23&utm_content=article-link-5) (accessed 10 September 2020) (my emphasis).

the temporary measures do not become permanent? How can we ensure that the emergency powers are not abused? How can we use this crisis to correct some of the errors of the past? How can we use this as an opportunity for innovation and creativity?

These were some of the questions dealt with by an online seminar on the theme 'Assessing the implications of COVID-19 pandemic regulations on human rights and the rule of law in Eastern and Southern Africa', organised by the Institute for International and Comparative Law in Africa (ICLA) of the Faculty of Law, University of Pretoria, South Africa, in partnership with the Konrad Adenauer Stiftung's Rule of Law for Sub-Saharan Africa, in Nairobi, Kenya, which took place on 13 and 14 August 2020. The ten articles in this section are selected from the papers that were presented during this two-day seminar. They cover three main areas. The first provides an overview of emergency powers generally; the second group of papers examine the way in which four countries in Eastern and Southern Africa (Eswatini, Kenya, Lesotho and South Africa) are dealing with the crisis; and the last set of papers look at how certain specific issues are being addressed in South Africa, South Sudan and Uganda.

The first article by Fombad and Abdulrauf has as title 'Comparative overview of the constitutional framework for controlling the exercise of emergency powers in Africa'. According to the authors, post-independence African constitutions contained provisions that conferred broad powers on governments during states of emergency. As a result, these powers were regularly used to abuse fundamental human rights and suppress opponents of the government. The authors point out that during the post-1990 wave of constitutional reforms in Africa, some attempts were made to introduce safeguards against the misuse of emergency powers. The article undertook a comparative assessment of the extent to which these reforms have reduced the risk that the exercise of emergency powers poses to human rights and progress towards constitutionalism and respect for the rule of law, especially in times of global pandemics such as COVID-19. According to the authors, the COVID-19 pandemic has exposed the weaknesses of the constitutional reforms designed to check against the abuse of emergency powers. The authors conclude by arguing that one of the major lessons of the COVID-19 pandemic is that there is a need to review the constitutional and regulatory framework for the exercise of emergency powers to better prepare for future pandemics.

The second category of papers that focus on the experiences of countries start with Shongwe's article, 'Eswatini's legislative response to COVID-19: Whither human rights'. As in many other

African countries, the author points out that instead of invoking the constitutional state of emergency powers, the government relied on the Disaster Management Act. Based on this Act, wide-ranging powers were assumed by the government and government officials with few oversight measures to ensure that these powers are not abused. Shongwe concludes that the measures and regulations introduced by the government have had an unprecedented negative effect on the lives and livelihoods of Eswatini.

Kenya's response is analysed by Kabira and Kibugi in 'Saving the soul of an African constitution: Learning from Kenya's experience with constitutionalism during COVID-19'. In their article the two authors point out that the COVID-19 pandemic for once put Kenya's transformative constitution to the test. They argue that the Constitution was supposed to provide a transformative agenda that will pave the way for the consolidation of the rule of law, democracy, human rights and governance. However, they are of the view that the government's response to the COVID-19 pandemic has exposed the inherent contradictions embodied in the Constitution. They nevertheless conclude that the Constitution effectively operates as a double-edged sword: a site of tension and contradiction, on the one hand, and a site of hope and transformation, on the other.

In 'Implications of Lesotho's COVID-19 response framework on the rule of law' Shale discusses the situation in Lesotho. Unlike that in many other countries, Lesotho's COVID-19 response was proactive. The country started by declaring a state of emergency but relied mainly on the Disaster Management Act. In spite of this, the author points out that the government acted in disregard of many of the basic rule of law principles. As a result of this, the author concludes that the existing legal and institutional frameworks for dealing with such emergencies need to be strengthened to prevent many of the abuses that are taking place, especially the misuse of public funds through corruption.

Van Staden examines the situation in South Africa in 'Constitutional rights and their limitations: A critical appraisal of the COVID-19 lockdown in South Africa'. According to him, the COVID-19 pandemic in South Africa has seen the reach of state power expand at the expense of constitutional rights. The author considers the constitutionality of the country's COVID-19 lockdown rules against the backdrop of the constitutional rights limitation regime within the broader theoretical framework of constitutionalism and the rule of law. He contends that the endorsement by the courts of many of the lockdown rules in the country has made a mockery of the rule of law. He concludes that the South African government, with the partial

endorsement by the courts, has strayed beyond the bounds of the Constitution and engaged in unjustified violations of constitutional rights.

The last category of five papers look at the impact of the pandemic on specific rights. The first article in this group is that of Nkatha and Mwenifumbo on 'Livelihoods and legal struggles amidst a pandemic: The human rights implications of the measures adopted to prevent, contain and manage COVID-19 in Malawi'. According to the authors, Malawi's response to the COVID-19 pandemic has seen the adoption of two pieces of legislation and the judiciary intervening to strike down proposed lockdown measures and the constant change in the institutional arrangements meant to spearhead the country's response. A key problem has been the struggle to balance the saving of lives with preserving livelihoods. The authors highlight some of the challenges that Malawi's response generated for the preservation of livelihoods and the human rights implications of the key measures adopted.

In 'Assessing the implications of digital contact tracing for COVID-19 on human rights and the rule of law in South Africa' Lim deals with one of the emerging issues that has been underscored by the virus. He argues that the establishment of centralised and aggregated databases and applications enabling mass digital surveillance, despite their public health merits in the containment of the COVID-19 pandemic, can lead to the erosion of South Africa's constitutional human rights frameworks, including equality, privacy, human dignity, as well as freedom of speech, association and movement, and security of the person. He therefore recommends that any proposed digital contact tracing frameworks in their design, development and adoption must pass the legal muster and adhere to human rights prescripts relating to user-centric transparency and confidentiality, personal information, data privacy and protection.

In 'COVID-19 and the inclusion of learners with disabilities in basic education in South Africa: A critical analysis' Kamga examines the plight of one of the groups of disabled persons affected by the pandemic. The author points out that by imposing a complete lockdown in the country, the South African government introduced numerous measures to counter the negative impact these will have on ordinary citizens. The article points out that there were no attempts in these measures to accommodate the needs of learners with disabilities, a fact aggravated by limited number of special schools for these vulnerable groups of learners. The author concludes that one of the main lessons to be learned from this pandemic is that

there is a need to rethink how emergency education planning can be inclusive of children or learners with disabilities in the future.

Another article dealing with the plight of vulnerable groups is that of Akech entitled 'Exacerbated inequalities: Implications of COVID-19 on socio-economic rights of women and children in South Sudan'. In his article the author points out that the measures adopted by the Transitional Government of National Unity (TGoNU) in South Sudan to fight the COVID-19 pandemic are succeeding in flattening the curve. However, since no supportive social protection measures were put in place to cushion the impact on low-income households, particularly women and children, it has aggravated the problems of poverty in the country. The author recommends a number of measures to be put in place to strengthen democratic governance and the rule of law as catalysts for a well-managed emergency response that will protect vulnerable groups when dealing with such disasters in the future.

The last article is that of Nkuubi, 'When guns govern hospitals: Examining the implications of a militarised public health pandemic response on democratisation in Uganda'. According to the author, the conduct, power, authority and prominent position accorded to the Uganda Peoples' Defence Forces (UPDF) in the management of COVID-19 and the enforcement of the prevention measures have perpetuated a trend towards the militarisation of politics in the country. In his opinion, the pandemic has merely provided an opportunity to intensify the deliberate build-up and normalisation of the infiltration of the military in what hitherto have been spheres of operation normally reserved for ordinary civil servants. Unlike other jurisdictions where the military has been deployed because of their superior capability to adapt and provide extra and immediate professional services to support civilian authorities, in Uganda this deployment is seen by the author as part of President Yoweri Museveni's strategy to tighten his grip on power with the backing of the military. The article concludes that in such situations there is a need for accountability through parliamentary oversight in the deployment of the military.

All ten articles provide us with a glimpse of the impact of the different measures governments in some countries in Eastern and Southern Africa on human rights and the rule of law in their frantic efforts to control the spread of COVID-19. All indications are that the virus will not disappear as suddenly as it appeared. Perhaps even more importantly, there is a need to realise that now is also the time to prepare for the next pandemic. From the important lessons highlighted in the different articles, there are four that cut across all

the articles. First, in spite of the post-1990 reforms designed to ensure that emergency powers are not exercised in an arbitrary manner that threaten human rights, the rule of law and constitutionalism, the COVID-19 pandemic has revealed that these reforms did not go far enough. As a result of the weak legal framework, African governments found it more expedient to rely on and invoke legislative emergency powers which entails limited oversight rather than the constitutional emergency powers that usually go with elaborate oversight mechanisms. A more robust legal framework that can respond promptly, effectively and efficiently to emergencies, such as COVID-19, backed by strong oversight mechanisms is critical. This may not prevent all the abuses but could limit and reduce the incidents of repression and human rights violations that have taken place during the attempts to prevent the spread of this virus. Second, a clearly-defined legal framework for taking corrective measures to counteract the negative impact of emergency restrictions, especially on the poor and vulnerable members of society, must be an integral part of any reforms designed to prepare for future pandemics. Third, special mechanisms to expeditiously deal with abuses of emergency powers, particularly human rights abuses and corruption, are imperative if the threats to constitutionalism, the rule of law and human rights abuses under the pretext of dealing with an emergency are to be countered. In the final analysis, there is an urgent need to ensure that all mechanisms of oversight and accountability, particularly the media, civil society, national and international human rights monitoring bodies, are never weakened or compromised under the excuse of an emergency, as has been the case now with the COVID-19 pandemic. Finally, since history shows that measures introduced to deal with emergencies often outlive the phenomenon that triggered them, before the dust settles after COVID-19 has been brought under some control, there is an urgent need at both national, sub-regional and regional levels to review the experience and draw the relevant lessons. This probably is the best way to prepare for future emergencies.

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## Comparative overview of the constitutional framework for controlling the exercise of emergency powers in Africa

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**Summary:** *The need to act swiftly in times of emergency gives governments a reason to exercise emergency powers. This is a legally valid and accepted practice in modern democracies. Post-independence African constitutions contained provisions that sought to regulate states of emergency, placing the emphasis on who could make such declarations and what measures could be taken, but paid scant attention to the safeguards that were needed to ensure that the enormous powers that governments were allowed to accrue and exercise in dealing with emergencies were not abused. As a result, these broad powers were regularly used to abuse fundamental human rights and suppress opponents of the government. In the post-1990 wave of constitutional reforms in Africa, some attempts were made to introduce safeguards*

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*against the misuse of emergency powers. This article undertakes a comparative assessment of the extent to which these reforms have reduced the risk that the exercise of emergency powers poses to human rights and progress towards constitutionalism and respect for the rule of law, especially in times of global pandemics such as COVID-19. Indeed, the COVID-19 pandemic has exposed the weaknesses of the constitutional reforms designed to check against the abuse of emergency powers. In most African countries, governments in dealing with the virus decided to act within the legislative framework, which subjects them to few checks rather than rely on the constitutional frameworks which in most cases provide for more elaborate checks. It is clear from the experiences of the past few months that most African constitutions never anticipated an emergency of such magnitude. The article concludes by arguing that one of the major lessons of the COVID-19 pandemic is that there is a need to review the constitutional and regulatory framework for the exercise of emergency powers to better prepare for future pandemics.*

**Keywords:** *state of emergency; emergency powers; constitutional control; comparative analysis; COVID-19*

## 1 Introduction

It is widely acknowledged that states today face a myriad of threats and challenges, sometimes of a complex, unfamiliar and unpredictable nature. This may require the invocation of emergency powers to enable prompt and decisive action. In Africa the use of emergency powers is not a rare occurrence. One of the major causes of the dictatorships that quickly emerged in the post-independence period was the ease with which governments arbitrarily invoked and abused emergency powers to suppress dissent and entrench their power. For example, Egypt was under a continuous state of emergency for 44 years, one that began in the Arab-Israeli war of 1967 and ended only in the revolution that ousted Hosni Mubarak in 2011.<sup>1</sup> Another case is Zambia, which for 27 years remained under a state of emergency until its first multiparty elections brought new incumbents to power in 1991. There are many more examples of such abuses.

<sup>1</sup> During this period the state of emergency was lifted for 18 months in 1980 but was reimposed for another 31 years after Sadat's assassination in 1981. In spite of the January 2011 revolution, in which one of the demands was for an end to emergency rule, it remained in force until 31 May 2012. Since August 2013, however, a state of emergency has again been declared in many parts of Egypt. See further Y. Auf 'The state of emergency in Egypt: An exception or rule?', <http://www.atlanticcouncil.org/blogs/menasource/the-state-of-emergency-in-egypt-an-exception-or-rule/> (accessed 20 July 2020).

The exercise of emergency powers is a recourse of democratic governance when unexpected national crises threaten the existence of the state, but in Africa prior to the 1990s it was the mainstay of most of the autocratic regimes in power. Because the legal framework regulating the conduct of governments during states of emergency was often weak, countries generally experienced high levels of repression and human rights abuses. This was particularly so in emergencies declared after the continent's frequent *coups d'état*, for decades the only means of alternation of power. Most of the independence constitutions that contained provisions regulating states of emergency focused on who could make such declarations and what measures could be taken, but paid scant regard to countermeasures to check the enormous powers governments were allowed to accrue and exercise in dealing with emergencies.

The COVID-19 crisis has reignited the debates on states of emergency, human rights and the rule of law. For the first time, a pandemic has resulted in more than half a million deaths globally.<sup>2</sup> Indeed, this is an emergency as never before which has challenged almost all aspects of the world economy. Because of the severe risk COVID-19 poses, nations across the world are responding using extraordinary measures. Invariably, the extraordinary measures have severe implications for human rights and the rule of law.

While recourse to extraordinary measures to deal with such emergencies is normal, what is also beyond debate is that these powers should not be abused: Not every threat warrants a declaration of a state of emergency. It therefore is not surprising that in Africa's post-1990 reform processes, constitutional designers grappled with the issue of regulating how and when governments should act when faced with crises that threaten the future and stability of the country. The question, however, is whether these reforms reduced the considerable risks that a declaration of a state of emergency poses to human rights and progress towards a culture of constitutionalism and respect for the rule of law. Indeed, the responses by African states so far have provided yet another opportunity to re-assess the successes or otherwise of these reforms.

In answering the above question, this article reviews modern African constitutions to assess the extent to which they contain provisions that guard against the misuse of emergency powers. It proceeds as follows: Part 2 briefly examines the influences that underlie the

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<sup>2</sup> As of 26 July 2020 the total death toll is 648 612. See <https://www.worldometers.info/coronavirus/> (accessed 26 July 2020).

various approaches that Africa's constitutions have adopted towards states of emergency. Part 3 concerns the different types of state of emergency provided for under these constitutions. The next part is an overview of how effective the different frameworks are. Part 5 assesses current trends with a special focus on the COVID-19 crisis. The article ends with concluding remarks.

The main question the article addresses is whether Africa's post-1990 constitutional reforms have made states of emergency less prone to abuse than in the past.

## 2 International and regional influences on African approaches to states of emergency

The declaration of a state of emergency is a national matter regulated by the constitution and other pieces of legislation, but it also has an international dimension. This arises from the fact that constitutions and implementing legislation often attempt to balance two equally important yet competing needs. The first is to mitigate the threat that the emergency poses to national security and public order; the second is to ensure that citizens' human rights, the constitutional order and the rule of law are not compromised. Declaring a state of emergency creates a high risk of human rights violations. These can have far-reaching extraterritorial implications, attracting international attention to the state's conduct. It is for this reason that states are not entirely free to design their emergency legislation as they please. As such, there are certain binding and non-binding international and regional instruments that are supposed to provide guidance to states on how to design their emergency laws. In this part we examine these international and regional influences, and subsequently consider their implications.

At the international level, the only important international human rights treaty that provides some indication of the limits to what states can do in dealing with states of emergency is the International Covenant on Civil and Political Rights (ICCPR).<sup>3</sup> Article 4(1) provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties

<sup>3</sup> It is worth pointing out that the first major international human rights instrument, the Universal Declaration of Human Rights of 1945, does not contain a specific provision to deal with states of emergency. The closest it comes to this is the general limitation provision in art 29(2) which provides that human rights can be limited for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order and the general welfare in a democratic society.

to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Articles 4(2) to (3) of ICCPR provide other restrictions on the imposition of a state of emergency. It suffices to note that article 4(1) makes it clear that two fundamental conditions must be met for a state party to invoke this provision. First, the situation must amount to a public emergency that threatens the life of the nation; and, second, the state must have officially proclaimed a state of emergency. While the objective of article 4 is to provide for the exceptional measures that a state party may take in derogating from its obligations under the treaty, article 4(2) provides a list of rights from which no derogation is allowed.<sup>4</sup>

Three points need to be made about article 4(2). First, the existence of this list does not mean that states can freely derogate from all the other provisions of the treaty once a state of emergency has been declared. In fact, article 4(3) imposes an obligation on a state not only to inform the other state parties – through the United Nations (UN) Secretary-General – of its decision to derogate from certain obligations under the treaty, but also to specify its reasons for doing so.

Second, the inclusion amongst the non-derogable rights of freedom of thought, conscience and religion – which under article 18(3) are subject to restrictions – does not mean that none of these rights is subject to limitations or restrictions. This suggests that the prohibition is absolute unless the relevant provisions recognising the right qualify it in the way that article 18(3) does.

Third, the list of non-derogable rights was not intended to be exhaustive. In fact, the UN Human Rights Committee in its General Comment 29, adopted on 31 August 2001, gives several examples of rights that cannot be made subject to lawful derogation under article

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<sup>4</sup> The list of non-derogable rights consists of arts 6 (right to life); 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment); 8(1)-(2) (prohibition of slavery and servitude); 11 (prohibition of imprisonment for non-fulfilment of a contractual obligation); 15 (prohibition of conviction for an act or omission that was not a crime when it was committed); 16 (right to recognition as a person); and 18 (right to freedom of thought, conscience and religion). The obligations imposed by art 4(1) also apply to states that are parties to the Second Optional Protocol to the Covenant, aimed at abolishing the death penalty, as stated in art 6 of this Protocol.

4.<sup>5</sup> These include the right to be treated with dignity and humanity; the prohibition of hostage taking, abductions or unacknowledged detentions; the international protection of minorities; the prohibition of deportation, forcible transfer of populations; and propaganda for war or advocacy of national, racial or religious hatred.

These are binding obligations with which all African states (with the exception of the Comoros island, which is not a party to this treaty) have undertaken to comply. It suffices to note that few African states have complied with the obligation to notify the UN Secretary-General immediately of the proclamation of a state of emergency and furnish full information about the measures taken as well as a clear explanation of any derogations to the treaty made during this period.<sup>6</sup> It will shortly become evident to what extent these commitments are reflected in contemporary constitutions.

ICCPR aside, mention must be made of the Paris Minimum Standards of Human Rights Norms in a State of Emergency (Paris Minimum Standards), which were approved by the International Law Association in Paris in 1984.<sup>7</sup> Although as soft law they are not binding on states, they reflect a consensus among experts as to the minimum standards that should govern the declaration and administration of states of emergency in response to matters threatening the life of a nation. Building on the work on the topic by many renowned scholars,<sup>8</sup> the Paris Minimum Standards focus on helping to ensure that in emergency situations states refrain from suspending the basic human rights that are regarded as non-derogable. An analysis of the Minimum Standards confirms the view that article 4(2) of ICCPR was not intended to be an exhaustive list of non-derogable rights.

The Paris Minimum Standards do no more than what their name states: to provide minimum standards of a procedural and substantive nature to prevent emergency powers from being abused for ulterior ends to oppress citizens. As pointed out, the objective of the drafters is that these principles should be constitutionally entrenched. However, it does not seem to have been the aim that they be incorporated holus-bolus into a constitution: The incorporation of

5 See CCPR General Comment 29: art 4: Derogation during a state of emergency. CCPR/C/21/Rev.1/Add.11. General Comment 29 (General Comments), <http://www.refworld.org/docid/453883fd1f.html> (accessed 26 July 2020).

6 See F Viljoen *International human rights law in Africa* (2012) 334.

7 See RB Lillich 'The Paris Minimum Standards of Human Rights Norms in a state of emergency' (1985) 79 *American Journal of International Law* 1072-1081.

8 According to Lillich, the Paris Minimum Standards used the work of Judge Buergenthal, Prof Hartman and Prof Higgins, as well as the work of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and a publication by the International Commission of Jurists; Lillich (n 7).

the basic principles contained in the Minimum Standards should suffice and the full text itself used as an interpretative guide.

At the regional level, unlike other similar treaties such as the European Convention on Human Rights of 1950 and the American Convention on Human Rights of 1969, the African Charter on Human and Peoples' Rights (African Charter) of 1981 contains no provisions that deal specifically with times of emergency – surprisingly so, in view of how detailed many of its provisions are.<sup>9</sup> The silence of the African Charter on the matter has provoked debates among scholars. For example, Murray argues that derogation from the rights provided under the Charter may be permitted through the use of the claw-back clauses.<sup>10</sup> A different view is expressed by Ouguergouz who, while acknowledging that states may derogate from the provisions of the African Charter, argues that in doing so they may instead rely on the rules relating to the termination and suspension of treaties under international law, generally, and the Vienna Convention on the Law of Treaties, 1969, in particular.<sup>11</sup>

Some support for this approach is provided by Leandro Despouy, the Special Rapporteur on States of Emergency, who, in a study of several treaties, concludes that at a time of emergency states could invoke the international law principles of force majeure or impossibility of performance to derogate from their treaty obligations.<sup>12</sup> Although there are plausible reasons for the view that in times of national crisis states may derogate from some of their obligations under the African Charter, the silence of the Charter on the matter means that there is no control mechanism for preventing abuses.

Be that as it may, the African Commission on Human and Peoples' Rights (African Commission) has consistently rejected this argument on several occasions when, in response to complaints, states argued that the existence of a crisis justified their disregard of some of their obligations under the African Charter. The African Commission has held that since the African Charter does not allow for derogation,

9 The European Convention on Human Rights deals with this in art 15, which provides for '[d]erogations in time of emergency'. The American Convention on Human Rights contains provisions on '[s]uspension of guarantees' in art 27, which may be invoked in 'in time of war, public danger, or other emergency that threatens the independence or security of a State Party'.

10 R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 126.

11 F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 434.

12 See E/CN.4/Sub.2/1995/20; The 8th annual report of Mr Leandro Despouy, Special Rapporteur of the Sub-Commission, on human rights and states of emergency (Report of the Special Rapporteur), [www.internationalhumanrightsexicon.org/hrdoc/docs/emergencyreport10.doc](http://www.internationalhumanrightsexicon.org/hrdoc/docs/emergencyreport10.doc) (accessed 26 July 2020).

states cannot invoke situations of war or other emergencies as justification for derogating from their obligations. For example, in *Commission Nationale des Droits de l'Homme et des Libertés v Chad*<sup>13</sup> the Commission stated:<sup>14</sup>

The African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of the rights in the African Charter.

In the *Gambian coup* case, which concerned the suspension of the Bill of Rights in the Constitution by a new government formed after a *coup*, the African Commission held that 'the suspension of the Bill of Rights does not *ipso facto* mean the suspension of the domestic effect of the Charter'.<sup>15</sup>

The Commission's approach, however, has been to treat attempts at derogation as simply another limitation.<sup>16</sup> For example, in *Constitutional Rights Project & Others v Nigeria*,<sup>17</sup> after reiterating its position that the African Charter does not contain or allow for any derogations, it pointed out that derogations may be allowed only if they satisfy the requirements of article 27(2) of the Charter. This means that derogations based on a lawfully-declared state of emergency are allowed to stand only if they are proportionate and necessary to protect the rights of others and maintain collective security, morality or common interest, and do not erode the right in question in a way that renders it illusory.

It thus is clear from the discussion that in periods of severe crisis African countries are not at complete liberty to act as they please within their national territories. This has implications for the way in which they design the legal frameworks for states of emergency, a subject to which we now turn.

### 3 Types of states of emergency in African constitutional practice

An analysis of how states of emergency are entrenched in modern African constitutions has to be understood against the background of

13 (2000) AHRLR 66 (ACHPR 1995).

14 *Commission Nationale des Droits de l'Homme et des Libertés* (n 13) para 21.

15 See *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 49.

16 See Viljoen (n 6) 334.

17 (2000) AHRLR 227 (ACHPR 1999). For other cases, see *Media Rights Agenda & Others v Nigeria*, (2000) AHRLR 200 (ACHPR 1998) (*Media Rights* case) para 67; *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999).

what constitutes a state of emergency and the debates surrounding this topic. Equally important is the distinction between a constitutional and legislative approach to dealing with states of emergency.

### 3.1 The complexity of emergencies

While there is near-universal agreement that states of emergency are exceptional circumstances calling for special measures, emergency situations can take an infinite variety of forms, each generating different effects that require a different response. Distinguishing between forms of emergencies thus is important.

An 'emergency' can be said to refer to any sudden or unexpected grave situation that threatens the existence of a country and its political, social and economic order. It may have an exogenous or endogenous origin.<sup>18</sup> It may result from a pandemic, a natural catastrophe such as flooding or earthquakes, or the outbreak of disease, famine or any other natural cause attributable as an act of God; it may also result from man-made causes, such as war, invasion, revolution and rebellion. The cause may also stem from a combination of natural and man-made forces, such as when an emergency results from a pandemic that might not have occurred but for man-made acts or omissions. For example, cholera or Ebola outbreaks may be regarded as man-made inasmuch as they stem from a failure of governance and lack of management of national resources to address health issues. The controversies surrounding the origin of COVID-19 make it difficult to determine whether it should be regarded as a natural or man-made emergency.<sup>19</sup> However, it generally is classifiable as a natural emergency.

Although the exact definition of emergency situations often depends on the national legislator, as guided by constitutional and international legal instruments the country has ratified, some critical issues must be considered in this regard. As noted, one of these is the dynamic character of emergencies. What may give rise to an emergency today may not necessarily do so in two decades' time if it can be predicted with reasonable certainty and precautions are taken. For example, advances in technology may make it possible to determine when a storm will occur and so enable the government to adequately prepare for it without having to invoke emergency

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18 See J Ferejohn & P Pasquino 'The law of exception: A typology of emergency powers' (2004) 2 *International Journal of Constitutional Law* 231.

19 It is generally stated that its immediate source is unknown. See MA Shereen et al 'COVID-19 infection: Origin, transmission, and characteristics of human coronaviruses' (2020) 24 *Journal of Advanced Research* 91.

powers. Similarly, advances in medicine and public health may reduce the potentially devastating effects of pandemics such as COVID-19.

Determining in advance what constitutes an emergency perhaps is one of the most complicated issues with which constitution drafters have to grapple. A definition that is too broad may cause as many problems as one that is too narrow. Broad or vague definitions not only create leeway for over-reaction but can be exploited by opportunistic politicians to suppress their opponents, as happened in most African countries before the 1990s. A narrow definition is equally problematic, with Haiti providing the best example of this. Its Constitution limited the definition of emergency situations to invasion and civil war, thus excluding natural disasters.<sup>20</sup> As a result of the restrictive wording, the government had to ignore the applicable constitutional provisions when an earthquake of 7,3 magnitude struck the country and killed more than 230 000 people, including 25 per cent of the civil servants in the capital, Port-au-Prince.

If one considers an emergency as a sudden, unexpected threat, this raises the question of whether international terrorism, which since 9/11 has become a permanent feature of our lives, qualifies as an emergency that warrants the invocation of emergency laws. If this were so, would it not make a state of emergency the norm rather than the exception? From this perspective, it may be argued that a general threat of emergency – much like the general threat of natural disaster (such as that facing a district prone to earthquakes or seasonal storms) – does not justify the declaration of a permanent state of emergency. A similar issue can also arise with regard to the COVID-19 crisis which has made the exercise of emergency powers some type of a ‘new normal’ across the world. Undoubtedly, the situation is novel but that is not a justification for the exercise of emergency powers in perpetuity considering that there are emerging insights on the virus mitigating its potential deleterious effect. It is because of this complex, dynamic nature of ‘emergency situations’ as existential realities that there is debate on what approach to adopt in dealing with states of emergency as politico-judicial realities.

### 3.2 The legal versus the extra-legal regulatory framework

Before we examine the two main competing approaches, it is worth alluding to the debate over whether a state of emergency should

<sup>20</sup> Art 278 of Haiti’s Constitution 1987.

operate within or outside the normal legal order.<sup>21</sup> In this regard there are two schools of thought. The first, led by Carl Schmidt and many other scholars,<sup>22</sup> is to the effect that a state of emergency cannot operate within the legal order. A contrasting opinion is that of scholars led by Hans Kelsen, who contend that although there are fewer statutory constraints in cases of national emergencies, all executive and administrative organs are bound by the constitution since this is the basis of their existence and the source of their emergency powers.<sup>23</sup>

Be that as it may, given the unforeseeable – often unavoidable – emergencies that occur at some point in every state, the critical question is how best to deal with these in a manner that ensures that the expanded and extraordinary powers governments assume are not abused at the cost of citizens' fundamental rights. It comes down to finding an appropriate legal framework that balances effective emergency mitigation with respect for democratic principles and the rule of law. Looking at the problem from this perspective and in light of Africa's record of misusing state of emergency powers, there can be little confidence that a state that declares a state of emergency outside of a clearly-established legal framework can be trusted to act in a way that respects the supremacy of the constitution and the rule of law. Thus, in spite of the contention of the Schmittian school of thought, it cannot be gainsaid that there still is a need for a clear and predictable legal regime in Africa. We will now consider this in greater detail.

### 3.3 The constitutional versus the legislative regulatory model

A review of contemporary practice suggests that there are two main approaches to regulating states of emergency: The one may be termed the legislative emergency powers model; the other, the

21 For an overview of these debates, see A Khakee 'Securing democracy? A comparative analysis of emergency powers in Europe' Geneva Centre for the Democratic Control of Armed Forces (DCAF), Policy Paper 30, [https://www.files.ethz.ch/isn/99550/pp30\\_anna\\_khakee\\_emergency\\_powers.pdf](https://www.files.ethz.ch/isn/99550/pp30_anna_khakee_emergency_powers.pdf) (accessed 26 July 2020) 6-9; and A Zwitter 'Constitutional reform and emergency powers in Egypt and Tunisia' (2015) 7 *Middle East Law and Governance* 257.

22 G Agamben *State of exception* trans K Attell (2005). See also M Tushnet (ed) 'Emergencies and the idea of constitutionalism' in M Tushnet *The constitution in wartime: Beyond alarmism and complacency* (2005) 39.

23 H Kelsen *Introduction to the problems of legal theory: A translation of the first edition of the Reine Rechtslehre or pure theory of law* (1997) 289. Ackermann also seems to be in support of the Kelsenian approach where he advocates an 'emergency constitution' for the US, arguing that this is the best way to minimise the risk of a creeping, ongoing erosion of civil liberties in the name of the 'war against terrorism'. See B Ackermann 'The emergency constitution' (2004) 133 *Yale Law Journal* 1029.

constitutional emergency power model.<sup>24</sup> The legislative emergency powers framework rests on the idea that the executive needs an explicit expression of popular support in order to take the extreme measures that are needed to effectively deal with an emergency threatening the existence of the state and its citizens. The democratically-elected legislature provides the legitimacy that the executive needs so as to act in a manner that often interferes with and limits some of the fundamental human rights of citizens.

According to Ferejohn and Pasquino, the advantage of this approach is that it is assumed that legislative intervention will be temporary and prevent emergency laws from 'corrupting the formal system'.<sup>25</sup> However, the authors point to Britain and the United States as countries where the Defense Against Terrorism Acts and Patriot Act, respectively, were enacted as temporary measures but in effect have become permanent fixtures.<sup>26</sup> In addition to this danger that emergency laws meant to be temporary become embedded in the normal legal system in a permanent manner, there are two other weaknesses in the model.

First, the country may be faced with an emergency of great magnitude yet may have no time to wait for a legislative delegation, which could be slow in coming, particularly so when the legislature is not in session or does not find it politically expedient to act timeously. Matters could be even worse if the legislature is not physically able to meet. For example, to refer again to the Haitian crisis, the Constitution provides that the declaration of a state of emergency requires the countersignature of the Prime Minister and all other government ministers, as well as an immediate determination by Parliament of the scope and desirability of the President's decision. This was a literal impossibility: Many of the ministers and parliamentarians had died in the earthquake.

A second, perhaps more serious, weakness of the legislative emergency powers model is that legislative delegation of powers could all too easily be obtained in circumstances that are not genuine emergencies. The approval of executive proposals by and large is a mere formality in the many African parliaments that are under the increasing control of dominant parties and their party-whip systems. Even in the few countries where the ruling party lacks

24 Further models are suggested by other authors. Eg, O Gross & F Aolain *Law in times of crisis: Emergency powers in theory and practice* (2006) examine three models of emergency regulations, namely, the accommodation model, the law for all seasons, and the extra-legality model.

25 Ferejohn & Pasquino (n 18) 219.

26 As above.

a parliamentary majority, or holds only a small, unpredictable one, illegal financial inducements are used to buy votes to support any proposals the government wants approved.<sup>27</sup> For all these reasons, however, the adoption of the legislative emergency powers model in Africa would give carte blanche to governmental arbitrariness and be exploited to the full by the continent's unruly presidents.

The second approach is the adoption of the constitutional emergency powers model. This involves the entrenchment in the constitution of the circumstances when emergency powers can be invoked and of who can invoke them. This approach entails a number of inherent control mechanisms to guard against any abuse of these powers. Constitutional emergency powers enjoy a particular status: They are based on the original general will of the people, and thus have considerable democratic legitimacy. The fundamental principle of constitutional supremacy should ensure that the legal framework is not vulnerable to abuse by the executive or arbitrary changes by transient and opportunistic parliamentary majorities for their own selfish political ends. To this extent, the approach provides the best way of mediating the tension between invoking and deploying emergency powers, on the one hand, and protecting democracy, the rule of law and constitutionalism, on the other.

However, as the example of the earthquake in Haiti demonstrates, the effectiveness of this approach to a large degree depends on whether the manner in which the powers are couched actually achieves this balance. Have enough powers been given to the body responsible for dealing with emergencies, usually the executive, and are there sufficient checks to prevent these powers from being abused? Before turning to these issues, it is worth noting that the difference in practice between the legislative and constitutional emergency models often hinges on the extent to which such questions are addressed in substantive detail. A constitutional regulatory system that does nothing more than require parliament to adopt the relevant laws in effect is no different from a legislative emergency model.

Although the constitutions of all African countries contain provisions on states of emergency, many of these constitution did not invoke this power in dealing with the COVID-19 pandemic

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27 Eg, on two separate occasions President Yoweri Museveni paid parliamentarians huge bribes to induce them to vote in favour of repealing the term and age limits in the 1995 Ugandan Constitution. See AR Reuss & K Titeca 'Removing the presidential age limit in Uganda: The power of cash and coercion', <https://www.opendemocracy.net/kristof-titeca-anna-reuss/removing-presidential-age-limit-in-uganda-power-of-cash-and-coercion> (accessed 26 July 2020).

but rather chose to go the way of emergency powers contained in ordinary legislation. We will subsequently return to this issue.

## 4 Constitutional framework for states of emergency

African constitutions differ considerably in the nature, scope and potential effectiveness of the legal framework they provide for dealing with emergencies and in the safeguards they furnish for ensuring that the powers needed to address these situations are not abused. This part of the article begins by examining the constitutional framework and then assesses the extent to which the various approaches provide mechanisms for effectively dealing with emergencies and yet limiting the risk that powers will be abused as they were in the pre-1990 era of one-party rule or military dictatorship.

Four main issues are considered, namely the general constitutional framework for declaring a state of emergency; the nature of the declaration of the state of emergency; the extent to which fundamental human rights are protected during the declaration of a state of emergency; and the control and oversight institutions and mechanisms put in place to protect against any abuses.

While it is admitted that focusing only on constitutional texts may not reflect the full picture in any country, particularly in the civil law-based constitutional traditions in Francophone, Lusophone and Hispanophone Africa where organic laws are common, it has to be reiterated that in the absence of a detailed constitutional framework with adequate checks against abuse of emergency powers, there scarcely is any reason, given Africa's poor record, to believe that such abuse can be avoided through ordinary legislation. This is especially true for the approach of African countries towards COVID-19, many of which countries are principally using emergency powers contained in ordinary legislation. Conversely, entrenchment in a constitution, in and of itself, is no guarantee against abuse of emergency powers. What is crucial is the scope of such entrenchment. This is what we now discuss.

### 4.1 An overview of the constitutional framework

Barring the Sahrawi Democratic Republic, of which the fairly short Constitution contains no provisions dealing with declarations of a state of emergency, all the other 55 African states have adopted the constitutionally-entrenched model of regulating emergency situations. As noted, what distinguishes the constitutionally-regulated emergency model from the legislative regulatory approach

is the constitution's depth of articulation of the nature and scope of the framework for intervening in emergencies and safeguarding rights. From this perspective, an analysis of the relevant provisions in the various constitutions reveals three main patterns, namely, the minimalist, moderate and elaborate constitutional regulatory approaches.

In the minimalist category are 27 countries<sup>28</sup> of which their constitutions, while containing provisions that regulate declarations of a state of emergency, provide little detail defining the nature, scope and limitations on the exceptional powers that are conferred on the executive. In other words, there are inadequate safeguards to prevent the abuse of these powers. For example, article 115 of the Burundi Constitution empowers the President to take 'all measures required' to deal with an emergency. All the President is required to do is to consult *ex post facto* certain persons or institutions, such as the bureaus of the National Assembly and the Senate, and 'inform' the nation by way of a message. Similarly, under article 9 of the 1996 Cameroonian Constitution, the President may declare a state of emergency where the 'circumstances so warrant' and exercise such extraordinary powers as may be conferred upon him by law; he is required only to 'inform the nation of his decision by message'. Article 131(6) of the Somali Constitution grants the President special powers that include the powers to violate the Constitution where such 'violation is absolutely necessary for the purposes of dealing with the emergency situation'.

In constitutions of this type, constraints on the exercise of emergency powers depend on the goodwill of the presidents. These powers, in other words, are absolute and were the lifeblood of Africa's pre-1990 dictators.

By contrast, the provisions in the constitutions of the 10 countries in the moderate category attempt to provide a slightly more detailed framework to regulate declarations of a state of emergency.<sup>29</sup> There

28 See arts 58, 59 and 106 of the Burkina Faso Constitution of 1991; art 61 of the Djibouti Constitution of 1992; art 92 of the Somaliland Constitution of 2001; art 29 of the Burundi Constitution of 2005; art 9 of the Cameroon Constitution of 1996; art 12(3) of the Comoros Constitution of 2001; art 154 of the Egyptian Constitution of 2014; arts 48 and 74 of the Côte d'Ivoire Constitution of 2000; art 29 of the Guinea Bissau Constitution of 1984; art 18 of the São Tomé Constitution 1990; art 61 of the Madagascar Constitution 2010; art 131 of the Somalia Constitution of 2012; arts 189-191 of the South Sudan Constitution of 2011; arts 210-212 of the Constitution of Sudan of 2005; art 110 of the Ugandan Constitution of 1995; secs 36-37 of the Swaziland Constitution of 2005; and secs 30-31 of the Zambian Constitution of 2016.

29 See art 27 of the Eritrean Constitution of 19 of 1997; sec 305 of the 1999 Nigerian Constitution of 1999; sec 27 of the Botswana Constitution of 1966;

are, however, flaws of one type or another that may undermine the effectiveness of these provisions, particularly in the hands of unscrupulous leaders wishing to use a state of emergency as a pretext to suppress legitimate opposition to their rule. For example, this may result from the vague manner in which the constitution defines a state of emergency and its failure to indicate the extent to which fundamental rights may be limited.<sup>30</sup>

In the last category, 14 countries<sup>31</sup> have constitutional provisions that provide a fairly elaborate framework for regulating the exercise of emergency powers. What distinguishes the countries in this category from the others is that they have a basic framework as to what constitutes an emergency, what action can be taken, what the limits of these actions are, and what mechanisms are in place for checking against abuse. Nevertheless, the extent to which these measures could be effective in checking governmental excesses varies from country to country, depending on the nature of the declaration of the state of emergency – an issue examined below.

## 4.2 The nature of the declaration of the state of emergency

Declaring a state of emergency entrains a number of questions. Who declares it? Under what circumstances? What are the mechanisms for making the declaration? What is the duration of a state of emergency?

The question of who declares a state of emergency is inextricably linked to the type of emergency in question. We are using the expression ‘state of emergency’, yet while this seems to be almost inveterate, our review of African constitutions shows that a variety of other terms and expressions are employed to refer to the type of crisis that may warrant the declaration of a state of emergency. These

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arts 293, 294 and 296-299 of the Cape Verde Constitution of 1992; art 30 of the Constitution of the Central African Republic of 2016; arts 87, 88 and 124 of the Chadian Constitution of 1996; arts 59 and 74 of the Moroccan Constitution of 2011; sec 94 of the Tanzanian Constitution of 1997, arts 85-88 of the Liberian Constitution of 1984; and art 26 of the Namibian Constitution of 1990.

30 See, eg, sec 17 of the Botswana Constitution of 1966 and sec 305(3)(b) of the 1999 Nigerian Constitution.

31 See arts 58, 119 and 204 of the Angolan Constitution of 2010; secs 34-36 of the Gambian Constitution of 1996; sec 23 of the Lesotho Constitution of 1993; arts 61, 85, 114, 119, 145, 148 and 156 of the DRC Constitution of 2005; sec 18 of the Mauritius Constitution of 2009; sec 37 of the South African Constitution of 1996; sec 45 of the Malawian Constitution of 1994; arts 72, 161, 166 and 283-290 of the Mozambican Constitution of 2004; sec 113 of the Zimbabwe Constitution of 2013; art 58 of the Kenyan Constitution of 2010; art 93 of the Ethiopian Constitution of 1995; art 31 of the Ghanaian Constitution of 1992; arts 41-43 of the Seychelles Constitution of 1993; and secs 29 and 171 of the Sierra Leone Constitution of 1991.

include 'state of urgency';<sup>32</sup> 'state of siege';<sup>33</sup> 'martial law';<sup>34</sup> 'state of public emergency';<sup>35</sup> 'state of war';<sup>36</sup> 'state of constitutional need';<sup>37</sup> 'state of exception';<sup>38</sup> 'state of alert';<sup>39</sup> 'state of alarm';<sup>40</sup> 'state of necessity';<sup>41</sup> and 'state of readiness'.<sup>42</sup> Some constitutions use a combination of such expressions; for example, 'state of urgency and state of siege'<sup>43</sup> and 'state of siege and state of emergency'.<sup>44</sup>

Do these differences in terminology matter? A few constitutions make practical distinctions between the terms and expressions, especially where they are used in combination. At first glance the distinctions appear to indicate different types of intervention based on the gravity of the crisis that warrants intervention, or on who may make the relevant declarations, or both. A number of constitutions seem to make this distinction on the basis of the gravity of the crisis.

Two examples will suffice. The first is the Cameroonian Constitution which in article 9(1) authorises the President to declare a *state of emergency* 'where the circumstances so warrant'; by contrast, article 9(2) authorises him to declare a *state of siege* 'in the event of a serious threat to the nation's territorial integrity or its existence, its independence or institutions'. The second example is the Constitution of Mozambique which provides for both a state of siege and state of emergency. Article 283, with the heading 'choice of declaration', prescribes that

[w]hen the circumstances giving rise to the declaration are of a less serious nature, a declaration of emergency shall be chosen, provided that the principle of proportionality shall be respected in all cases, and the duration and extent of the measures used shall be limited to

32 Eg, see art 58 of the Burkina Faso Constitution of 1991.

33 Eg, see art 74 of the 2011 Constitution of Morocco of 2011.

34 Eg, see art 61 of the Djibouti Constitution of 1992; art 29 of the Constitution of Guinea Bissau of 1984; and art 61 of the Constitution of Madagascar of 2010 (which also refers to state of necessity and state of urgency).

35 Eg, see sec 17 of the Botswana Constitution of 1966; secs 27 and 35 of the Constitution of The Gambia of 1996; art 30 of the Constitution of Zambia of 2016; and sec 113 of the Constitution of Zimbabwe of 2013.

36 Eg, see arts 119 and 204 of the Angolan Constitution of 2010.

37 Eg, see art 204 of the 2010 Angolan Constitution of 2010.

38 Eg, see art 115 of the Constitution of Burundi of 2005.

39 Eg, see art 30 of the Constitution of Central African Republic of 2016.

40 Eg, see art 41 of the Constitution of Equatorial Guinea of 1982 (which also refers to state of exception and state of siege).

41 Eg, see art 61 of the Constitution of Madagascar of 2010 (which also refers to state of necessity and state of urgency).

42 Eg, see art 29 of the Constitution of Gabon of 1991 (which also refers to state of siege, state of alert and state of urgency).

43 Eg, see arts 87 and 88 of the Constitution of Chad of 1996; arts 105-107 of the Constitution of Algeria of 2013 (this is in addition to referring to 'state of emergency'); and art 94 of the Constitution of Togo of 1992.

44 Eg, see art 9 of the 1996 Constitution of Cameroon; arts 293 and 294 of the Constitution of Cape Verde of 1992; arts 282 and 283 of the Constitution of Mozambique of 2004; and art 94 of the Constitution of Tanzania of 1997.

what is strictly necessary for the prompt restoration of constitutional normality.<sup>45</sup>

Only the Gabonese Constitution makes a formal distinction based on both the level of the threat and the person who is authorised to intervene. In this respect, article 25 authorises the President to declare a state of emergency or state of siege, while article 29(a) reserves declarations of a state of readiness and state of alert to the Prime Minister.

A careful analysis of the wordings of these provisions suggests that the terminology 'state of emergency' adequately covers all the different situations contemplated. In the absence of any further clearer guide, it is doubtful whether, for example, the criteria of 'where circumstances warrant' or circumstances of 'a less serious nature' provide an objective standard for determining if a particular crisis warrants one type of a declaration rather than the other. It may be concluded that the apparent differences are purely of a semantic nature and that the decision to declare the one type of emergency and not the other is a matter of political judgment rather than a legal one guided by the gravity of the crisis.

The clarity with which the different constitutions define the circumstances that warrant the declaration of a state of emergency as well as the processes for making these declarations informed our

45 Other examples are the Algerian Constitution which in art 105 authorises the President, after consultation with specified institutions, to declare a state of urgency or a state of siege in 'case of compelling necessity'. By contrast, art 107 authorises him, after similar consultations, to declare by decree a state of emergency 'whenever the country is threatened by an imminent danger to its institutions, its independence or its territorial integrity'. The Constitution of Cape Verde authorises the President in art 293 to declare a state of siege 'in case of actual or imminent aggression against the national territory by foreign forces or serious threat or disturbance of the constitutional order', but a state of emergency under art 294 in case of 'public calamity or disturbance of the constitutional order the seriousness of which does not warrant the declaration of the state of siege'. Art 131 of the Constitution of the Republic of Congo of 2002 provides for the declaration of a state of urgency 'when an imminent peril appears, resulting from grave threats to the public order or in the case of events presenting, by their nature and their gravity, the character of public calamity or of national disaster', and a state of siege 'when an imminent peril appears, resulting from, either a characterised foreign threat, or from an armed insurrection, or from grave acts occurring during the state of emergency'. Under art 26(1) of the Namibian Constitution of 1990, a state of national defence or public emergency may be declared when there is a threat to the 'life of the nation or the constitutional order', while under art 26(7) martial law is to be declared when there is a state of national defence involving another country or when civil war prevails. Finally, art 137 of the Rwandan Constitution of 2003 authorises the President to declare a state of siege 'in the event of effective or imminent aggression by a foreign state, [or a] serious threat or danger to the constitutional order', and a state of emergency 'when the country faces a public or constitutional crisis whose gravity does not warrant the declaration of a state of siege'.

classification of African constitutions into minimalist, moderate and elaborate categories. Several observations may be made about the general pattern that emerged.

First, African constitutions vary considerably in the manner in which they regulate the process for declaring a state of emergency and its duration. These differences are particularly significant when it comes to the role that other institutions, mainly the legislature, play in the process. In nearly all the countries the President declares the state of emergency. While there are many exceptions to this,<sup>46</sup> it is worth noting that the 1992 Constitution of Cape Verde is silent on who actually is responsible for declaring a state of emergency.

Second, the process of making the declaration is important, as it determines the extent to which those charged with doing so cannot simply act on a whim. From this perspective, two patterns emerge. The first is where the President alone decides when a state of emergency is to be declared and his only obligation is to inform the nation by way of a 'message'.<sup>47</sup> There also are many other constitutions that authorise the President alone to declare a state of emergency but impose on him a duty to obtain parliamentary approval within a period that ranges in some constitutions from 24 hours to 14 days.<sup>48</sup> In many of these instances, the constitution requires the President to submit to parliament all the evidence that justifies the invocation of the extraordinary measures that go with the declaration of a state of emergency. The effect of this is that the prior declaration made by the President is effective subject to it being confirmed or revoked by parliament.

A more common pattern is the requirement that the President, or whoever is authorised to make a declaration of a state of emergency,

46 The exceptions to these are Swaziland where, under sec 36(1) of the 2005 Constitution, the King makes the declaration. In the other two African kingdoms, Lesotho (see sec 23(1)) and Morocco (see art 74 of the 2011 Constitution), the Prime Ministers make the declarations. The other exception is Ethiopia where, under art 93(2)(a) of the Ethiopian Constitution the state of emergency is declared by the Council of Ministers.

47 See art 9 of the 1996 Constitution of Cameroon. Art 41 of the 1982 Constitution of Equatorial Guinea is to a similar effect, by only requiring the President to inform the Chamber of Representatives, and the vague wording of art 131 of the 2002 Constitution of the DRC which can be interpreted to have a similar effect, that is, that the President is free to act solo.

48 See, eg, sec 17(1) of the 1966 Constitution of Botswana; sec 34(2) of the 1996 Constitution of The Gambia; sec 18(2) of the 1968 Constitution of Mauritius; art 92 of the Somaliland Constitution of 2001; art 94 of the 1992 Constitution of Togo; secs 305(1) and (2) of the 1999 Constitution of Nigeria; sec 45(3) (b) of the 1994 Constitution of Malawi; art 285(1) of the 2004 Constitution of Mozambique; and sec 113(2) of the 2013 Constitution of Zimbabwe.

does so only after consultation,<sup>49</sup> deliberation<sup>50</sup> or obtaining the opinion<sup>51</sup> or advice<sup>52</sup> of others. Those that are required to be involved in the process include the cabinet, the presidents of the national assembly and senate, the bureaus of the national assembly and senate, or the president of the constitutional court. The significance of this approach is that it compels the President to involve others in the decision-making process even if, at the end of the day, he is not under any obligation to take account of their views in the final decision he makes.

A far more effective process is provided by some constitutions which require that there is prior approval of the President's plans before a declaration of a state of emergency becomes effective. An example is article 210(1) of the Sudanese Constitution of 2005, which requires the President to act only after obtaining the consent of his Vice-President.<sup>53</sup> As mentioned, while this is a more effective way of guarding against presidential abuse of emergency powers, its practical effect depends, however, on the constitution's providing sufficient mechanisms to ensure that the President can be compelled to act in accordance with its provisions. Interventions, whether prior to or after the formal declaration of emergency by presidents, are useful only to the extent that they provide some possibility for an independent – or, at worse, 'other' – voice to ascertain that the conditions stipulated for making such a declaration are met. Unfortunately, the all-pervasive dominant parties combined with the party-whip system often limits the prospects of African parliaments raising any serious criticism of the merits of the declaration of emergency.

A third pertinent issue is the duration of the state of emergency. Most constitutions provide for a duration of seven to 21 days (subject to ratification), but more generally for periods of two, three or six months, with extensions being possible. Although there is a risk in most cases of extensions *ad infinitum*, the real danger is posed by

49 See, eg, arts 105 and 107 of the 2013 Constitution of Algeria; art 80 of the 2014 Constitution of Tunisia; art 199 of the 2010 Constitution of Angola; art 115 of the 2005 Constitution of Burundi; art 85 of the 2005 Constitution of the DRC; art 94(1) of the 1997 Constitution of Tanzania; art 154 of the 2014 Constitution of Egypt; arts 85-86 of the 1984 Constitution of Liberia; arts 49-50 of the 2009 Constitution of Mauritania; and art 26 of the 1990 Constitution of Namibia.

50 See art 51 of the 1991 Constitution of Burkina Faso; art 87 of the 1996 Constitution of Chad; and art 48 of the 2000 Constitution of Côte d'Ivoire.

51 See art 30 of the 2016 Constitution of Central African Republic; art 61 of the 2010 Constitution of Madagascar; art 90 of the 2010 Constitution of Guinea; and art 67 of the 2010 Constitution of Niger.

52 See art 31(1) of the 1992 Constitution of Ghana.

53 Other examples of such prior approval are to be found in art 27(2) of the 1997 Constitution of Eritrea and art 80(g) of the 1990 Constitution of São Tomé and Príncipe.

those constitutions that are either silent<sup>54</sup> or vague on how long a state of emergency can be declared.<sup>55</sup>

As noted, Egypt is among those countries that for many decades have been under a state of emergency. Given the vague wording of article 154 of its 2014 Constitution, the state of emergency that was declared in April 2017, when the bombing of two churches led to the death of more than 45 people, has been extended several times.<sup>56</sup> Generally, few constitutions ensure that each extension of a declaration of a state of emergency is supported by a fresh declaration and is subject to the same approval conditions as the first declaration. In other words, most extensions are a formality justified by the circumstances prevailing at the time of the first declaration, rather than by those prevailing when the extension is sought.

Overall, the circumstances in which states of emergency may be declared under modern African constitutions do not adequately shield the process from abuse. Much depends on the next two issues discussed, namely, the measures provided to guard against the abuse of fundamental human rights, and the ability of oversight institutions to ensure that constitutional safeguards are respected.

### 4.3 The extent to which human rights are protected

Perhaps the most serious problem posed by declarations of states of emergency is the risk of violations of fundamental human rights, especially the non-derogable rights. In this regard, African constitutions fall into three categories.

The first consists of those countries constitutions of which do not mention the issue of human rights protection at all,<sup>57</sup> or do so

<sup>54</sup> See, eg, art 12(3) of the Comoros Constitution of 2010.

<sup>55</sup> See, eg, art 105 of the Constitution of Algeria of 2013 and art 9 of the 1996 Cameroonian Constitution.

<sup>56</sup> See 'Egypt to extend state of emergency for three months: Official gazette' *Reuters* 14 April 2018, <https://www.reuters.com/article/us-egypt-security-emergency/egypt-to-extend-state-of-emergency-for-three-months-official-gazette-idUSKBN1HK2ZO> (accessed 1 June 2020).

<sup>57</sup> Examples include art 9 of the 1996 Constitution of Cameroon; arts 104-107 of the Algerian Constitution of 2013; art 61 of the Djibouti Constitution of 1992; art 92 of the Somaliland Constitution of 2001; art 94 of the 1992 Constitution of Togo; art 80 of the Tunisian Constitution of 2014; sec 305 of the 1999 Constitution of Nigeria; art 74 of the 2011 Constitution of Morocco; sec 18 of the 1966 Constitution of Botswana; art 115 of the Burundi Constitution of 2005; arts 42-44 of the 2016 Constitution of the Central African Republic; arts 87-88 of the Chadian Constitution of 1996; art 12(3) of the 2001 Constitution of the Comoros; arts 48, 71-72 of the 2000 Constitution of Côte d'Ivoire; arts 25, 31-32 of the Constitution of Tanzania of 1977; art 154 of the 2014 Constitution of Egypt; art 18 of the 1990 São Tomé and Príncipe Constitution; art 61 of

in obscure terms,<sup>58</sup> or stipulate that this and other matters will be laid down in subsequent legislation.<sup>59</sup> The most extreme example seemingly is article 131(6) of the 2012 Somali Constitution. It is formulated in vague terms that allow the rights recognised and protected under the Constitution to be violated if the 'violation is absolutely necessary for the purposes of dealing with the emergency situation'. Considering the fact that not every disturbance qualifies as an emergency, authorising presidents – who are prone to abusing power – to determine subjectively what is 'absolutely necessary' leaves the door completely open for misuse of the extraordinary powers that go with declarations of states of emergency.

In the second category are those countries of which the constitutions list the rights that may be curtailed during a state of emergency. The scope of this list of derogable rights varies from one country to another, and in most cases hardly meets the minimum standards laid down in the Paris Minimum Standards.<sup>60</sup> For example, many of the common rights to which derogations are allowed include those that are non-derogable under international human rights treaties, such as the prohibition of torture and cruel, inhumane or degrading punishment or treatment; the prohibition of slavery and servitude; conforming with the principles of legality of offences and penalties; the right to defence; the right to a remedy; the prohibition of imprisonment for debt; and freedom of thought, of conscience and religion.<sup>61</sup> Another important feature of the states in this category is the rather restricted list they often contain of rights that may not be limited or suspended.<sup>62</sup>

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the Madagascar Constitution of 2010; arts 25-26, 29a and 50 of the 1991 Constitution of Gabon; art 90 of the Constitution of Guinea of 2010; arts 49-51 of the 1992 Constitution of Mali; arts 85-88 of the 1986 Constitution of Liberia; arts 39, 71-72 of the 2009 Constitution of Mauritania; arts 67-68 and 105 of the 2010 Constitution of Niger; art 131 of the 2002 Constitution of the DRC; arts 108, 136-138 of the Rwandan Constitution of 2003; art 69 of the 2001 Constitution of Senegal; art 101 of the 1990 Constitution of Benin; and secs 30-31 of the Zambian Constitution of 1991 (which was left unchanged by the substantial amendment of the Constitution in 2016).

58 See, eg, art 297 of the Cape Verde Constitution of 1999; art 29 of the 1984 Constitution of Guinea Bissau; and secs 29(6) and (18) of the Sierra Leone Constitution of 1991.

59 See, eg, art 42(3) of the Constitution of Equatorial Guinea of 1982.

60 See sec (B)(2) of the Paris Minimum Standards which states that derogatory measures shall be subject to five general conditions which include principles of notification, proportionality, compliance with obligations under international law, non-discrimination and the recognition of non-derogable rights.

61 See art 61 of the Constitution of DRC of 2005; art 27(5)(a) of the Eritrean Constitution of 1997; secs 35 and 36 of the Constitution of The Gambia of 1997 (noting that sec 36 contains elaborate provisions to protect persons detained during a state of emergency); sec 21 of the 1993 Constitution of Lesotho; sec 18 of the 1968 Constitution of Mauritius; and arts 72 and 287 of the 2004 Constitution of Mozambique.

62 See, eg, art 93(4)(c) of the 1995 Constitution of Ethiopia; art 32 of the 1992 Constitution of Ghana (which focuses on the protection of persons detained

The last category consists of countries of which the constitutions contain a list of non-derogable rights. There are again wide variations in content. An example of a country with elaborate provisions that not only protect fundamental human rights but also require the government to comply with its international commitments is South Africa.<sup>63</sup> In terms of section 37(4) and 37(5) of the 1996 Constitution, any legislation enacted due to the declaration of a state of emergency may derogate from the Bill of Rights only under certain specified conditions, which include that the derogation is strictly required by the emergency; and that the legislation is consistent with the country's obligations under international law applicable to states of emergency. Finally, the legislation may not indemnify the state, or any person, in respect of any unlawful act; and may not permit any derogation from section 37; and any derogation from the rights in column 1 of the table of non-derogable rights.<sup>64</sup>

In addition, subsection (6) contains elaborate provisions regarding the conditions to be observed when a person is detained without trial in consequence of a derogation of rights resulting from a declaration of a state of emergency.

Constitutionally restricting derogations from human rights, especially those that international human rights instruments regard as non-derogable, is one thing; their effective enforcement is another. As we shall see, this depends largely on the operation of the oversight institutions and mechanisms put in place to monitor and control the exercise of emergency powers.

#### 4.4 Judicial and legislative control and other oversight mechanisms during states of emergency

Ensuring fundamental human rights, constitutionalism and respect for the rule of law under a state of emergency is always challenging.

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under emergency laws); art 190 of the 2011 Transitional Constitution of South Sudan; art 211(a) of the 2005 Constitution of Sudan; secs 36(8), 37 and 38 of the 2015 Constitution of Swaziland; and art 47 of the 1995 Ugandan Constitution.

63 A similar approach is adopted in secs 45(1) and (4) of the 1994 Constitution of Malawi; secs 86(3) and 87(4) of the 2013 Zimbabwean Constitution; arts 58(1), (3) and (5) which, besides listing rights not to be derogated from, introduces the principle of proportionality in any action being taken. Others include arts 58(6) and (7) of the 2010 Kenyan Constitution; art 24(3) of the 1990 Constitution of Namibia; and art 43 of the Seychelles Constitution of 1993.

64 The table of non-derogable rights includes the following: sec 9 on the right to equality; sec 10 on human dignity; sec 11 on the right to life; sec 12 dealing with freedom and security of the person (for some aspects of this right only); sec 13 on freedom from slavery, servitude and forced labour; sec 28 on the rights of children (but only covering certain aspects of this); and the right of arrested, detained and accused persons (with respect to certain aspects of this only).

There may well be many provisions in the constitution to achieve this purpose, but the critical question is whether the government can be compelled to comply with these safeguards. In checking against governmental arbitrariness, the primary oversight institutions are the legislature and the judiciary, an inevitable part of the checks and balances associated with the separation of powers in all African constitutions. Furthermore, many of these constitutions provide for some specialised bodies to operate during periods of emergency to monitor and prevent any governmental excesses.

#### **4.4.1 Legislative oversight**

As mentioned, African constitutions vary considerably in the extent of the powers they confer on parliaments to intervene either before or after the declaration of a state of emergency. It was also noted that the effectiveness of parliamentary intervention, whether to authorise, ratify or approve the extension of a state of emergency, is limited by two factors: first, the executive's dominance of parliament and, second, party caucusing and the whip system, which make parliamentary approval of executive declarations virtually a foregone conclusion. Despite these obstacles, a number of constitutions introduce innovative measures to enhance parliamentary control of executive conduct under a state of emergency.

One way of monitoring and countering the executive exercise of emergency powers is provided by those constitutions that prescribe that the President or a minister must submit monthly reports to parliament during the period of a state of emergency that exceeds one month. These reports are required to indicate the number, names and addresses of persons restricted or detained under the emergency laws, the number of cases that have been reviewed by a special tribunal set to review the cases of detainees, and the number of cases in which the authority that ordered the restrictions or detention acted in accordance with the decisions of the tribunal appointed to review the cases of detainees.<sup>65</sup> These reports ensure transparency and accountability.

There are also other constraints designed to limit actions that may be taken by the executive during the period of a state of emergency. Examples include the prohibition of any amendments of the

<sup>65</sup> See, eg, sec 36(b) of the Constitution of the The Gambia of 1996; art 32(3)-(4) of the 1992 Constitution of Ghana; sec 36(11) of the Swaziland Constitution of 2005; and arts 49 and 110(6) of the 1996 Ugandan Constitution.

constitution;<sup>66</sup> the prohibition of the dissolution of parliament;<sup>67</sup> and the prohibition of the holding of elections during this period. These are commendable measures to prevent leaders from misusing a state of emergency to perpetuate their rule by altering the constitution or dissolving a parliament where the majority does not support the state of emergency. Similarly, emergency periods are hardly ever conducive to free and fair elections. The impact of these restrictions hinges on the existence of a judiciary with the powers and will to discharge its functions independently and impartially without fear, favour or prejudice.

#### 4.4.2 *The judicial role*

Any framework for regulating periods of emergency is of limited use if it does not provide for the intervention of an independent and impartial judiciary to ensure that the constitution and the rule of law are respected during the crisis. The efficacy of judicial intervention will depend on the role assigned to the judiciary in the constitution, noting that there is no reason to assume that the judiciary enjoys the same powers in normal times as it does in emergencies. In fact, judicial intervention may be contemplated in one or more of four scenarios.

First, some constitutions provide that before or after declaring a state of emergency, one of the institutions to be consulted or whose advice may be sought is the constitutional court or its president.<sup>68</sup> The involvement of the judiciary in such an important decision is understandable, given the assumption that its members are people whose independence and impartiality in dealing with issues of

66 See, eg, art 294 of the 2004 Mozambique Constitution; art 26 of the 1991 Constitution of Gabon; and art 87(a) of the 1986 Constitution of Liberia.

67 See art 296(1) of the 1992 Constitution of Cape Verde; art 88 of the 1996 Constitution of Chad; art 12(3) of the 2001 Constitution of the Comoros; art 154 of the 2014 Constitution of Egypt; art 26 of the 1991 Constitution of Gabon; art 87(a) of the 1986 Constitution of Liberia; art 50 of the 1992 Constitution of Mali; and art 138 of the 2003 Constitution of Rwanda. By contrast, see arts 190(b)-(c) of the 2011 Transitional Constitution of South Sudan and art 211(a) of the 2005 Constitution of Sudan, both of which, in similar language, authorise the President to do the exact opposite, namely, to dissolve or suspend any of the state organs or suspend such powers as may be conferred upon the state under their constitutions.

68 See, eg, art 115 of the 2005 Constitution of Burundi; art 43 of the 2016 Constitution of the Central African Republic; art 87 of the 1996 Constitution of Chad; art 12(3) of the Constitution of the Comoros of 2001; art 48 of the 2000 Constitution of Côte d'Ivoire; art 61 of the 2010 Constitution of Madagascar; art 26 of the 1991 Constitution of Gabon; art 90 of the 2010 Constitution of Guinea; art 50 of the 1992 Constitution of Mali; art 39 of the 2009 Constitution of Mauritania; art 67 of the 2010 Constitution of Niger; and also art 80 of the 2014 Constitution of Tunisia (which is worded slightly differently as it requires, *inter alia*, that the President informs the president of the Constitutional Court).

constitutional justice are widely accepted and respected. However, for these same reasons, the involvement of the judiciary in what may turn out to be a political decision may imperil the reputation of the judiciary.

As we shall see, the practice of involving constitutional courts in such matters is prevalent in Francophone Africa, where it is these same courts that have exclusive jurisdiction to adjudicate constitutional controversies. How will the constitutional court decide the matter if the President's decision to declare a state of emergency is challenged before it, after it had previously been consulted and/or expressed an opinion that was taken into account by the President before making his decision? It therefore is desirable to keep the courts, particularly the constitutional courts before which litigation on the legality of any declaration of a state of emergency might go, out of the decision-making processes embarked upon by the President.

The second instance for judicial intervention may come about in its normal role as a guardian and enforcer of the constitution. However, this is a normal role only to the extent that the jurisdiction of courts is not excluded from disputes concerning the legality of the declaration of emergency specifically or disputes concerning the constitutionality of action taken during the state of emergency. Seen from this perspective, two observations may be made about current trends in Africa.

The first is that some constitutions, using rather obscure language, appear to exclude the jurisdiction of courts from adjudicating any disputes concerning the legality of a declaration of a state of emergency or even violations of the constitution that take place during this period. For example, section 29(4) of the 1991 Sierra Leonean Constitution, in referring to proclamations issued by the President on a state of emergency, states that 'all measures taken thereunder shall be deemed valid and lawful and shall not be enquired into by any court or tribunal'. This seems clear enough. However, section 29(17) of the same Constitution allows any person who is detained under any emergency legislation to request an 'independent and impartial tribunal established by law' to review the 'necessity or expediency of continuing his detention'. The confusion and inconsistency appears to be deliberate.<sup>69</sup>

<sup>69</sup> This is so because sec 29(18) of the same Constitution declares: 'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the taking during a period of a state of public emergency of measures that are reasonably justifiable for the purpose of dealing with the

Another equally puzzling example, alluded to earlier, is article 131(6) of the 2012 Somalian Constitution, which allows for the violation of the Constitution during a state of emergency provided this is ‘absolutely necessary for the purposes of dealing with the emergency situation’. Judicial review of any action taken during the crisis is excluded as article 131(7) states that only the ‘validity of a declaration of a state of emergency and the procedures involved in making the declaration, may be challenged in court’. It therefore means that in both countries fundamental human rights may be violated with impunity during a state of emergency.

A second observation is that, prior to the 1990s, individuals in Francophone and Lusophone Africa were excluded from challenging violations of the constitution before the constitutional courts or councils (the exception being disputes about electoral matters). This in effect meant that there were no avenues, save for those provided in administrative law, for challenging constitutional violations during a state of emergency.<sup>70</sup> Although the global expansion of judicial review since the 1990s has seen the extension of individual access to constitutional courts and councils, there are still many jurisdictions where no such access is available.<sup>71</sup> For example, article 80 of the Tunisian Constitution of 2014, which deals with states of emergency, provides that ‘the President of the Assembly of the Representatives of the People or thirty of the members thereof shall be entitled to apply to the Constitutional Court with a view to verifying whether or not the circumstances remain exceptional’. The implication is that, unless other remedies are provided for by ordinary laws or in the emergency laws, individuals whose fundamental human rights have been violated during a state of emergency cannot approach the constitutional courts or councils in these jurisdictions.

By contrast, Anglophone African constitutions usually allow individuals in such situations to approach either the ordinary courts

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situation that exists immediately before and during that period of a state of public emergency.’

70 See generally CM Fombad ‘An overview of contemporary models of constitutional review in Africa’ in CM Fombad (ed) *Constitutional adjudication in Africa* (2017) 17.

71 See, eg, the Burkina Faso Constitution of 1991; the Cameroon Constitution of 1996; the Côte d’Ivoire Constitution of 2000; the Djibouti Constitution of 1992; the Guinean Constitution of 2010; the Madagascan Constitution of 2010; the Moroccan Constitution of 2011; the Rwandan Constitution of 2003; the 2001 Constitution of the Republic of Congo; the São Tomé and Príncipe Constitution of 1990; the Senegalese Constitution of 2010; the Togolese Constitution of 1992; and the Cape Verdean Constitution of 1992.

or courts within the hierarchy of courts that are vested with a specific mandate to deal with violations of the constitution.<sup>72</sup>

A third instance of judicial intervention is where the constitutional provisions regulating the state of emergency provide a special process for settling disputes related to the exercise of emergency powers.<sup>73</sup> Section 37(3) of the 1996 South African Constitution illustrates the importance of this approach, prescribing that

[a]ny competent court may decide on the validity of –

- (a) a declaration of a state of emergency;
- (b) any extension of a declaration of a state of emergency; or
- (c) any legislation enacted, or other action taken, in consequence of a declaration of a state of emergency.

Also adopting this approach are section 113(7) of the 2013 Zimbabwean Constitution and article 58(5) of the 2010 Kenyan Constitution, the sole difference being that the powers to deal with these disputes are exclusively vested in the Constitutional Court of the former and the Supreme Court of the latter. The advantage of the approach is that the scope of judicial intervention is broadly defined to enable the legality of the declaration of a state of emergency, the implementing regulation, and any action taken during this period, to be subject to judicial review for conformity with the constitution. Overall, the varying ways in which modern African states monitor and control executive action during states of emergency have significant implications for constitutionalism and the rule of law, a subject examined below.

## 5 Some implications of current trends in Africa: COVID-19 in perspective

African countries have frequently invoked emergency powers to deal with crises, in most cases doing so in an abusive manner. The constitutional reforms of the last three decades which were reviewed above were designed to guard against such abuses in a new era, one marked by constitutions which, for the first time, sought to establish

<sup>72</sup> Eg, art 33(1) of the 1992 Constitution of Ghana states: 'Where a person alleges that a provision of this Constitution on the fundamental human rights and freedoms has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.'

<sup>73</sup> See, eg, sec 45(6) of the 1994 Constitution of Malawi, which provides that 'the High Court shall be competent to hear applications challenging the validity of a declaration of a state of emergency, any extension thereof, and any action taken, including any regulation enacted, under such declaration'.

a culture of constitutionalism, human rights and respect for the rule of law. We briefly examine the recent trend in Africa.

### 5.1 Constitutional emergency powers and the challenge of the rule of law

Before examining the trend with the invocation of states of emergency under modern African constitutions, it is important to consider the meaning of the rule of law in states of emergency considering the tension between both concepts. One school of thought, again led by Carl Schmitt, is that the rule of law and states of emergency are irreconcilable and that emergency powers cannot operate within the confines of the rule of law.<sup>74</sup> Another view, an arguably better one, is that states of emergency are an acceptable derogation from the rule of law and can thus operate within its confines.<sup>75</sup> Indeed, according to Dyzenhaus, 'there is a substantive conception of the rule of law that is appropriate at all times', whether under a state of emergency or a normal constitutional order.<sup>76</sup> Therefore, 'even if democratic government must yield to an emergency, actors ought to take care to preserve the formal structure that makes it appear as though democratic constitutionalism is operating'.<sup>77</sup> In essence, therefore, the rule of law is essential in states of emergency so as to prevent tyranny while managing emergencies.

Frequent resort to emergency rule is not peculiar to Africa.<sup>78</sup> The trend, in many cases, on the continent, however, shows that the rule of law was simply disregarded. It is a basic principle of a state of emergency that it should be merely conservative, that is, for the purpose restoring the legal order. However, we have earlier mentioned examples of states of emergency that continued for more than 40 years.

While scholarship on emergency powers categorises emergencies as violent situations, natural disasters and economic crises, states of emergency have so far been declared in Africa with regard to violent situations and natural disasters. In fact, most emergencies

74 See C Schmitt *The concept of the political* trans G Schwab (2007).

75 Scholars such as Rossiter hold this view; see CL Rossiter *Constitutional dictatorship: Crisis government in modern democracies* (1948) 314.

76 D Dyzenhaus 'Schmitt v Dicey: Are states of emergency inside or outside the legal order?' (2006) 27 *Cardozo Law Review* 2038.

77 See Ferojohn & Pasquinom (n 18) 209.

78 According to Bjørnskov and Voigt, between 1985 and 2014 approximately 137 countries at least once resorted to states of emergency. See C Bjørnskov & S Voigt 'The architecture of emergency constitutions' (2018) 16 *International Journal of Constitutional Law* 101.

in the last two decades have been the result of violent situations (internal crises) that supposedly threatened the existence of the nation. This is no surprise. Civil unrest is a regular occurrence and for a wide variety of reasons, such as the marginalisation of minorities,<sup>79</sup> ethnic or religious conflict, and post-electoral violence caused by 'sit-tight' leaders wishing to retain power at all costs.<sup>80</sup> In some of these instances, emergency powers were used mischievously to consolidate power and suppress agitation for regime change. This is the case with quite a number of emergencies, among which are those in Cameroon,<sup>81</sup> Ethiopia<sup>82</sup> and The Gambia.<sup>83</sup> Yet another trend in Africa is the recourse to constitutional emergency powers for 'perceived' and not actual emergencies. States of emergency have been declared to purportedly prevent an emergency. For example, a state of emergency was declared in Ethiopia to respond to the resignation of the Prime Minister and to facilitate a peaceful transition of power.<sup>84</sup> It was also declared in Egypt as a result of an anticipated breakdown of order due to the bombing of churches.<sup>85</sup> As a general principle, states of emergency should only be declared to prevent an emergency. The threat should be imminent and the state of emergency should be necessary to restore order. Indeed, according to Fatovic, 'perceived emergencies' are a threat to the

- 79 Eg, the marginalisation of Anglophone people in the north and south-west regions of Cameroon leading to a declaration of a state of emergency. See International Crisis Group 'Cameroon's worsening Anglophone crisis calls for strong measures', <https://www.crisisgroup.org/africa/central-africa/cameroon/130-cameroon-worsening-anglophone-crisis-calls-strong-measures> (accessed 26 July 2020). See also the marginalisation of the people of Oromia regional state in Ethiopia, causing uprisings leading to a consistent declaration of state of emergency. This is considered in detail later.
- 80 Eg, the post-election violence in Zimbabwe of 2008, leading to the death of more than 100 people, was a result largely of former President Robert Mugabe's refusal to concede defeat after the run-off presidential elections. See C McGreal 'This is no election. This is brutal war' *The Guardian* 22 June 2008, <https://www.theguardian.com/world/2008/jun/22/zimbabwe1> (accessed 26 July 2020). Another example is the 2007-2008 post-election violence in Kenya, a result of widespread rigging by the government of President Mwai Kibaki. See MK Juma 'African mediation of the Kenyan post-2007 election crisis' (2009) 27 *Journal of Contemporary African Studies* (2009) 407.
- 81 See C Fombad 'Cameroon's emergency powers: A recipe for (un)constitutional dictatorship?' (2004) 48 *Journal of African Law* 62.
- 82 See P Schemm 'Under a new state of emergency, Ethiopia is on the brink of crisis, again' *The Washington Post* 3 March 2018, [https://www.washingtonpost.com/world/africa/under-a-new-state-of-emergency-ethiopia-is-on-the-brink-of-crisis-again/2018/03/03/5a887156-1d8f-11e8-98f5-ceecfa8741b6\\_story.html?noredirect=on&utm\\_term=.bc3ffb9cd66a](https://www.washingtonpost.com/world/africa/under-a-new-state-of-emergency-ethiopia-is-on-the-brink-of-crisis-again/2018/03/03/5a887156-1d8f-11e8-98f5-ceecfa8741b6_story.html?noredirect=on&utm_term=.bc3ffb9cd66a) (accessed 26 July 2020).
- 83 'The Gambia's President declares state of emergency' *BBC News* 17 January 2017, <https://www.bbc.com/news/world-africa-38652939> (accessed 26 July 2020).
- 84 'Ethiopia declares national state of emergency' *BBC News* 16 February 2018, <http://www.bbc.com/news/world-africa-43091248> (accessed 26 July 2020).
- 85 'Egypt to extend state of emergency for three months: Official gazette' *Reuters* 14 April 2018, <https://www.reuters.com/article/us-egypt-security-emergency/egypt-to-extend-state-of-emergency-for-three-months-official-gazette-idUSKBN1HK2ZO> (accessed 26 July 2020).

rule of law as they serve as a pretext for governments to ignore or circumvent checks that ordinarily prevent the abuse of power.<sup>86</sup>

Emergency declarations have also recently been made due to terrorism and Islamic insurgency, as happened in Cameroon, Chad, Egypt, Nigeria and Somalia. In some of these countries, the military were given sweeping powers to bring the situation under control. In this case also, the rule of law was severely threatened in that it helps in the expansion of the executive's powers to confront 'perceived' threats to national security.<sup>87</sup>

In other instances, states of emergency were declared in response to natural disasters, such as extreme drought in Malawi,<sup>88</sup> severe flooding in Namibia,<sup>89</sup> and the outbreak of the Ebola virus in parts of West Africa, in this case the worst-hit countries being Liberia<sup>90</sup> and Sierra Leone.<sup>91</sup> The latter two cases involved the suppression of

86 C Fatovic 'Emergencies and the rule of law' in *Oxford Research Encyclopaedia of Politics* (2020), <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-93?print=pdf> (accessed 26 July 2020)

87 As above.

88 See 'Malawi declares state of emergency over drought' *Aljazeera News* 14 April 2016, <https://www.aljazeera.com/news/2016/04/malawi-declares-state-emergency-drought-160413144707560.html> (accessed 26 July 2020). In this case, approximately 2,8 million Malawians face food insecurity owing to extreme drought.

89 The then President of Namibia declared a state of emergency in the northern parts of the country following heavy flooding which displaced more than 10 000 people and washed away roads. See 'State of emergency declared in Namibia' *News 24*, <https://www.news24.com/Africa/News/State-of-emergency-declared-in-Namibia-20110329> (accessed 26 July 2020).

90 Invoking art 86(a)(b) of the Constitution of Liberia of 1984, former President Ellen Johnson Sirleaf declared a state of emergency throughout the Republic of Liberia, with effect from 6 August 2014 for a period of 90 days, as a result of the widespread Ebola virus. The declaration included measures curtailing the rights of the people, including the closure of schools, markets and other public places, quarantining communities, and the imposition of a curfew. See 'President Sirleaf declares 90-day state of emergency, as government steps up the fight against the spread of the Ebola virus disease' *Executive Mansion* 6 August 2014, [https://www.emansion.gov.lr/2press.php?news\\_id=3053&related=7&pg=sp](https://www.emansion.gov.lr/2press.php?news_id=3053&related=7&pg=sp) (accessed 26 July 2020). The state of emergency ended in November following a national broadcast in which former President Sirleaf cited progress in the fight against the deadly virus. See C MacDougall 'Liberia President, citing Ebola gains, ends state of emergency' *The New York Times* 13 November 2014, <https://www.nytimes.com/2014/11/14/world/africa/president-ellen-johnson-sirleaf-ends-state-of-emergency.html> (accessed 26 July 2020).

91 In an address to the nation on 30 July 2014 on the outbreak of Ebola, President Ernest Bai Koroma invoked emergency powers under sec 29(5) of the Constitution of Sierra Leone 1991. See 'President Koroma declares state of emergency in Sierra Leone' *Cocorioko: The Voice of the People* 31 July 2014, <http://cocorioko.net/president-koroma-declares-state-of-emergency-in-sierra-leone/> (accessed 26 July 2020). Pursuant to the powers under the section, the Public Emergency Regulations 2014 were promulgated defining the exact scope of the powers and the nature of derogation of rights that was to take place during the emergency. There were, however, allegations that President Koroma was taking advantage of the emergency powers to suppress political opponents. This led to the common slogan, 'End the state of emergency laws now'. See 'Calls for an end to state of emergency in Sierra Leone' *Sierra Leone Telegraph* 26

certain human rights in order to contain the spread of the virus, a pandemic that could be classifiable as a natural disaster threatening the existence of the countries concerned. The COVID-19 pandemic is also classifiable as a natural disaster. However, many African governments did not make use of their constitutional state of emergency provisions.

## 5.2 Legislative emergency powers, COVID-19 and the 'new normal'

As mentioned, in dealing with COVID-19, the trend is that most governments did not declare a state of emergency based on their constitutions but rather had recourse to their emergency powers in ordinary legislation. The two possible explanations for this are, first, that in spite of the deleterious effect of the pandemic, it did not constitute a sufficient 'emergency' to warrant the invocation of the constitutional provision and, second, that curtailing the virus could be effectively done through ordinary legislation. Therefore, most governments resorted to their public health or infectious diseases legislation to declare a 'state of disaster' which gives the President (or other public official such as the Minister for Health) powers towards containing the spread of the virus. The use of ordinary legislation in managing the crisis has generated intense legal debates.<sup>92</sup> Questions particularly have arisen regarding the extent to which the constitutional safeguards can be applicable in this regard.

While this approach has the advantage of providing a speedier and more flexible response needed in dealing with the virus, it has severe implications for human rights and the rule of law. In the first place, the scrutiny and checks that are typically associated with the constitutional emergency model are lacking. Thus, this is a convenient means of unabatedly perpetuating human rights abuses as numerous cases show. For example, there were several reported cases of deaths resulting from police violence in implementing emergency regulations. Another implication of this approach is to help the executive further consolidate power. This is now becoming the new normal in dealing with emergencies and, according to critics, leading to the erosion of the rule of law and the values it is supposed to uphold.<sup>93</sup> Furthermore, most African countries relied on public health legislations that obviously were obsolete to provide

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April 2015, <http://www.thesierraleonetelegraph.com/calls-for-an-end-to-state-of-emergency-in-sierra-leone-grows/> (accessed 26 July 2020).

92 G Joelle 'States of emergency' *VerfBlog* 26 May 2020, <https://verfassungsblog.de/states-of-emergency/> (accessed 26 July 2020).

93 Fatovic (n 86).

a legal basis for the emergency powers. In some cases, such as the case in Nigeria<sup>94</sup> and Egypt,<sup>95</sup> these legislations were hurriedly amended or new ones enacted without the requisite public scrutiny or due process. In many countries such as Ghana, the newly-enacted legislation placed restrictions on constitutionally-guaranteed fundamental rights.<sup>96</sup> These new pieces of legislation also delegated legislative powers to the executive without appropriate checks. In some cases, the laws give ‘unelected executives’ such as the Minister for Health sweeping powers as is the case in Nigeria.<sup>97</sup> It is worth mentioning that the newly-introduced legislations/regulations were also extremely punitive causing the parliament in countries such as Kenya, on that basis, to decline approval.<sup>98</sup> More disturbing is the fact that most of these legislations have no sunset clause making them a near permanent feature considering that the pandemic is not time-bound. In all, the use of the ordinary legislative framework anticipates that since powers are granted by ordinary legislative processes, the process remains in place to check abuses. However, the foregoing shows that African leaders cannot be trusted with such potentially unbridled powers. While it is easier to check the use of these powers in advanced democracies, it is not so with African countries.

## 6 Conclusion

The preceding discussion shows that, in spite of wide-ranging constitutional reform since the 1990s, most declarations of states of emergency in Africa have been used to address what are essentially political crises through repressive measures that often violate

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- 94 L Abdulrauf ‘Nigeria’s emergency (legal) response to COVID-19: A worthy sacrifice for public health?’ *VerfBlog* 18 May 2020, <https://verfassungsblog.de/nigerias-emergency-legal-response-to-covid-19-a-worthy-sacrifice-for-public-health/> (accessed 26 July 2020).
- 95 See A llaboudy ‘Emergency law amendments to fight COVID-19 in Egypt: Putting the poison in the honey’ *VerfBlog* 19 May 2020, <https://verfassungsblog.de/emergency-law-amendments-to-fight-covid-19-in-egypt-putting-the-poison-in-the-honey/> (accessed 26 July 2020).
- 96 See ME Addadzi-Koom ‘Quasi-state of emergency: Assessing the constitutionality of Ghana’s legislative response to COVID-19’ (2020) *The Theory and Practice of Legislation*, where she contended that parliament hurriedly passed the legislation after a voice count. K Agyeman-Budu ‘COVID-19, constitutionalism and emergencies under Ghana’s 1992 Fourth Republican Constitution’ *VerfBlog* 23 May 2020, <https://verfassungsblog.de/covid-19-constitutionalism-and-emergencies-under-ghanas-1992-fourth-republican-constitution/> (accessed 26 July 2020).
- 97 The Control of Infectious Diseases Bill 2020 grants the Minister of Health and the Director-General of Nigeria Centre for Disease Control (NCDC) sweeping powers.
- 98 A Maleche et al ‘Excessive law enforcement in Kenya’ *VerfBlog* 14 May 2020, <https://verfassungsblog.de/excessive-law-enforcement-in-kenya/> (accessed 26 May 2020).

fundamental human rights. In most of these instances, the primary objective has been to suppress dissenting voices and pave the way for the incumbent to perpetuate his stay in power. Yet genuine emergencies, whether man-made or natural, or both, are normal in the life of any nation. The recent COVID-19 pandemic has challenged this *status quo* and has been an example of a natural emergency that requires the use of extraordinary powers. The extraordinary powers given to governments to enable them to act swiftly in such emergencies threatening the existence of a country place a huge responsibility on them to act with caution and sensitivity and within the bounds of the law.

These exceptional powers are prone to abuse, as the historical record demonstrates has been the case in Africa since the 1960s. Although most African states now have an improved constitutional and legal framework for dealing with emergencies, the abuse of emergency powers remains one of the greatest threats in Africa today to entrenching a culture of constitutionalism, good governance, and respect for human rights and the rule of law. The continent's sit-tight dictators are using all manners of democratic paraphernalia to disguise their autocratic designs. The key to reversing the trend lies in a better understanding of democratic constitutional emergency regulations and their enforcement.

The choice of a regulatory framework is usually between a constitutional and legislative approach, the former clearly being preferable to the latter. The constitutional entrenchment of the framework shields it from arbitrary changes by opportunistic leaders using their transient parliamentary majority for their selfish political ends. An analysis of African constitutions reveals that the constitutional emergency regulatory approach has been adopted by all. However, the lack of clear detail on matters such as what constitutes an emergency, when it can be declared, who can make the declaration, and what safeguards exist against abuses of that state of emergency, suggest that states taking the minimalist approach have adopted what amounts to a legislative regulatory approach, because most of this detail then depends on the whims of the legislature. This is especially true for managing COVID-19 where most governments have chosen to go the way of ordinary legislation with its attendant implications for the rule of law and constitutionalism. While this style may not be an issue for advanced democracies, it will always be problematic for African countries with executives that are always willing to arrogate as much powers as possible to themselves. Accountability will also always be a challenge.

It is understandable that an emergency should not be defined in precise and rigid terms. What counts as an emergency inevitably varies from one time and place to another. For example, advances in technology can make it possible to anticipate, and so ward against, situations that decades ago would have been classified as emergencies. As such, this calls for both clarity and flexibility in defining what constitutes a state of emergency.

Carefully-crafted constitutional provisions regulating declarations of a state of emergency, as the experiences of the last three decades shows, may not prevent abuses. Nevertheless, they may limit and at least reduce the incidence of repression and human rights violations experienced in the exercise of emergency powers. Even if implementation of the constitutional provisions will remain a challenge in making constitutionalism and respect for the rule of law and fundamental rights a reality in Africa, an important step in this direction is having the appropriate constitutional framework.<sup>99</sup> Although a number of African countries have adopted fairly elaborate constitutional frameworks to regulate states of emergency, many lacunae remain.

To counter the risks that emergency powers pose to Africa's fledgling democracies, there is a need to adopt a constitutionally-entrenched regulatory framework based on good international practices, such as ICCPR and the Paris Minimum Standards, as well as to take into account Human Rights Committee General Comment 29. Emergencies must be defined in terms that ensure that they can be invoked only in serious crises where the survival of the state and its institutions is at stake. The conditions for declaring a state of emergency must be clearly defined in a manner that ensures that emergency powers are not used as a pretext for solving other temporal political problems, or as an indirect and illegitimate means to modify the legal order, even the constitution itself. Such abuses are tantamount to abrogating or amending the constitution rather than functioning to preserve it.

Ideally, a declaration of a state of emergency should be preceded by prior authorisation or immediately followed within 72 hours by legislative approval. The poor human rights record of African states means that there is a need to ensure that citizens' human rights are protected. The list of non-derogable rights contained in ICCPR and the Paris Minimum Standard constitutes the lowest standard of

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<sup>99</sup> For a general discussion of this issue, see CM Fombad (ed) *The implementation of modern African constitutions. Challenges and prospects* (2016).

human rights protection that should be recognised and protected. One of the major lessons to be drawn from the experience of the last three decades involves enforcement. However elaborate a constitutional framework for regulating states of emergency, this will serve no purpose if there is no effective enforcement mechanism in place to monitor and ensure compliance with its provisions.

# Eswatini's legislative response to COVID-19: Whither human rights?

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**Summary:** *Having been confronted with the COVID-19 pandemic, the Kingdom of Eswatini has had to adopt both soft and hard response measures. The constitutional emergency response framework had not envisaged the type of emergency brought about by COVID-19, forcing the state to enact extraordinary regulatory measures. Unprecedented emergency powers have been conferred on state functionaries. Questions have arisen as to the nature of these emergency powers, the manner in which these powers have been exercised and the absence of special oversight mechanisms. The response measures and regulations have had an unparalleled impact on lives and livelihoods of Eswatini. This article explores the nature of emergency powers in the laws of Eswatini, and the particular effects of the COVID-19 regulations on human rights. This article commences with an analysis of constitutional emergency powers in Eswatini and the limitations thereof, and considers the question of why the state did not invoke a constitutional state of emergency. The article proceeds to examine the nature of statutory emergency powers under the Disaster Management Act, and considers whether there are effective legal limitations on the exercise of executive authority and effective safeguards against the abuse of power. The article then deals with the particular impact of the COVID-19 response legal framework on human rights protection. In this regard, the article advances examples of situations where rights have been infringed. Finally, the article proposes that the state's response measures should continuously endeavour to mitigate the long-term impact on human rights.*

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## 1 Introduction

The Kingdom of Eswatini has not been spared the scourge of the COVID-19 pandemic. The first confirmed case was recorded on 13 March 2020, and thereafter the number of infections steadily soared. By 30 September 2020 there were 5 462 confirmed cases and 108 deaths<sup>1</sup> in a population of plus-minus 1,2 million people.<sup>2</sup> As in the case of many developing countries, Eswatini has been particularly vulnerable to the scourge of the virus due to the lack of preparedness<sup>3</sup> and a weak healthcare system which has historically been marked by shortages of basic medical necessities.<sup>4</sup> Eswatini is also among the 33 African countries that have been found to be least prepared to deal with COVID-19.<sup>5</sup> The true extent of the spread of this virus remains relatively unknown today.

The government of Eswatini was reactive in its response to COVID-19. A national state of emergency was declared in terms of which government imposed a partial lockdown of the state's operations.<sup>6</sup> The regulations pertaining thereto featured extraordinary measures that were primarily adopted to slow the transmission of the virus and to restrict freedom of movement, consequently restricting people's freedom to enjoy many other human rights. This article examines the way in which the emergency response measures and the implementation of regulations have inadvertently affected the enjoyment of some fundamental rights and impacted lives and livelihoods. The next part includes an examination of the nature of constitutional and statutory emergency powers and the manner in which these have been exercised, in an attempt to discern how the COVID-19 response framework caters for human rights concerns and ensures compliance with the rule of law. The article proceeds to discuss how the lockdown regime has placed human rights and other legal protections under extra pressure, and also addresses

1 Ministry of Health 'COVID-19 update' 30 September 2020.

2 FAO 2020 Southern African Emergency Response Plan (2019-2020), <https://doi.org/10.4060/ca7652en> (accessed 23 June 2020).

3 UN Eswatini 'Economic Situation Report No 1 – COVID-19' prepared by UNRCO Economist M Mamba 30 March 2020 2.

4 EP Chowa et al 'Emergency care capabilities in the Kingdom of Swaziland, Africa' (2017) 7 *African Journal of Emergency Medicines* 15-18.

5 African Development Bank Group 'African Economic Outlook 2020: Coping with the COVID-19 pandemic', [www.afdb.org](http://www.afdb.org) (accessed 20 July 2020).

6 Government of Eswatini *Declaration of national emergency in response to Coronavirus* 17 March 2020.

how the COVID-19 crisis has exacerbated the vulnerability of the least protected in society by causing greater economic and social inequality. The article highlights a few examples of how violations have occurred under cover of the COVID-19 response measures, and concludes with arguments advocating the strengthening of a rights-based approach to COVID-19 in Eswatini. It is commonplace that the state has a continuing duty to respect, protect and fulfil the rights of its people,<sup>7</sup> and that human rights law recognises the necessary limitations on the exercise of certain rights during national emergencies.<sup>8</sup> It is also accepted that an emergency by its nature is temporary.<sup>9</sup> The article therefore recognises that the scale and severity of COVID-19 may reach levels at which the limitation of some rights might be reasonable on the grounds of public health. From that perspective, the article seeks to identify and interrogate the medium and long-term impact of Eswatini's legislative response to people's lives, rather than to downplay the significance of the response measures.

## 2 Nature of emergency powers in Eswatini

### 2.1 Constitutional emergency powers

The Constitution of Eswatini<sup>10</sup> defines a state of emergency as an emergency due to war, natural disaster or an imminent threat thereof, or an imminent terrorist threat.<sup>11</sup> The King, acting on the advice of the Prime Minister, is constitutionally empowered to declare a state of emergency in terms of a proclamation published in the Government Gazette.<sup>12</sup> Once a state of emergency is declared, the Constitution provides that civil liberties may be suspended for a period of 21 days to three months,<sup>13</sup> with the exception of the right to life, equality before the law, security of the person, the right to a fair hearing, freedom from slavery or servitude, the right of access to justice, and freedom from torture, cruel, inhuman or degrading treatment or punishment.<sup>14</sup>

7 D Dessiarto 'Austerity measures and international economic, social and cultural rights' in EJ Criddle (ed) *Human rights in emergencies* (2016) 244.

8 Criddle (n 7) 32.

9 J Oraa *Human rights in states of emergency in international law* (1992) 30.

10 Act 1 of 2005 (Constitution of Eswatini).

11 Sec 36(2) Constitution of Eswatini.

12 Sec 36(1) Constitution of Eswatini.

13 Sec 46(4) Constitution of Eswatini.

14 Sec 38 Constitution of Eswatini.

When read as a whole<sup>15</sup>, the Constitution is unequivocal on the wide-ranging powers of the monarch. The head of state is vested with executive authority;<sup>16</sup> supreme legislative authority;<sup>17</sup> the power to withhold his assent to legislation;<sup>18</sup> and he is vested with ultimate authority in the appointment of members of the judiciary.<sup>19</sup> Evidence of the unrestrained powers of the head of state is more clearly expressed in section 65(4) which states that '[w]here the King is required by this Constitution to exercise any function after consultation with any person or authority, the King may or may not exercise that function following that consultation'.

This indicates that in the exercise of executive functions the King maintains unfettered discretion, and in the context of the state of emergency declaration, the King is not bound to follow the advice of the Prime Minister. When one examines the history of the emergency powers in Eswatini, it becomes difficult to ignore the 1973 Decree<sup>20</sup> which radically changed the political situation in the country. In terms of this Decree,<sup>21</sup> the former head of state unilaterally declared a state of emergency, banned political parties, disbanded government, suspended the 1968 Constitution and consolidated his rule. This ensued after a more radical opposition party had displayed strength in the 1972 elections.<sup>22</sup> From 1973 to 2005 the head of state ruled by decree, with no known limits to his power, the exercise of which was not subject to any checks or balances. In 2001 His Majesty King Mswati III exercised his powers and issued another decree<sup>23</sup> in terms of which he declared a state of emergency in Swaziland. In the absence of a constitution, the decree perpetuated the violation of human rights.<sup>24</sup>

It is interesting to note that in the wake of the COVID-19 pandemic, section 36 of the Constitution was never invoked to

15 It is a general principle of constitutional interpretation to read the constitution as a whole. See the Supreme Court judgment in *Mhlanga & Another v Commissioner of Police & 3 Others* Civ Case 12/2008.

16 Sec 64(1).

17 Sec 106.

18 Sec 108(3).

19 Sec 153(1).

20 Sec 2-3 King's Proclamation 12 April 1973.

21 As above.

22 L Laakso & M Cowen *Multi-party elections in Africa* (2002) 37.

23 Extraordinary Government Gazette Decree 2 of 2001 (23 June 2001).

24 Such as freedom of opinion, expression, media and press freedom. Art 13 of the Decree provides: 'Proscription: Where a magazine, book, newspaper or excerpt thereof is proscribed in terms of the Proscribed Publications Act, 1968 the Minister concerned shall not furnish any reasons or jurisdictional facts for such proscription. No legal proceedings may be instituted in relation of such proscription.' See also sec 7 on the protection of the name and actions of His Majesties; and sec 8, '[m]atters pending before the *Ingwenyama* or King cannot be taken to any court of law'.

declare a state of emergency in Eswatini. The drafters of the 2005 Constitution did not envisage an emergency of this nature under section 36. Had section 36 included a public health emergency, such as the COVID-19 pandemic, the declaration of a constitutional state of emergency would have triggered parliamentary oversight<sup>25</sup> as well as an effective protective role of the Human Rights Commission.<sup>26</sup> This would have gone some way towards ensuring compliance with the rule of law and mitigation of possible rights violations in the response. The implications of a constitutional state of emergency would perhaps have been safer in respect of human rights as safeguards exist in section 38. These are non-derogable rights that include the right to life; equality before the law; security of the person; the right to a fair hearing; freedom from slavery; the right to apply to the High Court for a remedy upon rights violations; and freedom from torture, cruel, inhuman or degrading treatment or punishment. Put together, the constitutional safeguards may have ensured that the state acts within the confines of constitutional authority. It may be observed, therefore, that the decision not to invoke a constitutional state of emergency could have been taken as a matter of political convenience, which consequently enabled the government to act without the constitutional constraints that are implicit in a constitutional state of emergency.

## **2.2 A national emergency in terms of the Disaster Management Act of 2006**

The laws of Eswatini define a 'national emergency' as an emergency due to a disaster event or a threatening disaster (being the COVID-19 pandemic in this case) affecting one or more regions within the state that are unable to effectively deal with it.<sup>27</sup> A state of national emergency is a state in which normal procedures are suspended and extraordinary measures are taken to avert the disaster,<sup>28</sup> a disaster being defined as a serious disruption of society's functioning which causes widespread human and environmental losses, and which exceeds the ability of society to cope by using its own resources.<sup>29</sup> The Disaster Management Act, 2006 (DMA) empowers the Prime Minister to declare a national emergency<sup>30</sup> in consultation with the relevant Minister (in this case the Minister of Health and the Deputy

<sup>25</sup> Secs 36(3)-(7); sec 37(1).

<sup>26</sup> Secs 36(8)-(10).

<sup>27</sup> Sec 29 of the Disaster Management Act 1 of 2006 (DMA).

<sup>28</sup> Sec 2 DMA.

<sup>29</sup> As above.

<sup>30</sup> Sec 29 DMA.

Prime Minister). In the past, section 29 of the DMA was invoked in response to the El Nino drought.<sup>31</sup>

The COVID-19 pandemic has brought about a national disaster. Hence, it would be legally proper to state that Eswatini is in a state of 'national disaster emergency'. Clarity on the distinction between a constitutional state of emergency and a national emergency is critical because on 17 March 2020 a 'national state of emergency' was declared in Eswatini, in terms of which a 'partial lockdown'<sup>32</sup> was imposed by the state. Among other things, all events and gatherings were cancelled, schools were closed, international travel was banned and visas were revoked.<sup>33</sup> Announcing the declaration, the Prime Minister stated:

I have been commanded by His Majesty King Mswati III and *Ingwenyama* to invoke section 29 of the Disaster Management Act 2006, having assessed the magnitude and severity of the outbreak of the Coronavirus (COVID-19) pandemic confirmed world over, to declare a national emergency in the Kingdom of Eswatini with immediate effect for a period not exceeding two (2) months.

This statement highlighted a larger issue about the manner in which the executive executes its mandate, as well as the nature and implementation of the lockdown regulations. First, the wording used in both the legislative instruments and the declarations of emergency brought confusion to non-lawyers as to which type of 'emergency' was being declared. For the Prime Minister to state that he has been commanded by the monarchy would mean either that the Prime Minister was announcing a declaration made by the King, or exercising authority delegated not from the statute (the DMA) but from the monarchy. Both derivations would be inaccurate as the only manner in which the King would declare and pronounce a constitutional state of emergency would be in terms of a Proclamation as required by section 36 of the Constitution. The 'royal command', therefore, had no clear role or legal justification in the Prime Ministers' declaration, especially because the COVID-19 pandemic clearly brought about a national emergency and not a constitutional state of emergency, as it fell outside of the ambit of section 36. Additionally, the Prime Minister's statement did not purport to invoke section 36 of the Constitution. Nevertheless, the public remained confused as to the implications of the declaration

31 Government of Swaziland *Swaziland drought rapid assessment report* (2016).

32 The lockdown was partial in the sense that government, in view of the need for continuity in key operations of the state and certain businesses or institutions in both the public and the private sectors of the economy, decided not to adopt a total shutdown of the country.

33 Government of Eswatini (n 6).

announced in such a manner, giving some an indication that the Prime Minister acted in terms of powers derived from the King.

This issue goes to the heart of respect for the rule of law in Eswatini, a founding value protected in paragraph 5 of the Preamble to the Constitution. Where a statute confers detailed authority or power on the Prime Minister to act, there is no need or justification for the monarchy to interfere in the exercise of that function. The wording used by the Prime Minister not only brought confusion but, as will be discussed further in this article, it subsequently opened the door to certain types of human rights violations by law enforcement officials who may have laboured under the impression that the country was in a 'state of emergency' as defined in the Constitution, which would permit the derogation of rights.<sup>34</sup> Some lawyers have argued that because the Constitution vests the King with executive authority<sup>35</sup> and that the King-in-Parliament is vested with supreme executive and legislative authority,<sup>36</sup> the King legitimately exercised his authority through the Prime Minister by commanding the Prime Minister to declare the national emergency.<sup>37</sup> However, this argument would then bring into question the intention of the legislature. Had the legislature intended to defer the declaration of a national emergency to the authority of the King, the DMA would have explicitly provided as such in section 29. What is even more puzzling from this experience is the clear absence of a separation of powers. It must be noted that constitutionally 'the King' and *Ingwenyama* refer to the head of state,<sup>38</sup> the latter in his capacity as traditional head of the Swazi state,<sup>39</sup> whose role is a customary one.<sup>40</sup> This means that the powers of the monarchy, in both capacities, are unlimited and overreaching the executive.

Returning to the emergency powers enshrined in section 29 of the DMA, the Prime Minister, in consultation with the Deputy

34 Incidents of brutal enforcement of lockdown regulations by the police reported on mainstream media: K Sibiya 'Policeman shoots boy, 15, playing football during Coronavirus lockdown' *Times of Eswatini* 13 April 2020 2; Z Dlamini 'PM condones police brutality during lockdown' *Independent News Eswatini* 15 April 2020 1.

35 Sec 64 (4) Constitution of Eswatini.

36 Sec 106 Constitution of Eswatini.

37 It has been argued that the Prime Minister of Eswatini only enjoys powers as delegated by the King. See S Boysen 'The legislature of Swaziland – Compromised hybrid' in N Baldwin (ed) *Legislatures of small states: A comparative study* (2013) 88.

38 Sec 4 Constitution of Eswatini.

39 Sec 228 Constitution of Eswatini.

40 See A Dube & S Nhlabatsi 'The King can do no wrong: The impact of the *Law Society of Swaziland v Simelane NO & Others* on constitutionalism' (2016) 16 *African Human Rights Law Journal* 281.

Prime Minister<sup>41</sup> and the National Disaster Management Council,<sup>42</sup> is empowered to determine and classify<sup>43</sup> a threatening disaster event, and to declare a national emergency.<sup>44</sup> The Act provides for the establishment of a national disaster management policy and an operationalisation plan thereof, which is subject to cabinet approval and publication in the *Government Gazette*.<sup>45</sup> The Act also provides for the establishment of the Ministerial Disaster Management Team chaired by the Deputy Prime Minister (DPM), consisting of cabinet ministers responsible for their respective portfolios.<sup>46</sup> This team carries an advisory function as it is mandated to give recommendations to the Prime Minister on policy, coordination, emergency declarations and compliance with international obligations.<sup>47</sup> The Act also provides for the establishment of the Disaster Management Council, which is a technical advisory organ to the DPM, consisting of principal secretaries from the various ministerial portfolios, executive representatives of the disciplined forces, emergency departments, regional secretaries, chiefs, religious and welfare groups, and civil society.<sup>48</sup> The National Disaster Management Agency (NDMA) is established in terms of Part II of the DMA as the primary implementing body.

This framework enables almost all key stakeholders within the central and local government hierarchy to participate in the national disaster response. Read in its entirety, the Act clearly vests major executive powers in the Prime Minister and the Deputy Prime Minister who work in collaboration with a select cabinet committee. It is also clear that the Act does not establish any special mechanism for ensuring the accountability of these state officials and for the prevention of abuse of emergency powers. This especially is a risk factor as the state of emergency by its nature calls for an immediate legislative response, and that alone creates the possibility of the absence of systems of checks and balances that would be done in the ordinary legislative process. The provisions of the Act are generally couched in terms that primarily cater for emergency response and the mitigation of disaster-related harm. Nowhere in the Act is there provision for human rights considerations in the response framework and in the implementation of emergency response plans.

41 The Minister responsible for disaster management is the Deputy Prime Minister. See sec 2 of the DMA.

42 Appointed in accordance with secs 8-11 of the DMA.

43 In conducting the assessment of the magnitude and severity, the Prime Minister may also enlist the services of an independent assessor. See sec 29(2). In the case of COVID-19 the state relied on the WHO, the Ministry of Health and other partners for expert information.

44 Secs 29(1)-(6) of the DMA.

45 Sec 4. An example is the NERMAP 2016-2022.

46 Sec 5 DMA.

47 Sec 6 DMA.

48 Sec 10 DMA.

Instead, glaring possibilities of rights violations are apparent. For example, special discretionary powers are conferred upon the Deputy Prime Minister to take action necessary for the preservation of human life 'without authority'.<sup>49</sup> Such action includes compelling or preventing the evacuation or movement of people and resources between disaster-stricken areas, and directing the termination or restriction of public utility services. Police officers and members of the army are also given powers of search and seizure which they are permitted to exercise without authority or a warrant.<sup>50</sup>

The DPM is empowered to make regulations for purposes of the Act,<sup>51</sup> and it is interesting that the powers and functions of the DPM may further be delegated to 'any person in the public service'.<sup>52</sup> For that reason, section 44(1) of the DMA appears to be contrary to the constitutional and administrative law principle *delegatus non potest delegare* according to which powers conferred on a person through delegation cannot be further delegated to another person.<sup>53</sup> The conditions of delegation are also questionable as, even though they are required to be in writing, they are made subject to 'unspecified' conditions.<sup>54</sup> Therefore, there are limited safeguards on the prevention of *ultra vires* acts or undefined authority. Even though in practice the DPM's office has not delegated the authority to develop the COVID-19 regulations, ministers have been accorded the prerogative to develop and issue guidelines for the enforcement of the regulations. This article will demonstrate how this state of affairs has resulted in indecisive leadership, back and forth regulations, and has created legal uncertainty during the lockdown.

The DMA required the state, through the Minister of Finance, to create a Disaster Management Fund, the objective of which is to fund the disaster management plan, emergency relief and relief operations.<sup>55</sup> At the inception of the state of emergency the fund had not been created. What existed before 2006 was a Disaster Relief Fund managed by the Deputy Prime Ministers' office and the NDMA which subsequently became dormant after 2005 as its mandate had lapsed. It must be noted that if the fund had been created after the Act came into force in 2006, the state would have had resources saved up to finance expenses aimed at mitigating the effects of COVID-19. The state therefore has been caught off-guard

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49 Sec 32(1).

50 Sec 32(2).

51 Sec 43.

52 Sec 44(1).

53 C Parker *Administrative law cases and materials* (2019) 90-91.

54 Sec 44(3)(b).

55 Sec 35(1).

in terms of financing the national response, and relies heavily on donor funding and loans, a situation that will have a negative impact on the country's economy. Following the declaration, the state put in place a National Emergency Committee made up of all members of cabinet, as well as a task team consisting of commanders of the disciplined forces, regional administrators and many technical experts that are representative of non-governmental organisations (NGOs), industry, health and other sectors. These organs were responsible for coordinating and implementing emergency policy plans.

The emergency powers discussed above are subject to limitations provided for in sections 33 and 35 of the Constitution (the right to administrative justice and the right to approach the High Court for a remedy) which create an oversight role for our courts. The national Human Rights and Public Administration Commission is also established by the Constitution<sup>56</sup> with the mandate to investigate complaints about human rights violations and to provide remedies. Although the Commission has received and investigated complaints submitted to it, its remedial role remains curtailed by the absence of enabling legislation.<sup>57</sup> The legislature also plays an oversight role by, for example, interrogating the tendering processes and general expenditure of COVID-19 funds. Even though parliament at times is constrained by the need to work remotely in the context of the lockdown and the continued spread of the virus to members, the response to COVID-19 is monitored by the legislature through a parliamentary select committee.

The partial lockdown took effect on 27 March 2020 after the regulations had been passed by Parliament.<sup>58</sup> Although Parliament had a role in passing the regulations, the exigent circumstances under which they scrutinised these regulations provided limited time and therefore constituted an insignificant oversight mechanism. In April 2020 the Prime Minister announced a gradual easing of the partial lockdown, but in view of the escalations in cases of infection, an almost total shutdown was re-instated a week later. The lockdown has been extended three times.<sup>59</sup> There has generally been back and forth regulations as changes are announced almost every week by the state. The sudden changes and easing of the lockdown created

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<sup>56</sup> Sec 163.

<sup>57</sup> Commission on Human Rights and Public Administration 'Press statement: Concerns on human rights violations during the COVID-19 pandemic' 1 June 2020. The Human Rights and Public Administration Omission Bill of 2020 has not yet been passed by Parliament.

<sup>58</sup> The Coronavirus (COVID-19) Regulations 2020 *Government Gazette* 53 (VII) (27 March 2020).

<sup>59</sup> The Declaration of a National Emergency (Extension of Time) Legal Notice 66 of 2020 and Legal Notice 80 of 2020.

confusion which could be attributed to the unprecedented growth in the numbers of infections. It was also noted that in extending the period of the lockdown, the Prime Minister stated that '[g]overnment has re-issued a Declaration in accordance with Section 29 of the Disaster Management Act'.<sup>60</sup> The Act requires a Government Gazette to be issued to extend the partial lockdown.<sup>61</sup>

The rule of law is of crucial importance as it serves to avoid the arbitrary use of power, and it protects all people from human rights abuses that flow from arbitrariness. The exercise of state authority must be authorised by specific legislation or regulations made under the enabling Act.<sup>62</sup> It is also crucial that the law authorising the exercise of public power must be certain and clear, not subject to conflicting interpretations, so that the public to whom the law applies knows what is expected of them.<sup>63</sup> This is the principle of legality.<sup>64</sup>

### 3 COVID-19 regulations and their impact on human rights and the rule of law

While the Constitution provides for the derogation of rights in a constitutional state of emergency, it has been established that Eswatini's response measures were taken in terms of the DMA and the COVID-19 regulations, rather than the constitutional derogation clause. It may be argued, therefore, that the state's duty to ensure the protection of constitutional rights continues even during the national emergency.<sup>65</sup> It is accepted, however, that the nature of COVID-19 has called for a response that will at times result in a legitimate limitation or infringement of rights. These limitations and infringements must nevertheless be permitted by just laws; they must be absolutely necessary, and must be proportionate to the aims of the response.<sup>66</sup> As provided in section 37 of the Constitution:

60 Statement of the Prime Minister of Eswatini, 23 June 2020.

61 Secs 29(3) and 29(7) of the DMA.

62 T Maseko & L Abdulrauf 'Constitutional implementation: The Swaziland experience' in CM Fombad (ed) *The implementation of modern African constitutions: Challenges and prospects* (2016) 72.

63 As above.

64 See art 15 of the International Covenant on Civil and Political Rights 1966 (ICCPR).

65 Eswatini is also bound by its ICCPR obligations including art 4 of ICCPR; the Convention Against Torture (CAT); Human Rights Committee General Comment 29. Eswatini is expected to abide by the non-binding Paris Minimum Standards of Human Rights Norms.

66 International Institute for Democracy and Electoral Assistance 'The impact of the COVID-19 crisis on constitutionalism and the rule of law in Anglophone countries of Central and West Africa' (2020) Analytical Report, Webinar 28 May 8, DOI: <https://doi.org/10.31752/idea.2020.30> (accessed 1 July 2020).

Nothing contained in or done under the authority of a law shall be held to be inconsistent with or in contravention of any provision of this chapter (the Bill of Rights) to the extent that the law authorises the taking, during any period of public emergency, of measures that are reasonably justifiable for dealing with the situation that exists during that period.

The outbreak of COVID-19 in Eswatini brought about a crisis and a threat to human life. One may therefore argue that the response measures limiting or restricting the enjoyment of rights came with new exceptions and variations from normalcy in the realm of human rights protection, and that fact raises a debate as to whether or not the measures that have an impact on human rights may be permissible in terms of the Constitution. Indeed, the supremacy of the Constitution has been tested under these circumstances because statutory law and regulations, which are the *lex specialis* in this context, are being used as the primary response framework, without constitutional guidelines. While it is true that the response measures have assisted Eswatini's attempts to delay the spread of the virus, the COVID-19 regulations imposed a plethora of limitations on the enjoyment of rights and, in an unequal society that is Eswatini,<sup>67</sup> those limitations have had disparate effects on the population.

The freedom to move freely throughout Eswatini guaranteed by the Constitution<sup>68</sup> is subject to limitations on the grounds of public health and safety.<sup>69</sup> Restrictions on the movement of persons are also sanctioned by the DMA.<sup>70</sup> The regulations banned non-essential travel between towns and cities, loitering in public spaces, and also restricted the use of public transportation by requiring a one metre distance between passengers.<sup>71</sup> The regulations specifically banned non-essential cross-border travel and provided for a systematic tracking of all cross-border travellers.<sup>72</sup> Although the main objective of the travel restriction was to break the chain of infections, issues arose with regard to the lack of clarity on what constituted essential travel, as well as issues pertaining to inconsistencies in the enforcement of these regulatory restrictions. It was officially communicated and widely accepted that internal travel to seek medical attention, to procure household necessities such as food, and travel by emergency response officials were classified as essential and were permitted subject to travellers obtaining written permits from their local

67 T Debyly 'Culture and resistance in Swaziland' in C Bassett & M Clarke (eds) *Postcolonial struggles for a democratic Southern Africa* (2016) 4.

68 Sec 26 Constitution of Eswatini.

69 Secs 26(3)(a) & (b) Constitution of Eswatini.

70 Sec 32 DMA.

71 Regulation 15.

72 Regulation 16.

government authorities (chiefs, *Tindvuna tetinkhundla* or *Bucopho*).<sup>73</sup> However, there was no standard form or criteria for the local authorities to assess and grant these permits. Hence, there were many reported incidents of unjustified refusals to grant permits, as well as many cases of dubious permits.<sup>74</sup> Even though the restrictions on the freedom of movement may have been proportionate to the aims of the response, they may not have been 'non-discriminatory'.<sup>75</sup> For example, the Commissioner of Police unilaterally decided to suspend these permits through a press statement<sup>76</sup> wherein the commissioner reasoned that he had noted an influx of permits issued by traditional local authorities and that those rendered the regulations useless. The commissioner proceeded to impose a curfew on the Manzini city, which in itself constituted a highly-punitive measure. Although the commissioner has the authority to make guidelines to combat COVID-19 within police stations, posts and holding cells,<sup>77</sup> the DMA does not empower the commissioner to make national regulations, but only to enforce regulations. More concerning is the fact that neither the regulations nor the Act provide for any safeguard against the abuse of the regulations. Not only did the commissioner's unilateral imposition of a curfew and new regulations constitute an usurpation of executive authority, but it also had an considerable impact on the lives of people whose livelihoods relied on their ability to move from place to place, such as hawkers.

The border lockdowns have also severely affected populations that live along the borders of South Africa and Eswatini in areas such as Pongola/Piet-Retief/Mshololo; Matsamo/Schoemansdal; and Mozambique-Eswatini. The use of informal crossing points has been reported to be on the rise due to the dependence of those persons on education, services and opportunities obtainable from either side, as well as their dependence on illicit trade in alcohol and cigarettes – which for some has become a source of earning a living.<sup>78</sup> Before COVID-19, these informal crossings operated without tough restrictions from border-line defence forces, and therefore people have established their livelihoods on those premises. However, since the lockdown the defence forces on both sides have strictly manned informal crossings, and turned people back. Although it

73 Local headmen and members of the Chief's Council.

74 K Khumalo & Z Dlamini 'NATCOM suspends travel permits from chiefs' *Eswatini Observer* 30 April 2020.

75 UN 'COVID-19 and human rights: We are all in this together' April 2020 4, [https://www.un.org/sites/un2.un.org/files/un\\_policy\\_brief\\_on\\_human\\_rights\\_and\\_covid\\_23\\_april\\_2020.pdf](https://www.un.org/sites/un2.un.org/files/un_policy_brief_on_human_rights_and_covid_23_april_2020.pdf) (accessed 2 June 2020).

76 M Msweli 'Epicentre Manzini under lockdown' *Times of Eswatini* 27 April 2020 1.

77 Sec 2 & 32(1) DMA.

78 See F Musoni *Border jumping and migration control in Southern Africa* (2020) 81-82.

is illegal to cross at the informal crossings, it may be argued that the prevailing strict enforcement has created an injustice in terms of which established livelihoods are now being disrupted, and this disruption will foreseeably have a long-term negative impact on the socio-economic rights of the communities living in the affected areas.

One of the consequences of internal travel restrictions during the initial period of the lockdown was that some people were unable to access healthcare services. This particularly affected those taking anti-retroviral treatment, and patients with existing chronic illnesses such as tuberculosis. The declaration advised the public not to visit medical healthcare facilities unless it was an emergency, and the problems associated with travel permits, as explained above, exacerbated people's inability to access health care. The Constitution of Eswatini categorises the right to health as a non-justiciable directive principle of state policy. It provides that '[t]he state shall take all practical measures to ensure the provision of basic health care services to the population'.<sup>79</sup> Eswatini is also party to a number of international conventions that guarantee the right to the highest attainable standards of health.<sup>80</sup> A major objective of the national COVID-19 response framework was to preserve the health of all persons in Eswatini by preventing the transmission of the virus and minimising the loss of lives.<sup>81</sup> The regulations therefore properly placed a legal duty on all persons to prevent the transmission<sup>82</sup> and a compulsory obligation to notify the Ministry of Health of any person exhibiting COVID-19 symptoms.<sup>83</sup> They further provided for the isolation of symptomatic persons and those that have been in contact with a symptomatic person.<sup>84</sup> These provisions clearly protected the right to health and also recognised its inextricable link to the right to life.<sup>85</sup> It was disturbing, therefore, that a 54 year-old COVID-19 patient who refused treatment and refused to be admitted into a health facility was never compelled into isolation and to undergo the prescribed treatment procedures, but opted to self-isolate. In an undocumented statement, the Minister of Health informed the nation that this patient had exercised their constitutional right to refuse medication. The Minister stated:

79 Sec 60(8) Constitution of Eswatini.

80 Universal Declaration of Human Rights 1948 art 25; International Convention on Economic, Social and Cultural Rights 1966 (ICESCR) art 12.

81 See sec 15 of the Constitution of Eswatini read together with the DMA and the COVID-19 Regulations.

82 Regulation 3.

83 Regulations 4 & 7.

84 Regulations 8-12.

85 See Office of the United Nations High Commissioner for Human Rights The Rights to Health Fact Sheet 31. See also IE Koch *Human rights as indivisible rights: The protection of socio-economic demands under the European Convention on Human Rights* (2009) 60.

We respect people's rights as enshrined in the Constitution to say no to certain types of treatment if they do not need them. But we need to emphasise that we are dealing with a contagious disease here, so we appeal to the nation to please comply.

It is submitted that the Ministry of Health and the COVID-19 enforcement officers have a legal duty in terms of section 12 of the COVID-19 regulations to isolate or quarantine a patient and to administer treatment to them. The regulation proceeds to specify that such a person 'shall not refuse consent' to an enforcement officer.<sup>86</sup> The right to refuse treatment therefore is unfounded in this context. There are exceptions to the guarantee of the right to life in terms of the Constitution, and those exceptions do not cover this type of situation.<sup>87</sup> In this case, the Ministry of Health and the NDMA had a duty to act as per the dictates of section 12 in order to prevent the possible loss of her life and the lives of those that would have been in contact with this patient.

Health workers have also been affected by the state's inability to provide sufficient personal protective equipment (PPE). The Nurses' Union had planned to institute an action against the government complaining about the non-availability of PPEs, and the overcrowding of hospitals.<sup>88</sup> Although at the time of writing this article the matter had not yet been enrolled in our courts, the continued inadequate availability of PPEs has placed the lives of health workers and those of patients at risk. There have also been reports of government hospitals' incapacity to handle COVID-19, dental services, and reports of persons being denied health care because of the lack of PPE.<sup>89</sup> It is probable that the deterioration in healthcare delivery and access to health care might lead to more illness and a greater loss of lives.

The right to work and the right to pursue a lawful trade or business<sup>90</sup> have also been affected by the lockdown. The halting of the operation of various businesses has created unemployment, especially within the manufacturing and hospitality industries,

86 Regulation 12(2).

87 In sec 15(4) it is provided that a person may not enjoy the right to life in the event they are convicted and sentenced to death or when medical treatment poses a serious risk to their health (in the context of abortion).

88 J Richardson 'eSwatini: Nurses' union to take government to court over handling of the COVID-19 crisis' *The South African* 29 April 2020 1.

89 JL Pigoga et al 'Evaluating capacity at three government referral hospital emergency units in the Kingdom of Eswatini using the WHO Hospital Emergency Unit Assessment Tool' *BMC Emerg Med* (2020) 33.

90 Sec 32 Constitution of Eswatini.

and has resulted in food insecurity for many families.<sup>91</sup> This has exacerbated the already high poverty levels in Eswatini. It is observed that the COVID-19 regulations do not equally effect all people: While persons in the middle and higher classes who enjoy secure employment were being inconvenienced by the lockdown, the lower class who are financially insecure and the destitute people of Eswatini have been hit hard. Food aid and cash relief grants or social welfare grants have been provided to deserving communities by the National Disaster Management Agency. However, not all deserving persons have received the grants. In the Manzini region, for example, more than 700 persons registered for the grants, but by 21 June 2020 only 20 people are reported to have received the funds.<sup>92</sup> The criterion for destitute persons that qualify for the grants has also not been made clear to the public upon registration.<sup>93</sup> It appears as if the determination is made at the discretion of politicians in each constituency.

The lockdown has also had a significant impact on non-essential businesses and their employees. The closure of businesses has resulted in very low or no profit for some businesses, such that they have failed to pay salaries. The courts have been robust in their response against such rights violations, as demonstrated in the case of *Vilakati & Others v Du Toit Holdings (Pty) Limited t/a The Specialists*.<sup>94</sup> In this matter the applicants had filed an urgent application before the Industrial Court contending that they were paid drastically reduced salaries for the month of May 2020 without any prior consultation as required under the Guidelines on Employment Contingency Measures in Response to the Coronavirus (COVID-19) Pandemic Notice. They applied for an order setting aside the employer's decision to reduce salaries, declaring this unlawful. The Court held that, even though the reasons behind salary cuts were understandable in the circumstances, the decision to reduce salaries was procedurally unfair and it constituted an unfair labour practice as it was taken without genuine and effective consultation. Hence, it was set aside.

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91 See United Nations Food and Agriculture Organisation 'Crop prospects and food situation' *Quarterly Global Report* 2 July 2020 23; and the IPC Eswatini Acute Food Insecurity Analysis June-September 2020, <https://reliefweb.int/report/eswatini/eswatini-acute-food-insecurity-situation-june-september-2020-and-projection-october> (accessed 30 September 2020).

92 Z Dlamini 'Pay back the money or face arrest – NDMA CEO' *Eswatini Observer* 21 June 2020 2.

93 See TG Nhaphi & J Dhemba 'The conundrum of old age and COVID-19 responses in Eswatini and Zimbabwe' *International Social Work* (2020) 1-5.

94 *Vilakati & Others v Du Toit Holdings (Pty) Limited t/a The Specialists* (34/2020) [2020] SZIC 92.

The regulations have also provided for the protection of consumers by outlawing price increases.<sup>95</sup> This was an attempt by the state to exercise its responsibility to protect<sup>96</sup> in terms of which the Ministry of Commerce and Trade, as well as the Eswatini Competition Commission, have actively guarded against the over-inflation of prices during the period of the national emergency.

As stated earlier, the emergency declaration announced the immediate closure of schools and tertiary institutions and, subsequently, the regulations affirmed the position.<sup>97</sup> The closure invariably disrupted the right to education.<sup>98</sup> At the initial stages of the lockdown there were no plans in place for home-based or remote learning. The difficulties in asserting the right to education in Eswatini were highlighted early in *Swaziland National Ex-Mine-Workers Association v The Ministry of Education & Others*,<sup>99</sup> where it was found that the state's obligation to provide free education is subject to the availability of resources. The Ministry of Education in July 2020 instituted distance-learning programmes that were run through national media houses that have country-wide coverage. Many primary, secondary and high school learners have been able to receive lessons via radio, the national newspaper, and these programmes are made available at all tinkhundla<sup>100</sup> centres around the country.<sup>101</sup> However, it is true that a minority of children without access to radio's and newspapers, and those who cannot travel to their local inkhundla continue to face difficulties and are thereby excluded. Private schools and tertiary institutions around the country are implementing online learning systems. However, similar issues of inaccessibility and exclusion are experienced by students who are without the required devices or data, as well as students living in remote areas where the mobile network coverage is poor. When the state announced the staggered re-opening of learning institutions in July, only students in the final years of study were to return to their institutions subject to the institution having been certified as ready to receive learners in compliance with the World Health Organisation (WHO) guidelines adopted by the state which require screening, social distancing, the availability of sanitary equipment, isolation centres,

95 Regulations 17-20.

96 S Seck & D Chimisso Dos Santos 'Exports, credits sovereign debt and human rights' in I Bantekas & C Lumina (eds) *Sovereign debt and human rights* (2019) 90.

97 Regulation 27.

98 Sec 29 Constitution of Eswatini.

99 (2168/09) [2010] SZHC 258.

100 These are local government centres located at political constituencies across the country.

101 [www.globalpartnership.org](http://www.globalpartnership.org) (accessed 5 August 2020).

the training of all persons, and so forth.<sup>102</sup> However, at the time of reopening there were, and are still, safety concerns among both learners and teachers as the pandemic remains on the rise in Eswatini. In many schools there is a visible lack of the COVID-19 institutional checklist requirements. The difficulties surrounding the closure and reopening of schools have been highlighted in the case of *Swaziland National Association of Teachers v Ministry of Education and Training, the Attorney General & Others*.<sup>103</sup> In this case the teachers' association instituted an action against the government of Eswatini based on section 18 of the Occupational Health and Safety Act<sup>104</sup> calling for the state to provide PPE for teachers so as to protect the teachers' and learners' right to life. The teachers argued that COVID-19 in their context was an occupational disease<sup>105</sup> to which they risked exposure. Although the matter has not yet been finalised, it can be anticipated that the decision and the modalities of reopening schools will have a long-term impact for both teachers' and learners' rights right to health and the right to education. The competing interests between the health and safety of persons in learning institutions can be balanced through strengthening the already-existing systems of remote learning as well as providing affordable access to the required facilities such as teaching and learning tools as well as recognising internet access as a human right.<sup>106</sup>

The lockdown regulations have also limited the number of persons at gatherings and, initially, a total closure of places of worship.<sup>107</sup> Although the constitutional freedom to practise a religion and the freedom to worship in community with others<sup>108</sup> are guaranteed, they remain subject to legal limitations on the grounds of public health and safety.<sup>109</sup> In the wake of 9 June 2020 the Minister of Home Affairs released a highly-controversial statement in which she announced that places of worship may reopen with a maximum of 70 per cent attendance capacity, but following a public outrage, the Minister retracted the statement in a subsequent press statement to state that the maximum capacity is 70 people instead of 70 per cent, which also shocked the entire nation as it became clear that the

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102 Government of Eswatini Ministry of Education and Training *Schools guidelines on prevention of COVID-19* (2020).

103 Industrial Court Case 163/2020.

104 Act 9 of 2001.

105 The WHO defines an occupational disease as 'any disease contracted primarily as a result of an exposure to risk factors arising from work activity'.

106 See A Peacock *Human rights and the digital divide* (2019) 1.

107 Ministry of Home Affairs press statement 'COVID-19: Suspension of services' 31 March 2020, which banned all church gatherings and limited the number of people to no more than 20 at other types of gatherings. The number was later on increased to 50.

108 Sec 23 Constitution of Eswatini.

109 Sec 23(4) Constitution of Eswatini.

Minister exercised her own discretion and in an arbitrary manner.<sup>110</sup> This not only caused legal uncertainty, but also made the rationale for reopening churches questionable. Numerous other back and forth regulations have occurred with minimal institutional checks and balances, which negates the rule of law. Subsequent guidelines on gatherings,<sup>111</sup> for example, allowed for churches to apply for permits to operate at 30 per cent holding capacity of the place of worship, which was later revised<sup>112</sup> to allow for 20 people, a one-hour service, a total ban on persons over the age of 50 and on children below 15 years of age. These legal uncertainties have the potential to cause people to lose faith in the legal system in the long term, and to lose faith in the ability of the state to protect them or act in their best interests.

As a customary cultural and religious practice, many people of Eswatini have traditionally conducted burials as a community affair, as many African communities do.<sup>113</sup> Families, extended family, friends, colleagues and the church have normally congregated to bury their own, following rituals tied to their ethnicities, cultures and religious beliefs. The practice of such rituals and customs had come to be known as burial rights.<sup>114</sup> The state has amended the COVID-19 regulations<sup>115</sup> and provided guidelines on the management of the body of a person who has died from 'acute respiratory illness'.<sup>116</sup> The new guidelines have fundamentally altered the traditional manner in which the body of such a deceased person is handled, the persons permitted to handle and transport the body, the management of the home and at the burial ground.<sup>117</sup> Although these regulations are in line with international or WHO guidelines, they have resulted in burials becoming a private affair. It is foreseeable that in the long term the burial customs and practices of the people of Eswatini may be lost.

There have been notable incidents of unequal enforcement of lockdown Regulation 25 which restricts the number of persons in public gatherings. Media reports have covered numerous government events in which gatherings exceeded the maximum number. These

110 Z Dlamini 'Cabinet pressured, retracts changes announced by Minister' *Eswatini Observer* 10 June 2020.

111 Ministry of Home Affairs Variation of Gatherings Directive, 8 July 2020.

112 Ministry of Home Affairs Variation of Gatherings Directive, 24 July 2020.

113 M Okechukwu Izunwa 'Customary right to befitting burial: A jurisprudential appraisal of four Nigerian cultures' (2016) 12 *Ogirisí: A New Journal of African Studies* 122.

114 *Shabangu-Zwane v Shabangu & Others* (85/2019) [2020] SZSC 1.

115 The Coronavirus (COVID-19) (Amendment) Regulations 2020.

116 As above.

117 As above.

events were generally state-led COVID-19 sensitisation workshops at tinkhundla centres. However, the police have ignored these, and have rather been stricter in policing church gatherings<sup>118</sup> and social events. The problem is that there is a general failure to hold those in authority accountable for their wrongful conduct. Law enforcement officials, that is, the police, the army and correctional services officers, have not been impartial in the enforcement of regulations. Their use of force must ideally be reasonable and proportionate to the aims of the regulations. The regulations allow for the engagement of the military and other disciplined forces to aid the enforcement of the regulations,<sup>119</sup> but there are no special mechanisms in place to ensure that there is no unjustified use of force or inhumane treatment of persons. Although Eswatini is a state party to the 1984 Convention against Torture (CAT), legislations such as the Public Order Act of 2017 and the Police and Public Order Act 1963 provide that a gathering that is deemed by a police officer (above the rank of sergeant) to be a direct and immediate threat to public order or safety may be dispersed, if necessary by force necessary to secure the dispersal of the gathering, and shall be proportionate to the circumstances of the case and the object to be attained. It is unfortunate that in carrying out their mandate, law enforcement officials on many occasions have found to have failed the proportionality test.<sup>120</sup> The unfortunate situation is that Eswatini does not have a specialised independent police oversight body with a mandate that may be similar to that of the South African Independent Police Investigative Directorate. The lack of efficient checks and balances over law enforcement authorities makes it difficult to avoid the excessive use of power.

The impact of the COVID-19 regulations has been felt strongly within the alcohol production and distribution value chain. Alcohol consumption has been identified as one of the leading factors that can increase the chances of the spread of the Coronavirus, and therefore has been banned in Eswatini.<sup>121</sup> This was done in terms of Regulation 21 and 32 which give the Prime Minister and cabinet ministers the power to issue guidelines to address, prevent and

118 Four pastors were arrested in April for violating Regulation 25 and sentenced to 12 months' imprisonment or 2000 fine which they paid. See S Khumalo 'Four pastors arrested for defying COVID-19 Regulations' *Times of Eswatini* 7 April 2020 1.

119 Regulation 32(3). The powers conferred upon the Minister by subsection (1) may be exercised also by a police officer, a member of the army or a member of the fire emergency service and any other authorised person.

120 See eg *Matsebula v The National Commissioner of Police & Another* (542/2017) [2020] SZHC 35; *Rose Magameni Lukhele (nee Fakudze) v The Commissioner of Police & Another* (1088/2012) [2015] SZHC 170.

121 This was contained in an official statement by the Prime Minister of Eswatini, Mr Ambrose Mandvulo Dlamini, on 1 July 2020 when he announced the immediate ban on the production and distribution of alcohol.

combat the spread. The sale of alcohol was banned in April, reopened on 15 June, and once again closed on 1 July, in response to a continued rise in COVID-19 cases between 15 and 30 June. The state has taken the position that alcohol consumption results in irresponsible behaviour and that it was necessary to prevent the health system being overwhelmed by alcohol-related cases.<sup>122</sup> The Swaziland National Liquor Association, through a Communiqué to the Prime Minister, challenged the regulations, arguing that the ban had been instituted arbitrarily and irrationally, without consultation of industry stakeholders, and that as such it went against the right to administrative justice.<sup>123</sup> They argued that the ban violated sections 59 and 60(3) of the Constitution.<sup>124</sup> They also argued that the closure of wholesale and distribution would negatively impact all workers employed within the value chain. Although no legal action has been taken in respect of this matter, it is worth noting that the right to administrative justice and the right to continue a lawful trade or business do not fall under the derogations that were prohibited in section 38 of the Constitution. Therefore, the sale and distribution of liquor could be lawfully restricted. The total ban remained in force up to the end of September 2020, and it has undoubtedly decimated the industry and those dependent on it.<sup>125</sup> It may also be observed that the basis of the liquor ban may not have been due to the fault of traders and distributors in violating COVID-19 regulations but, instead, the justification for the ban was attributable to the fault of the end users. It is submitted, therefore, that the total ban brought about an injustice in that the rights and livelihoods of persons within the entire value chain were infringed because of the non-compliance of end users.

#### 4 Balancing response measures and public health objectives with human rights

In view of the magnitude of the impact of the COVID-19 pandemic on people's lives, it is important that the state's response measures should continuously endeavour to mitigate the impact on human

122 As above.

123 Sec 33 Constitution of Eswatini.

124 Sec 59(1) provides that '[t]he state shall take all necessary action to ensure that the national economy is managed in such a manner as to maximise the rate of economic development and to secure the maximum welfare, freedom and happiness of every person in Swaziland and to provide adequate means of livelihood and suitable employment and public assistance to the needy'. Sec 60(3) states that '[t]he state shall give the highest priority to the enactment of legislation for economic empowerment of citizens'.

125 N' Mhlongo 'Eswatini beverages effects 10% salary cuts' *Times of Eswatini* 17 August 2020.

rights. The right to health itself is inextricably linked to other human rights. This is because one can only enjoy all other rights when they are in 'a state of complete physical and mental health, and not merely the absence of disease or infirmity'.<sup>126</sup> The right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.<sup>127</sup>

It is important to consider the socio-economic and political context within which the COVID-19 response has been framed. In the past decade the government of Eswatini has experienced major financial challenges that have been caused by a variety of factors including the rising government debt,<sup>128</sup> poor governance and corruption.<sup>129</sup> COVID-19 hits the state at a time when the new government elected in 2018 was at the early stages of implementing an economic recovery plan.<sup>130</sup> The state has had limited resources to deploy in the COVID-19 response. In the haste of responding, some laws and policies that are meant to benefit the people of Eswatini and that are justifiable on public health grounds have limited people's rights in a manner that has had extremely negative consequences for some. While it is true that this pandemic has brought about a novel crisis warranting extraordinary response measures aimed at saving lives, those very same measures inadvertently affect people's means of survival and people's ability to enjoy other human rights.

It remains important, therefore, that the manner in which emergency powers are exercised must take into consideration the need to mitigate potential rights violations. It is also important that the response measures adopted by the state must be informed by both scientific and public health objectives as well as considerations of the degrees to which persons, especially those vulnerable, will be affected. In Eswatini there are persons who reside in poverty-stricken communities with inadequate access to basic amenities such as water, people living on an inadequate minimum wage and those without employment security. Many men and women employed in informal jobs have no recourse to social assistance. The lockdown,

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126 Art 1 of the WHO Constitution.

127 The ESCR Committee has affirmed this in General Comment 14.

128 The World Bank Group 'An analysis of issues shaping Africa's economic future: Assessing the economic impact of COVID-19 and policy responses in sub-Saharan Africa' (2020) 21 *Africa's Pulse* 97.

129 KR Hope 'The corruption problem in Swaziland: Consequences and some aspects of policy to combat it' (2016) 32 *Journal of Developing Societies* 130.

130 National Development Plan 2019-2022 (NDP); Strategic Roadmap 2019-2022 (SRM).

which halted the operations of industries and firms, has caused a stoppage of income for many families, which also means that their financial ability to access food has been severely compromised. It is not clear how the people of Eswatini will recover or at least have some resilience to get past this situation.

It is recommended that COVID-19 responses must not create discrimination but must be inclusive of all. Human rights must be used to address the human rights implications of the state's health policy and legislation.<sup>131</sup> It is clear now more than ever that the government has a responsibility to guarantee and ensure the realisation of economic and social rights. It is recommended that budget reallocations must cater for social assistance targeted to the most vulnerable, and the availability of the three basic needs, namely, water, food and decent housing. A rights-based response will ensure that long-term programmes enable future rebuilding after the emergency has subsided. The state must during this time also escalate protection to front-line health workers.

Emergency powers must not be used arbitrarily. Incidents of heavy-handed law enforcement must be discouraged as they affect the faith of the people in the state. The principles of legality and the rule of law must continue to prevail. Because COVID-19 is a global threat, Eswatini must strengthen its efforts to abide by WHO standards, and to adopt responses taking into account the transnational impact of the virus. Eswatini must not be left behind in the international cooperation and assistance initiatives, such as pursuing research in the development of a vaccine, providing national statistics and the required data globally.

## 5 Conclusion

This article has demonstrated how a public health emergency has required the adoption and use of extraordinary powers which, while enabling the state to respond to the crisis, have created opportunities for excess power. It has been demonstrated how the Disaster Management Act gives the Deputy Prime Minister's office free reign over the development of regulations, and cabinet ministers the authority to make specialised regulations, which are subject to weak restraints. This state of affairs in our law has resulted in incidents of manifest misuse of power. It has also shown how, in the context of the pandemic, there is a continuing need for the state to abide by the

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<sup>131</sup> RM Essawy 'The WHO: The guardian of human rights during pandemics' (2020) *European Journal of International Law* 18.

rule of law by acting within the confines of just laws and acting with caution so that the extraordinary powers are not abused. It remains ever important for the state not to dismantle the human rights gains that had been realised before the crisis. The regulations in force must therefore be revised so that, while the state promotes the right to life and health, the response measures are less intrusive or disruptive to people's livelihoods, are aligned or balanced with other rights, are responsive to the evolving situation, and are promulgated with the much-required clarity and certainty.

In as much as the pandemic has demonstrated more clearly that no right is absolute, the exceptional legislative measures through which the response has been formulated and implemented should not be allowed to become the new normal. Many of the COVID-19 response measures that have had a negative impact on rights are by their nature temporary, and must be removed in the long term so that the human rights protective norms remain in force.

## Saving the soul of an African constitution: Learning from Kenya's experience with constitutionalism during COVID-19

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**Summary:** *On 27 August 2010 Kenyans celebrated the promulgation of a new Constitution. This Constitution aimed at fundamentally transforming the governance framework through far-reaching institutional, administrative, legal and policy reforms. Ten years later this Constitution was put to the test when the government of Kenya reported the first COVID-19 case. In this article the authors argue that even though Kenya put in place a transformative Constitution intended to consolidate the rule of law, democracy, human rights and governance, the government's response to the COVID-19 pandemic questioned the transformative character of the Constitution and exposed inherent contradictions embodied in the Constitution. The article demonstrates that the Constitution is a double-edged sword, a site of tension and contradiction, on the one hand, and a site of hope and transformation, on the other.*

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**Key words:** *Constitution of Kenya 2010; COVID-19 pandemic; rule of law; human rights*

## 1 Introduction

August 2020 marks the tenth anniversary of the Constitution of Kenya 2010 (Constitution).<sup>1</sup> The promulgation of the Constitution was a joyous day for most Kenyans as it marked a new beginning with the promise to develop a new political and legal culture that would protect the rights of all Kenyans. The Constitution aimed at fundamentally altering the governance framework through far-reaching institutional and legal reforms and ensuring that all Kenyans would be part of the process of telling a different story about governance. The Constitution was born out of a people-driven process that entailed several stages of civic education, collection, and collation of the views based on what the people said.<sup>2</sup> After many years of intense negotiation among political parties, organs of the civil society, religious groups, women's rights organisations, the youth and other stakeholders, Kenyans finally agreed upon a new social contract.<sup>3</sup> It was hoped that the Constitution would lead to a revolutionary transformation of their society through the consolidation of the rule of law, democracy, human rights and good governance.

Ten years later, Kenya has an elaborate legislative, institutional and administrative legal framework to operationalise the Constitution. The implementation of the laws continues to pose major challenges but never before was the Constitution tested more than when the first COVID-19 case was revealed in Kenya. COVID-19 has ravaged the world, and Kenya is no exception. Since the announcement of Patient Zero in Kenya on 13 March 2020, the government has passed several laws, policies and regulations aimed at mitigating the effects of the COVID-19 pandemic. These interventions include the declaration of COVID-19 as a national pandemic; rules of mandatory quarantine; the disinfection of infected places; the deployment of quasi emergency powers to enforce a nationwide curfew; fiscal incentives; and socio-economic relief for citizens and businesses.

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1 Kenyans approved the final Constitution in a referendum on 4 August 2010.

2 See, in general, the Final Report of the Constitution of Kenya Review Commission, 2005 (Constitution of Kenya Review Commission).

3 See N Kabira 'Wanjiku and the wig: Kenya's legal transformation dance' (2020) 3 *AAS Open Res*, <https://aasopenresearch.org/posters/3-20> (accessed 1 October 2020).

When the Constitution encountered the pandemic, its transformative character was questioned as several issues arose. First, the Kenyan government did not invoke the Constitution's state of emergency powers that automatically trigger parliamentary oversight in restricting civil liberties.<sup>4</sup> Instead, the state utilised public order legislation that empowers Ministers to act without reference to Parliament. Second, the role of Parliament in undertaking oversight over the actions of the executive branch came into question. Third, questions also arose as to whether the government could curtail individual rights and freedoms. The tensions inherent in the Constitution were magnified. The pandemic revealed that the expansive Bill of Rights provisions in the Constitution were based on the idea that the one who claims to have a right may disregard the rights of others. Claims for rights by their very structure are 'trumps' against the claims of others.<sup>5</sup> The rhetoric of rights is not only a reflection of social division but contemporaneously functions to promote these divisions. Essentially, even though all Kenyans have a right to freedom of association, a right to freedom of movement, a right to freedom of speech and a right to socio-economic rights as embodied in the Constitution in the face of a pandemic, the government can curtail one's rights and freedoms. As far as rights are concerned, it indeed is a zero-sum game.<sup>6</sup>

Kenyans expected that the Constitution would mediate the multiplicities that exist in Kenyan society and in Kenya's legal system.<sup>7</sup> Consequently, the Constitution expansively captures individual rights, community rights, religious rights, cultural rights, linguistic rights and even environmental rights. As a result, this Constitution embodies tensions inherent in liberalism such as the tension between protecting liberties of individuals versus liberties of the collective, the tension between democracy's focus on prioritising collective rights versus the rights of people to govern themselves. For instance, 'if I have a right to property, I can do whatever I want with it but the police can restrain you when your right infringes on another's individual right to property'.<sup>8</sup> The Constitution models the contradiction underlying the liberal ideal that the individual is free to pursue his or her self-interest, while the pursuit of freedom demands the restraint of other individuals. In this article, we demonstrate that when the Constitution encountered the pandemic, this classic

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4 Art 58 Constitution of Kenya 2010.

5 D Kennedy 'The critique of rights in critical legal studies' in W Brown & J Halley (eds) *Left legalism/left critique* (2002) 216.

6 As above.

7 N Kabira 'Constitutionalising travelling feminisms in Kenya' (2019) 52 *Cornell International Law Journal Special Issue on Gender* 137.

8 Kennedy (n 5) 215.

contradiction in rights rhetoric was magnified. This contradicts the idea that African socio-political contexts such as that of Kenya are premised on the maxim coined by John Mbiti, 'I am because we are and since we are therefore I am'.<sup>9</sup> This article demonstrates that the way in which we implement rights during pandemics must consider context-specific realities as there is a tension between individual rights as enshrined in the Constitution and the interconnectedness between individual and community rights.

The article is divided into four main parts. The first part defines the soul of an African constitution. The second part examines what happens when the soul of the constitution encounters the COVID-19 pandemic. The third part uses two specific examples, one on public order regulations and one on the public health regulations to illustrate the tensions between the regulations and the Constitution. This part argues that even though Kenya put in place a transformative Constitution intended to consolidate the rule of law, democracy, human rights and governance, the government's response to the COVID-19 pandemic questions the transformative character of the Constitution and exposes the inherent contradictions embodied in the Constitution. This part explores the idea that the Constitution is a double-edged sword, a site of tension and contradiction, on the one hand, and a site of transformation and hope, on the other. The article concludes with some lessons relating to Kenya's experience with constitutionalism.

## 2 The soul of an African constitution

The 2010 Constitution was a negotiated document.<sup>10</sup> The 'soul' of the Constitution was expected to capture the interests and views of all Kenyans and above all to be responsive to *Wanjiku* (the common man/woman), her realities, her hopes and dreams.<sup>11</sup> It was expected to represent the aspirations of all Kenyans from all walks of life. This is evident in the Preamble which recognises the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. The Constitution consolidates the views of Kenyans during the constitution-making process in various aspects such as culture;<sup>12</sup> the

9 I Menkiti 'The person and community in African political thought' in RA Wright (ed) *African philosophy: An introduction* (1984) 171.

10 Final Report of the Committee of Experts on Constitutional Review, October 2010. See chs 8 & 9 on the political and parliamentary negotiation process.

11 N Kabira & P Kameri-Mbote 'Woman of law: Women's triumph in Kenya's Constitution of Kenya 2010' in N Kabira (ed) *Changing the mainstream: Celebrating women's resilience* (2018) 31.

12 Art 11 Constitution of Kenya 2010.

legal system;<sup>13</sup> the state and political system;<sup>14</sup> devolution;<sup>15</sup> land and environment;<sup>16</sup> affirmative action;<sup>17</sup> the Bill of Rights;<sup>18</sup> participatory governance;<sup>19</sup> and security.<sup>20</sup> In essence, the Constitution embodied the negotiated views of Kenyans during the constitution-making process.<sup>21</sup> At the core of the Constitution is the 'soul' of the Constitution, the overarching principles, the guiding philosophy, the values of the nation – *the soul of the African constitution*. These values are stipulated in article 10 of the Constitution which sets out the values and principles of governance and stipulates that these provisions are mandatory for the government and the governed. These values and principles are:

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development.

The Constitution's provisions in their totality, the context and history that drove the clamour for constitutional change, the aspirations of the Kenyan people and the values promoted by the Constitution, including its interpretation rules, could, arguably, be called the 'soul'. From the foregoing it is clear that this constitutional soul, and the reforms contained in the 2010 Constitution, were intended to provide for transformative governance towards a common prosperity, such as the national development goals elucidated in Kenya's Vision 2030.<sup>22</sup> It is this transformative governance of which the utility and strength is being examined by this article in the context of governmental actions taken during the COVID-9 pandemic.

### 3 The soul encounters the COVID-19 pandemic

On 13 March 2020 the soul of the Constitution encountered the COVID-19 pandemic when the Ministry of Health announced the

13 Art 159 Constitution of Kenya 2010.

14 Art 1 Constitution of Kenya 2010.

15 Art 174 Constitution of Kenya 2010.

16 Art 60 Constitution of Kenya 2010.

17 Art 27 Constitution of Kenya 2010.

18 Art 19 Constitution of Kenya 2010.

19 Art 1 Constitution of Kenya 2010.

20 Art 238 Constitution of Kenya 2010.

21 See, in general, Final Report of the Committee of Experts on Constitutional Review, October 2010.

22 See Sessional Paper 10 of 2020 on Vision 2030.

existence of Patient Zero, the first person to test positive for COVID-19. This would lead to months of legal, administrative, social, economic, political and public health interventions by the government. Kenya's constitutional fabric and governing structure continued to be tested for its ability to backstop responses to a rapidly-evolving situation.<sup>23</sup>

The strategies adopted by the Kenyan government may be categorised as follows: first, public order measures such as the curfew, lockdown, and controlled movement between counties; second, public health measures such as quarantine, hand washing and sanitising, the wearing of face masks, burial procedures, and so forth; and, third, socio-economic measures such as fiscal incentives for businesses and individuals. The discussion in this article is limited to the first two and, more specifically, to the curfew order (public order) and the burial procedures (public health).

### 3.1 Public order rules

During the pandemic the government applied the Public Order Act to restrict the movement of people. The Public Order Act is an old law and order legislation enacted in June 1950, while Kenya was still a colony.<sup>24</sup> On 25 March 2020 the President announced that the National Security Council (NSC) had approved the imposition of a nationwide curfew by the Cabinet Secretary for the Interior. The curfew would apply daily between 19:00 and 05:00 from 27 March 2020 and would remain in force for a period of 30 days.<sup>25</sup> In explaining the rationale for the curfew, the President stated:<sup>26</sup>

It is incumbent on every Kenyan to support the efforts of our medical professionals, health workers, critical and essential services providers, and the government as a whole by reducing movement and congregating in large groups.

The rationale for the curfew was that socialisation patterns and cultural practices present opportunities for the spread of the virus. Three constitutional questions arose from this curfew order, and its

23 Ministry of Health 'First case of Coronavirus confirmed in Kenya' 13 March 2020, <https://www.health.go.ke/first-case-of-coronavirus-disease-confirmed-in-kenya/> (accessed 22 July 2020).

24 See Public Order Act, Cap 50 Laws of Kenya, commenced application on 13 June 1950.

25 See Public Order (State Curfew) Order 2020 and Legal Notice 36 of 25 March 2020.

26 Government of Kenya 'Presidential address on the state interventions to cushion Kenyans against economic effects of COVID-19 pandemic' 25 March 2020, para 13 <https://www.president.go.ke/2020/03/25/presidential-address-on-the-state-interventions-to-cushion-kenyans-against-economic-effects-of-covid-19-pandemic-on-25th-march-2020> (accessed 21 July 2020).

various subsequent variations. The first was the police brutality that accompanied the enforcement of the curfew order in the immediate aftermath. The second was the question of who qualified as essential service providers. The third was the fact that, even with the involvement of the NSC, the curfew order was based on a colonial era law and was meant to restrict fundamental rights under the 2010 Constitution. In this part we examine the first and third questions.

In the immediate aftermath of the curfew order, namely, on its first day in place, reports indicated that many people who relied on public transport could not make it home by 19:00. One news report observed that while most Kenyans travel in privately-owned taxis (*matatus*), these are also required to cease service at the commencement of the curfew, and in apprehension most operators either stayed home or raised their fares, creating artificial scarcity.<sup>27</sup> Many reasons have been given in local discourse at community level. The first was that this being the first such nationwide curfew order in decades, citizens did not take it seriously. The second, and just as plausible, was that in apprehension of police harassment, most (privately-owned) public service vehicle operators had ceased business early to avoid breaching the curfew. Consequently, the conventional and social media abounded with news coverage and stories of people being brutalised by the excessive use of force by police officers. News reports carried headlines such as 'Traffic jams, police brutality mark the first night of curfew';<sup>28</sup> 'Editors Guild condemns police brutality as curfew kicks off';<sup>29</sup> 'Coronavirus: Stop bludgeoning Kenyans during curfew, leaders tell police';<sup>30</sup> 'Police or Coronavirus: What will kill more Kenyans?'<sup>31</sup> On Twitter that day, the trending topic of discussion, demonstrating concern were #CurfewKenya #Police and #Policebrutality.<sup>32</sup> From 16:30 on 27 March 2020 the two trending topics of discussion were under #CurfewKenya from

27 'Coronavirus begins with wave of police crackdowns' *Washington Post*, [https://www.washingtonpost.com/world/africa/kenyas-coronavirus-curfew-begins-with-wave-of-police-crackdowns/2020/03/28/358327aa-7064-11ea-a156-0048b62cdb51\\_story.html](https://www.washingtonpost.com/world/africa/kenyas-coronavirus-curfew-begins-with-wave-of-police-crackdowns/2020/03/28/358327aa-7064-11ea-a156-0048b62cdb51_story.html) (accessed 21 July 2020).

28 'Police brutality marks the first night of curfew' *Daily Nation*, <https://www.nation.co.ke/kenya/news/traffic-jams-police-brutality-mark-the-first-night-of-curfew-282662> (accessed 21 July 2020).

29 'Police brutality prevails as Kenyans rush to beat curfew' *The Standard*, <https://www.standardmedia.co.ke/article/2001365937/police-brutality-prevails-as-kenyans-rush-to-beat-curfew> (accessed 21 July 2020).

30 'Stop brutalising Kenyans during curfew leaders tells police' *The Standard*, <https://www.standardmedia.co.ke/article/2001365989/stop-brutalising-kenyans-during-curfew-leaders-tell-police> (accessed 21 July 2020).

31 'Police or Coronavirus: What will kill more Kenyans?' *The Standard*, <https://www.standardmedia.co.ke/entertainment/local-news/2001366620/police-or-coronavirus-what-will-kill-more-kenyans> (accessed 21 July 2020).

32 'Trending in Kenya' Twitter, <https://archive.twitter-trending.com/kenya/27-03-2020> (accessed 21 August 2020).

16:30 to 23:30, measured at 30-minute intervals among the top ten. This was also the case with #Likoni and #Ferry to signify the extensive crowding and panic at the main ferry crossing in Mombasa city, across the Kilindini channel entry to the port of Mombasa in Kenya.<sup>33</sup> This excerpt from the Daily Nation newspaper on 30 March 2020 is instructive of the situation at the Likoni ferry crossing:<sup>34</sup>

The police officers also went on another brutality spree, beating up hundreds of ferry users who were lining up to get into the ferries at the Likoni channel. The officers who were armed with batons beat the commuters after they crowded and tried to force themselves towards the Likoni channel. The commuters complained they were getting late as the curfew time was approaching. The officers hurled teargas canisters at the crowd as they mercilessly beat up the people seriously injuring them. Women who were caught in the melee were left with tears after they were beaten and frogged and marched by the irate officers. A stampede occurred as the hundreds of the pedestrians were forced back to the line.

The tension between the Constitution's guarantee of the rights and freedoms of all Kenyans and the manner in which the police implemented the curfew order regulations was evident when on 28 March 2020, #PoliceBrutality was the trending topic of discussion on Twitter the whole day.<sup>35</sup> The Kenya National Commission on Human Rights (KNCHR), an independent body established under article 59 of the Constitution to promote human rights observance and investigate violations in the country, published a report on 30 June 2020 titled 'Pain and pandemic: Unmasking the state of human rights in Kenya in containment of the COVID-19 pandemic' covering the period between 17 March and 30 June 2020.<sup>36</sup> In the period between 15 March and 6 June 2020 KNCHR reported having received 222 complaints related to the COVID-19 situation.<sup>37</sup> The majority of the complaints were against state agents with 91 complaints (40 per cent) against the Ministry of Interior and Coordination of National Government, out of which 54 complaints were against the Kenya police service; 23 against administration police; eight against the general service unit; four against area chiefs and one levelled against an assistant county commissioner.<sup>38</sup> Another 49,5 per cent of the

33 As above.

34 'Dozens injured as police brutality marks start of curfew' *Daily Nation*, <https://www.nation.co.ke/kenya/news/dozens-injured-as-police-brutality-marks-start-of-curfew-282622> (accessed 21 August 2020).

35 Twitter (n 32).

36 Kenya National Commission on Human Rights 'Pain and pandemic: Unmasking the state of human rights in Kenya in containment of the COVID-19 pandemic' 30 June 2020, <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1104/Pain-and-Pandemic-Unmasking-the-State-of-Human-Rights-in-Kenya-in-Containment-of-the-COVID-19-Pandemic> (accessed 1 October 2020).

37 See Kenya National Commission on Human Rights (n 36) 9.

38 See Kenya National Commission on Human Rights (n 36) 10.

complaints related to civil and political rights, which included ten complaints related to the right to life; 87 related to violations against freedom and security of the person; seven on access to justice; and five on fair administrative action.<sup>39</sup>

The KNCHR report documents various incidents in different parts of the country. For instance, in Kakamega, one of Kenya's most populous counties, one complaint indicated that a market trader died after police had lobbed tear gas canisters at him in a market area to enforce a social distancing directive. He took refuge in a stall and was later found dead inside the stall.<sup>40</sup> In Nairobi county, a complaint to KNCHR was that a 27 year-old man sustained injuries after being assaulted by police officers enforcing curfew orders. He was then abandoned by the officers by the roadside and his family members picked him up while in serious pain. He succumbed to the injuries a day after the assault.<sup>41</sup> In Busia county, another complaint to KNCHR alleged that police officers without any justifiable cause entered a private homestead and indiscriminately assaulted all family members and destroyed properties.<sup>42</sup> One particular complaint from Kisii county alleged that a *boda boda* (motorcycle taxi) rider was requested by a police officer to drop him at his work place in a police station in order to get there on time. On his way back from the station heading to his home, he was stopped and assaulted by other police officers at 19.30, arrested and detained for the night while continuously being assaulted. He was released without any charges being preferred. He sustained serious physical and mental injuries as a result of the ordeal.<sup>43</sup> These examples illustrate the enduring tension between the law as written in the Constitution versus the reality on the ground.

### **3.1.1 Public order case law and its implications for the rule of law and human rights in Kenya**

Soon after the government put in place curfew measures to prevent the spread of the virus, the Law Society of Kenya (LSK) went to court to contest the validity of the curfew order in *Law Society of Kenya*.<sup>44</sup> In this case the LSK sought a court order to declare that the curfew order and the use of the police in enforcing the curfew

39 See Kenya National Commission on Human Rights (n 36) 11-12.

40 See Kenya National Commission on Human Rights (n 36) 23.

41 As above.

42 See Kenya National Commission on Human Rights (n 36) 23-24.

43 As above.

44 *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others; Kenya National Commission on Human Rights & 3 Others (Interested Parties)* 2020 eKLR.

were unconstitutional. The LSK argued that the government's use of the Public Order Act (POA) to enforce the curfew did not meet the constitutional standards for restricting fundamental rights and freedoms stipulated in the Constitution of Kenya.<sup>45</sup> The LSK further relied on the Constitution to argue that the curfew order violated the rights of arrested persons<sup>46</sup> and the right to a fair hearing<sup>47</sup> as it excluded legal representation from the list of exempted services even though persons arrested or detained had no access to legal representation. The main legal issues that the Court addressed were whether the curfew order was constitutional and legal; whether the national police service violated the Constitution in the enforcement of the curfew order; whether the Cabinet Secretary for Health should have been ordered to issue guidelines under section 36(m) of the Public Health Act; and whether the judiciary had abdicated its constitutional mandate.

On the question of whether the curfew order was constitutional and legal, the LSK argued that the curfew order was 'illegal, illegitimate and unproportionate' as it was 'blanket in scope and indefinite in length'.<sup>48</sup> The LSK also contended that the curfew order contained no reasons or rationale for the curfew; that the legal notice limited rights and ascribed penal consequences without any legitimate aim; and that the failure by the second respondent to provide the period of the curfew order contravened section 8 of the POA. The LSK contended that a curfew order under section 8 of the POA could not be open-ended considering that where a state of emergency is declared under articles 58 and 132 of the Constitution, time limits are imposed. The respondents held the view that the instrument published as Legal Notice 36 of 2020 was fully compliant with the requirements of the Constitution and section 8 of the POA. They argued that the LSK failed to appreciate that the aim of the curfew order was to minimise and mitigate the spread of the virus, thereby protecting human lives, which is a legitimate constitutional responsibility of the government. They further contended that the engagement of the POA in the fight against the COVID-19 pandemic was meant to complement the provisions of the Public Health Act (PHA). In responding to this issue, the Court held that it should not address the issue of the constitutionality of section 8 of the POA because from the submissions of the parties there was unanimity on the constitutionality of the provision. The Court also held the view that the constitutionality of the provision had been upheld by the

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45 Art 24(1) Constitution of Kenya.

46 Art 49 Constitution of Kenya.

47 Art 50 Constitution of Kenya.

48 *Law Society of Kenya* (n 44).

Court (per Kamau J) in *National Super Alliance (NASA) Kenya*<sup>49</sup> and that it was not necessary to reopen the issue.

The LSK argued that the POA is a law that is specifically tailored for combating criminal activities. The Court agreed with the petitioners and argued that the purpose of the POA was to bring law and order to areas visited by turmoil caused by human beings. However, the Court held that this did not answer the question as to whether the POA can be applied to other disasters and emergencies including the containment of disease.<sup>50</sup> The Court deduced that the question then was whether the PHA is self-sufficient to the extent that no other Act of Parliament needs to be engaged in health matters. The Court observed that the POA may be used to complement other laws since section 16 of the PHA creates room for the application of other laws to health matters. Thus, the Court deduced that it cannot be said that the POA is not applicable to health emergencies such as the one posed by the COVID-19 pandemic because it was possible that the provisions of the PHA may need to be supplemented by those of the POA. The Court took note of the fact that panic and fear sometimes may lead to disorder and a curfew may be needed to reinforce the provisions of the PHA. Therefore, the Court declined to agree with the LSK that a curfew order cannot be used to address a public health emergency. Therefore, the Court held the order was legal as it specified the period during which the curfew would last and specified the person to grant permission.

On the issue of limitation of rights, the Court was of the view that the curfew order can only be deemed constitutional if it passes the article 24(1) test. The Court reiterated the four-step test elaborated in the *Kosovo* case.<sup>51</sup> The Court emphasised that the four-step test stipulates that the limitation of a right or freedom (i) may be done only by 'law' of the Assembly; (ii) there should be a 'legitimate aim'; (iii) it should be 'necessary and proportional'; (iv) it should be 'necessary in a democratic society'. The Court in this case was of the view that the curfew order passed this test. In addition, the Court stated that the challenge with the application of the proportionality test in this case was that the objective the curfew order intended

49 *National Super Alliance (NASA) Kenya v Cabinet Secretary for Interior and Coordination of National Government & 3 Others* [2017] eKLR.

50 The Court appreciated the fact that the judges in *Law Society of Kenya v Inspector General Kenya National Police Service & 3 Others* [2015] eKLR (*Lamu Curfew* case) and *Muslims for Human Rights (MUHURI) & 4 Others v Inspector General of Police & 2 Others* [2014] eKLR were not invited to consider the applicability of the POA to circumstances other than the restoration of law and order.

51 *Constitutional Court of the Republic of Kosovo in Case KO54/2020 President of the Republic of Kosovo (Applicant) – Constitutional Review of the Decision [Government] 15/01, 23 March 2020.*

to achieve was unmeasurable. The Court noted that although the main objective of the curfew was to reduce the transmission of the Coronavirus, no evidence was adduced by either side to show how the curfew will achieve this objective and whether the reduced transmissions, if any, outweigh the hardship visited on the populace by the curfew. It was appreciated that because of the novelty of the virus, statistics are not yet available. Thus, the Court held that in a crisis such as the one facing the country, it can be presumed that the second respondent issued the curfew order in line with the 'precautionary principle' as was elucidated in the *Kennedy Amdany Langat* case.<sup>52</sup> The Court thus held that the government cannot be faulted for enforcing precautionary and restrictive measures in order to slow the spread of this novel disease in line with the precautionary principle.

On the question of whether the national police service violated the Constitution in the enforcement of the curfew order, the Court observed that the curfew was imposed for a public health purpose and not to fight crime or disorder. The Court argued that the main problem with the curfew order was the manner in which it was implemented. However, the Court observed that unconstitutional and illegal acts that occur in the implementation of a legal instrument did not render that instrument unconstitutional. On the question of whether the Cabinet Secretary for Health should be ordered to issue guidelines under section 36(m) of the Public Health Act, the Court failed to address itself on the issue of whether the Cabinet Secretary for Health should be ordered to issue such guidelines because in the course of the hearing of the petition, the fifth respondent answered the LSK's request for rules under section 36 of the PHA by enacting rules for the COVID-19 pandemic.<sup>53</sup> On the question of whether the judiciary had abdicated its constitutional mandate, the Court held that insufficient evidence was brought by the LSK to prove the alleged abdication by the judiciary.

The Court found that despite being a law and order statute, the Public Order Act could still be used to enforce a public health emergency.<sup>54</sup> The Court found that the curfew order passed the test of article 24(1) which declares that a fundamental right or freedom shall not be limited except by law, but also held that the main problem was the manner of its implementation which, while

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52 *Republic v Ministry & 3 Others Ex-parte Kennedy Amdany Langat & 27 Others* [2018] eKLR.

53 The rules were found in Legal Notice 46: The Public Health (Prevention, Control and Suppression of COVID-19) Rules 2020, published on 3 April 2020 in Kenya Gazette Supplement 39.

54 *Law Society of Kenya* (n 44) paras 113 & 115.

unconstitutional, does not render the curfew order itself to be so.<sup>55</sup> The judge observed:<sup>56</sup>

It appears that in confronting the Coronavirus, which is by all means a faceless enemy, the police brought the law and order mentality to the fore. Diseases are not contained by visiting violence on members of the public. One cannot suppress or contain a virus by beating up people. The National Police Service must be held responsible and accountable for violating the rights to life and dignity among other rights.

Based on this reasoning, the Court declined to declare the curfew order unconstitutional. However, it found that the use of force to enforce the curfew violated the Constitution. The police service is bound by article 10 of the Constitution which makes the rule of law, human dignity, human rights, good governance and integrity mandatory in implementing any law, or making public policy decisions. As part of the Kenyan state, the police are also bound by articles 24(1) and 25 which expressly prohibit any actions to limit the fundamental freedoms from torture and cruel, inhuman or degrading treatment or punishment. Recent conduct by state agents brings about concerns that Kenya may be having ornamental constitutionalism.

The case raises several issues about the transformative character of the Constitution in the face of a pandemic. First, as a negotiated document, the Constitution embodies internal tensions. Some of these tensions include the tension between individual rights and community rights; the tension between tradition and modernity; and the tension between the international and the local. The result is that during the pandemic, the Constitution has proved to be a double-edged sword, a site of tension and contradiction, on the one hand, and a site of hope and transformation, on the other. It is interesting to note that the Kenyan government in all the presidential and ministerial speeches made no reference to the Constitution, but instead relied on regulations.<sup>57</sup> In contrast, civil society and other organisations used the Constitution to save its 'soul'. For instance, as we have seen in this case, the LSK relied on the Constitution to justify its arguments.<sup>58</sup> The KNCHR also relied on the Constitution to justify their arguments.<sup>59</sup> In essence, they argue that their role is to save the soul of the Constitution, even though FIDA-Kenya did not

<sup>55</sup> *Law Society of Kenya* para 134.

<sup>56</sup> *Law Society of Kenya* (n 44) para 137.

<sup>57</sup> Government of Kenya 'President Kenyatta urges Kenyans to observe government directives on Coronavirus 7 April 2020', <https://www.president.go.ke/2020/04/07/president-kenyatta-urges-kenyans-to-observe-government-directives-on-coronavirus/> (accessed 22 July 2020).

<sup>58</sup> *Law Society of Kenya* (n 44) para 23.

<sup>59</sup> *Law Society of Kenya* para 31.

explicitly cite the constitutional provisions but relied on constitutional principles to argue for women's and children's rights to dignity during the pandemic.<sup>60</sup> IPOA cited the Constitution in justifying its interest in the case.<sup>61</sup> The Inspector-General of Police did not cite the Constitution.<sup>62</sup> The Principal Secretary for the State Department of Interior relied on the Constitution to justify the imposition of a curfew.<sup>63</sup> For his part, he argued that section 8 of the POA enjoys a presumption of constitutionality and is *prima facie* legal and effective in Kenya; further, that the constitutionality of the said provision had indeed been determined in the affirmative in a previous case.<sup>64</sup>

Further, the Attorney-General's files did not cite the Constitution but cited constitutional principles and considerations such as public interest and proportionality. The Attorney-General argued that since the curfew order affects constitutional rights and fundamental freedoms, it ought to be premised on a substantive law. He argued that the curfew not only affects the people's way of life but also negatively impacts constitutional rights and freedoms such as freedom of movement, freedom of association and freedom of assembly. He argued that the curfew also limits socio-economic rights especially in the case of vulnerable members of society.<sup>65</sup>

Interestingly, the Constitution continues to be invoked by different actors in different ways, illustrating that the Constitution is a site of tension, on the one hand, and a site of liberation, on the other. The Constitution is a site of tension in the sense that the same Constitution has been used by different actors to assert their rights and at the same time to deprive their rights. While the Constitution of Kenya 2010 provides that everyone has the right to freedom of speech, freedom of movement and freedom of association, the same Constitution allows the government to limit those rights. While the Constitution provides that everyone has the right to socio-economic rights, the same Constitution allows for the declaration of a state of emergency when most rights are suspended.

It is important to note that in spite of the interventions by civil society organisations, the excessive use of force by the police continued. When the petition in *Law Society of Kenya* was filed, the Court issued temporary orders as follows:<sup>66</sup>

60 *Law Society of Kenya* para 39.

61 *Law Society of Kenya* para 43.

62 *Law Society of Kenya* para 51.

63 *Law Society of Kenya* para 56.

64 *National Super Alliance (NASA) Kenya* (n 49).

65 Art 43 Constitution of Kenya 2010.

66 *Law Society of Kenya* (n 44).

An order is hereby issued compelling the 1st Respondent, Hillary Mutyambai, Inspector General of the National Police Service, to within 48 hours herewith, publicise in newspapers of national circulation, and concurrently file in court for scrutiny, guidelines on the conduct of police officers enforcing the Public Order (State Curfew) Order 2020.

On 1 April 2020 President Uhuru Kenyatta issued a public apology on television 'to apologise to all Kenyans for some excesses that were conducted or happened'.<sup>67</sup>

Subsequently, the judgment ordering the police to stop the excessive use of force was delivered by the courts on 16 April 2020. Yet, in their report the KNCHR recorded complaints resulting from the excessive use of force by police up to 6 June 2020. While there have been instances of positive action, such as police officers assisting mothers with children to get home after the curfew, the overall disregard of constitutional safeguards during the implementation of curfew restrictions suggests that the soul of the Kenyan Constitution is not something the police service, for instance, has taken to heart.

One element of these restrictions that the Court did not address concerns the role of parliamentary oversight, where statutory orders curtailing fundamental freedoms are issued. The judges in the *Law Society of Kenya* case noted that perpetual extension of the curfew was contrary to provisions relating to a state of emergency under the Constitution,<sup>68</sup> which limits presidential powers to impose such a state of emergency to only 14 days. The circumstances surrounding the declaration of a state of emergency arise only when the state is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency.<sup>69</sup> The Court held that the declaration of the state of emergency must also necessarily meet the circumstances in which the emergency is declared.<sup>70</sup> Considering the adverse public health, public order, social and economic impacts of the COVID-19 pandemic, it is arguable that the current situation meets the definition of 'other public emergency' in article 58(1). It may be argued that the declaration of a nationwide curfew rather than a state of emergency may have been intended to limit the scope of human rights restrictions by applying it only during night time. However, Kenya has not enacted legislation to implement provisions concerning the declaration of a state of emergency to delimit the

67 'President Kenyatta apologises over police brutality during curfew' Citizen TV Minute 1:27-1:34, <https://www.youtube.com/watch?v=w86rhM8hfVU> (accessed 1 October 2020).

68 *Law Society of Kenya* (n 44) para 9.

69 Art 58(1)(a) Constitution of Kenya 2010.

70 Art 58(1)(b) Constitution of Kenya 2010.

parameters of such powers. Additionally, the state of emergency is valid for 14 days, and subsequently the first extension would require the supporting vote of at least two-thirds of all the members of the National Assembly, and any subsequent extension requires a supporting vote of at least three-quarters of all the members of the National Assembly. This is a very high threshold set by the current Constitution, which the colonial era Public Order Act does not integrate.

As a result, people's representatives have been excluded from any oversight concerning this public order restrictions imposed during the pandemic. The Twitter discussion between the Inspector General of Police and the public under the #EngagetheIG certainly is a good starting point, but the reach of social media is limited to a section of society. The totality of values, including the rule of law, participation of people, good governance and integrity, will need to be applied during the implementation of constitutional and statutory provisions to awaken and drive the soul of the Constitution.

### 3.2 Public health rules

The Public Health Act has been at the heart of actions taken by the government during the pandemic.<sup>71</sup> As the Public Order Act, this is an old law enacted in 1925 but which has been amended over the years. It is the main legal tool available in Kenya to deal with infectious diseases. Although a new law, the Public Health Act should be implemented in accordance with the Constitution, including the overall principle of constitutionalism that requires the executive branch to exercise restraint, and adhere to the rule of law, as well as the guaranteed substantive and procedural rights. This is important to ensure that, even in the current unprecedented situation of health risks and urgency of action, the soul of the Constitution is not mutilated. In this part the article examines the public actions, steps and decisions taken by the government under this law and assesses whether they have been compatible with the values of the Constitution.

On 27 March 2020 the Cabinet Secretary for Health published a legal notice under section 17(2) of the Public Health Act declaring COVID-19 a notifiable disease. Further, the legal notice informed the public that the provisions of Part IV of the Public Health Act would now be applicable. Several points are important in analysing this decision. First, 27 March was also the date on which the nationwide curfew

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<sup>71</sup> Public Health Act, Cap 242 Laws of Kenya.

orders discussed in the previous part came into effect, demonstrating the seriousness of COVID-19 to the government. Second, Part IV of the Public Health Act provides for actions to deal with infectious diseases. The law defines an infectious disease as one that can be communicated directly or indirectly by any person suffering from it, to any other person.<sup>72</sup> It is important to highlight that Part IV of the public health law gives powers in regard to disinfecting contaminated areas, the transportation of infected persons, the admission of infected persons to hospital and the isolation of persons exposed to the infectious disease. It also provides that any patient who is not a pauper should repay the cost of treatment incurred by the government. Further, section 36 provides that whenever any part of the country appears to be threatened by any formidable epidemic or infectious disease, the Cabinet Secretary for Health may make rules to govern various matters, including

- (a) the removal of corpses and speedy interment of the dead;
- (b) house to house visitation;
- (c) the promotion of cleansing, ventilation and disinfection and guarding against the spread of disease;
- (d) preventing any person from leaving any infected area without undergoing all or any of the following, namely, medical examination, disinfection, inoculation, vaccination or revaccination and passing a specified period in an observation camp or station;
- (e) the formation of hospitals and observation camps or stations, and placing therein persons who are suffering from or have been in contact with persons suffering from an infectious disease;
- (f) the removal of persons who are suffering from an infectious disease and persons who have been in contact with such persons;
- (g) the regulation of hospitals used for the reception of persons suffering from an infectious disease and of observation camps and stations.

Based on the global nature of the COVID-19 pandemic, and the public pressure during the period leading up to numerous orders and regulations prescribed by the government, many of the orders continue to be in tension with the Constitution. The mandatory quarantine orders and the cessation of movement orders all contradict the soul of the Constitution and mimic colonial vestiges of rule and control. The public health rules are measures aimed at mitigating the effects of COVID-19.<sup>73</sup> The rules provide guidelines for the notification of a medical officer of health in case of a suspected

<sup>72</sup> See sec 2 of the Public Health Act.

<sup>73</sup> See Legal Notice 50: Public Health (COVID-19 Restriction of Movement of Persons and Related Measures) Rules, 2020; Legal Notice 49: Public Health (Prevention, Control and Suppression of COVID-19) Rules 2020.

COVID-19 patient. The rules outline the powers for control of COVID-19, the power of search, the power to disinfect premises, and direct the use of a building by a medical officer. The regulations confer significant powers on the Ministry of Health with regard to control measures that are necessary during the COVID-19 pandemic. They allow medical officers and public health officers to have powers over COVID-19 patients and their properties. The aim is to reduce the spread of diseases in the country and is consistently in tension with the spirit of constitutionalism. The rules also outline the procedure for the removal and disposal of bodies.<sup>74</sup> The guidelines are centred at ensuring that the burial process does not result in a spread of the disease. However, they are lacking in promoting the dignity of deceased persons and their family members, which is at the heart of Kenyan customary law.

### **3.2.1 Public health case law and its implications for the rule of law and human rights in Kenya**

Several cases have been brought to court arguing that burials are being conducted contrary to the procedures and some in contradiction to African customary rites with regard to the dignity of the deceased. For instance, in the case of *Joan Akoth Ajuang*<sup>75</sup> the petitioners sought to invoke the jurisdiction of the Court to determine the question of whether their rights and fundamental freedoms in the Bill of Rights had been denied, violated and infringed upon. The facts of the case were that the deceased, James Oyugi Onyango, was travelling from Mombasa<sup>76</sup> to his home in Siaya county in the company of some of his family members. Along the way, the deceased was involved in a road accident wherein he lost control of the motor vehicle he was driving, which was wrecked. The deceased survived the accident but later passed on in the hospital. The next morning the deceased's family proceeded to the hospital to view the body but were informed that they could not view the deceased's body since samples had been taken from the deceased and transported for analysis in line with the COVID-19 Ministry of Health guidelines. The same day the family was informed that they should go and collect the body of the deceased for immediate burial. The petitioners protested this move, but the deceased's body was buried during the night by Ministry of Health officials. These facts necessitated the filing of this petition and

74 See the Public Health (Prevention, Control and Suppression of COVID-19) Rules 2020.

75 Constitutional Petition 1 of 2020 *Joan Akoth Ajuang & Another v Michael Owuor Osodo the Chief Ukwala Location & 3 Others; Law Society of Kenya & Another* [2020] eKLR.

76 One of the largest cities in Kenya.

the petitioners sought various orders from the Court, including an order that the body of the late James Oyugi Onyango be exhumed by the respondents and subjected to an autopsy/biopsy to ascertain the cause of death, the deceased's body to be re-buried immediately thereafter in a decent burial in accordance with the World Health Organisation guidelines on the safe management of a dead body in the context of COVID-19 (if confirmed that the deceased died as a result thereof), the Constitution and cultural requirements.

The main legal issues for determination by the Court were (i) whether the petition disclosed any infringement of the petitioner's rights; (ii) whether the deceased had rights and whether those rights and the petitioner's rights had been infringed; (iii) whether the petitioners are entitled to the exhumation of the body of the deceased and whether a biopsy/autopsy should be carried out on the deceased's body to determine the cause of death of the deceased; and (iv) what orders the Court should make, whether the instant petition discloses any infringement of the petitioner's rights.

On the question of whether the petitioner's rights had been infringed, the petitioners argued that they had the right to practise their cultural rights under articles 27, 28, 32 and 44 to bury the deceased and these rights had been violated by the respondents. The Court found that article 28 of the Constitution was clear on this right and that the provisions required no further elaboration. The Court held that it was not disputed that the deceased indeed had been buried without any of the cultural rites of the Luo community, of which the deceased had been a member, being observed, causing the petitioners pain and anguish. In addition, the Court found that the deceased was hurriedly buried in the night and without any coffin. His family members did not participate in his hurried burial, he was interred in a shallow grave, the undertakers were overwhelmed by the body, so they literally dumped the body wrapped in plastic bags into the grave.

On the question of whether the dead have rights, the petitioners argued that the deceased's right to a decent burial in line with his cultural practices were infringed by the respondents, whereas the respondents argued that the petitioners could not claim the violation of any right or freedom on behalf of the deceased as a dead person does not enjoy the rights and privileges of a living person. The Court argued that even once dead, one does not lose their dignity and, moreover, others can retain an important interest in their bodies and legacy. The Court went on to further note that whereas it would not consider the direct rights of the deceased to have a private

and family life, but the action taken against his cadaver could be considered to the extent that it affected the private and family lives of others around him and also affected his inherent dignity which does not expire even after his death. To emphasise this point, the Court proceeded to quote various international covenants and laws that specifically deal with the rights of handling the dead. The Court reiterated that Kenyan law does not guarantee specific rights to the dead but provides for the protection of the dignity of every person. However, the Court stated that article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity respected and protected. Thus, the Court mentioned that whereas there are no proprietary rights to a dead body, one does not cease being a human once dead, that only the state of life is altered. The Court stated that it is universally agreed that a dead body is the physical remains of an expired human being prior to complete decomposition. It was also noted that although the right to a decent burial has long been recognised at common law, no universal rule exists as to whom the right of burial is granted to.

The Court also mentioned that the right to possession of a dead human body for the purpose of burial lies with the spouse or other relatives of the deceased. However, it was the Court's view that an unrestricted property right to a dead body does not exist. The Court further mentioned that the matter of the disposition of the dead is a matter of public interest, including the public's health, safety and welfare, and is subject to control by law and not the desires of individuals. Finally, in concluding that indeed the dead have limited legal rights, the Court stated that chief among those rights is the right to remain silent. The Court said that from the time of the ancient Egyptians, the conviction has been that corpses have the right to rest undisturbed. The dead have rights attributable to those they leave behind and, further, there was a legitimate expectation that the dead be interred in a respectful and dignified manner.

As to whether the deceased and the petitioner's rights had been infringed, the petitioners alleged that the undignified burial of the deceased, without a coffin, was against their culture and an affront to their rights as envisioned in articles 11 and 44 of the Constitution. The fourth respondent argued that the rights of the petitioners could be limited as provided under article 24 of the Constitution as a result of the COVID-19 pandemic. The Court highlighted the traditional view of grief resolution which requires the bereaved person to disengage from the deceased. The Court said that that was often expressed as a necessary 'letting go' of the past for the survivor to be free to continue with his or her life and form new relationships.

The Court noted that the contemporary grief theory, in contrast, recognises that healthy grieving involves maintaining bonds with the deceased. The relationship between the bereaved person and the person who has died, although transformed, is ongoing. The Court made reference to the WHO Guidelines on the management and handling of the dead bodies of victims of COVID-19 and Legal Notice 49 published on 3 April 2020 under the Public Health (Prevention, Control And Suppression of COVID-19) Rules 2020, after which the Court stated that these rules and regulations do not restrict burials or funerals but in fact acknowledge the need to follow a deceased's customs during the preparation of their burial.

Thus, the Court found that the Ministry of Health officials were responsible for the transportation and burial of the deceased at his ancestral home. In the process of handling and interment of the body of the deceased, the officials did not follow the protocol or guidelines set up and established by the Ministry of Health on the disposal of the body of the deceased, James Oyugi Onyango. That being the case, the Court found that the fourth respondents violated the protocols or guidelines established for handling dead bodies and did not adhere to the guidelines on observance of the deceased's and the petitioner's cultural norms and practices of giving respect and dignity to the deceased. The Court found that that was a violation of the rights guaranteed in articles 11, 28 and 44 of the Constitution.

The petitioners also alleged discrimination of the deceased in the manner in which he was buried as there were other persons (COVID-19 victims) who were accorded decent burial ceremonies including a church service and a coffin burial during the day and in the presence of his family members. To counter this argument, the fourth respondent argued that had the deceased and his family been truthful about the deceased's condition from the start, the deceased could have been treated in a different manner. The fourth respondent argued that the deceased and his family members knew or suspected that he was COVID-19 positive, having travelled from Mombasa, a hotspot of the pandemic, but declined to disclose this information to the hospital authorities early enough. Instead, despite feeling unwell with symptoms of COVID-19, he undertook treatment with over the counter drugs which worsened his situation.

The Court held that the deceased was buried in the dead of the night in disregard of the deceased's custom or religious beliefs and practices which are guaranteed under articles 11, 32 and 44 of the Constitution, and without any input by the deceased's surviving relatives and further in direct contravention of the guidelines of both WHO and the local authorities, the Ministry of Health. In conclusion,

the Court found and held that the deceased's and the petitioner's rights had been violated by the fourth respondent.

As to whether the petitioners should be granted the orders sought, the Court addressed itself on the question of what remedy the petitioners have in law after it had found that their rights had been violated. The petitioners had sought orders to exhume the deceased's body, carry out an autopsy and biopsy and subsequently a decent re-burial to be carried out in the presence of the petitioners and their family members at the cost of the respondents. The petitioners further prayed that they may be provided with protective gear during the re-burial of the deceased, James Oyugi Onyango. Article 24(1) requires that there be reasonable and justifiable reasons for the limitation to a right. Thus, the question was whether there was reasonable justification to inter the deceased as carried out by the fourth respondent's agents. The Court was alive to the fact that both the guidelines of WHO and local authorities acknowledge the need to respect the deceased's customs during burial and further that there is no need to bury the deceased without a coffin. On the burial and exhumation of dead bodies, the Court examined section 146 of the Public Health Act, which provided that no dead body wherever interred in Kenya can be exhumed without a permit granted by the Cabinet Secretary for the time being responsible for matters relating to health.<sup>77</sup>

The Court appreciated the precautionary principle which was to the effect that authorities must take precautionary measures when stakes are high, despite scientific evidence about the expected event being harmful not yet being certain. This implied that protective action should be taken to prevent any possible harm. For example, when there is a hurricane, it would make more sense to get out of its way than to stay put and evaluate possible responses. In applying the precautionary principle, the Court held that it was better to err than to be sorry. It followed that if the consequences of an activity could be serious and subject to scientific uncertainties, as in this case, where it was not certain whether the body of the deceased was suspected of having been COVID-19 positive, then precautionary measures should be taken, or the activity should not be carried out. Finally, the Court concluded by stating that it was indeed unfortunate that the deceased, James Oyugi Onyango, was not accorded a proper,

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77 The Court also noted that powers to order the exhumation of a body are to be found in sec 388(3) of the Criminal Procedure Code, which empowers the Attorney-General to direct that a body be disinterred for the purposes of an inquiry into the cause of a particular death, and in sec 387(2) of the Criminal Procedure Code which empowers a magistrate holding an inquest to cause a body to be disinterred.

decent and dignified burial. However, the Court was unable to find that the actions of the respondents were deliberate or that they were wholly intended to stigmatise the petitioners and disrespect the dead. In the Court's view, the circumstances prevailing were beyond the capacity of the public health officials at Siaya. In dismissing the substantive prayers sought in the petition, the Court, however, ordered the government of Siaya to cement the grave of the deceased at their own expense and in all its future endeavours to comply with public health and WHO protocols on the management and disposal of bodies of persons suspected of having succumbed to highly-infectious diseases such as COVID-19.

The case raises several issues. First, this case illustrates the tension between the traditional rights to bury the dead as protected under the Constitution versus the international guidelines outlined in the WHO. It also highlights the tension between the individual rights of the deceased person to equality and non-discrimination and the rights to public interest and public safety. The tension here is clear because it is between the WHO rules and regulations and local culture and traditions on burial processes. The tension inherent in the international/local WHO guidelines are based on the assumption that a burial is a private affair when in fact it is a communal affair that involves celebrations, feasting, dancing and other cultural activities. The second tension is the tension between the individual and communal customary rights to bury and be buried and the public interest and public safety. All these tensions highlight that in upholding the rule of law and human rights, the classic liberal tension discussed in part 2 of this article continues to play out in rights rhetoric in the courts.

#### **4 Lessons from Kenya's experience with constitutionalism**

Many lessons may be drawn from Kenya's experience with constitutionalism during the COVID-19 pandemic. However, for the purposes of this article we will limit ourselves to three main lessons. The first lesson relates to how the government of Kenya sought to restrict human movement and interactions to curtail the spread of the pandemic. As was highlighted in the article, the Cabinet Secretary for Interior, upon the recommendation of the National Security Council, invoked the colonial era Public Order Act to impose a nationwide dusk to dawn curfew which has been extended severally at intervals of 30 to 60 days. In contrast, the declaration of a state of emergency under article 58 of the Constitution would have required the National Assembly to approve any extension after

the initial 14 days with a two-thirds majority for a maximum of two months at a time. Any subsequent extension would require three-quarters approval of all the members of the National Assembly. The involvement of the legislature in an exercise which, in spite of its noble intention, resulted in the violation of fundamental rights, would have assured automatic application of checks and balances through parliamentary oversight. A plausible argument against the deployment of state of emergency provisions would be that Kenya has no statute that defines the parameters and degrees of such a state of emergency. This argument could mean that declaration of a state of emergency in such circumstances might amount to a total curtailment of civil and political rights. However, a reading of article 58 together with article 24 of the Constitution provides valuable insight into inherent proportionality safeguards during a limitation of fundamental rights. Article 24(1) requires limitations of any fundamental rights and freedoms to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>78</sup> It also requires such limitations to take into account various factors, including the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.<sup>79</sup> This would then mean that in the face of the pandemic, justifiable limitations such as a dusk to dawn curfew or cessation of movement orders could be framed and enforced through state of emergency provisions while maintaining parliamentary oversight on the actions of the executive branch.

The second lesson relates to the way in which the government responded to the pandemic using the Public Health Act. The colonial era Public Health Act focuses on mainly criminal enforcement of measures and unless read together with article 10 of the Constitution and the Bill of Rights, it can result in the erosion of fundamental rights and freedoms. Two examples stand out concerning mandatory quarantine and burials. Human Rights Watch, an international advocacy body, reported that, in forcefully quarantining tens of thousands of people, the Kenyan government was potentially facilitating the transmission of the COVID-19 virus as these facilities lacked proper sanitation, protection equipment and nutritious food.<sup>80</sup> Indeed, people were also forced into these overcrowded quarantine facilities for violating the curfew or

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<sup>78</sup> Art 24 Constitution of Kenya 2010.

<sup>79</sup> Art 21(4)(e) Constitution of Kenya 2010.

<sup>80</sup> Human Rights Watch 'Kenya quarantine conditions undermine rights', <https://www.hrw.org/news/2020/05/28/kenya-quarantine-conditions-undermine-rights> (accessed 28 September 2020).

defying orders to wear face masks.<sup>81</sup> It is important to note that at no time had Kenya enacted any legislative provision or regulation prescribing mandatory quarantine as a criminal penalty for violating the state curfew or for failing to wear face masks. The prescribed penalty for curfew violation is a fine not exceeding 15 000 shillings or imprisonment not exceeding three months,<sup>82</sup> while the penalty for not wearing a mask is a fine not exceeding 20 000 shillings or to imprisonment for a period not exceeding six months or both.<sup>83</sup> While article 10 of the Constitution makes the rule of law mandatory for all actions by state and public officers, the use of mandatory quarantine as an unlawful form of punishment discloses a deficit in observance of the restraint in the use of governmental authority as required by constitutionalism. On the issue of burials, there was the undignified handling of human remains including early morning interments by public health officials without upholding customary last rites practices. This goes against John Mbiti's perspective that the African view of the person amounts to 'I am because we are, and since we are, therefore I am'. This ratifies the argument that a person, even with distinct individual traits, is one and the same with his or her community which through culture defines their identity even in death. Therefore, the undignified handling of the body of a deceased person in turn amounts to undignified handling of his family and community. Yet, the preservation of human dignity is the very essence of the Bill of Rights.<sup>84</sup> In similar circumstances in the future, public health officials ought to bear in mind the importance of dignity under African customary law and culture especially during funerals. An unintended consequence of public health measures was the spread of stigma against people who were visited by public health officials dressed in personal protective wear. Sufficient public and community level awareness building on disease infection and risk factors could provide an accurate picture of the situation and lessen the ostracisation of those perceived to be infected.<sup>85</sup> This could be done, for instance, using community health workers and advocacy civil society organisations.

The third lesson relates to the compliance mechanisms established by the Constitution to ensure observance of human rights by the state. The Constitution of Kenya has established the Kenya National

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81 As above.

82 Sec 8(6) of the Public Order Act.

83 Legal Notice 50 of 2020.

84 Art 19(2) Constitution of Kenya.

85 Centre for Global Development 'Protecting community health workers: PPE needs and recommendations policy action', <https://www.cgdev.org/publication/protecting-community-health-workers-ppe-needs-and-recommendations-policy-action> (accessed 22 August 2020).

Human Rights Commission with a mandate to ensure compliance with the rule of law and human rights obligations.<sup>86</sup> It also guarantees the Commission independence such that it is not subject to direction or control by any person or authority.<sup>87</sup> Yet, in the face of the pandemic the Commission's investigatory role only yielded the report referred to in this article but failed to hold accountable those responsible for the violations. In its report, the Commission revealed a high degree of human rights violations by security services. These human rights violations demonstrate the difficulties the country continues to face with respect to compliance with the rule of law as enshrined in the Constitution of Kenya. It also indicates a need to enhance the legal powers and practical capabilities of this Commission and other such oversight mechanisms in Kenya to adequately respond to future violations of human rights and the rule of law.

Based on its extensive Bill of Rights, state obligations on human rights, enforcement mechanisms and mandatory values and principles of governance, the Kenyan Constitution contains the hallmarks of a transformative supreme law. This supremacy has been tested during the pandemic and the documented violations vitiate the transformative claim because of the inability to limit the power of the state. Therefore, ten years after promulgation, the implementation of this Constitution has proved to be a double-edged sword, a site of tension, on the one hand, and transformation, on the other. While the Kenyan government has made major strides forward as far as consolidating the rule of law, human rights and governance is concerned, the COVID-19 pandemic has revealed that there is a minefield in the path to realising constitutionalism. It is important for state officials and citizens to recall that the Constitution itself requires that it must be construed in a manner that promotes its purposes, values and principles, contributes to good governance, and advances the rule of law and human rights.

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86 Art 58 Constitution of Kenya.

87 Art 249(2)(b) Constitution of Kenya.

## Implications of Lesotho's COVID-19 response framework for the rule of law

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**Summary:** *Lesotho's COVID-19 response was proactive. A state of emergency was declared prior to confirmation of any positive case of the virus in the country. The approach was two-pronged in that, first, a state of emergency was declared under section 23 of the Constitution with effect from 18 March 2020 and, second, a disaster-induced state of emergency was declared in terms of sections 3 and 15 of the 1997 Disaster Management Act with effect from 29 April to 28 October 2020. An ad hoc body aimed at oversight of the response was also established, but was disbanded after four weeks and replaced with another similarly ad hoc body. On the basis of the three core principles of the rule of law, this article interrogates the repercussions of this approach on the principle of the rule of law, in particular, compliance with international human rights obligations contained in ICCPR, the African Charter as well as municipal laws, namely, the Constitution and the Disaster Management Act. It is argued that while Lesotho had to act swiftly in order to protect lives, in so acting the existing legal and institutional frameworks were ignored in violation of the rule of law principle. The article concludes by recommending that in order to avoid similar challenges in the future, the existing legal and institutional frameworks must be strengthened*

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*rather than replaced as such duplication of institutions depletes meagre resources and creates a platform for the misuse of public funds and corruption.*

**Key words:** Lesotho; COVID-19; rule of law; international obligations; state of emergency; Disaster Management Act

## 1 Introduction

According to the Universal Declaration of Human Rights, 1948 (Universal Declaration) 'it is essential, if a man is not to be compelled to have recourse ... to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.<sup>1</sup> That is, the rule of law plays a major role in the protection of human rights, more so when there is a threat to life such as the novel Coronavirus disease (COVID-19) pandemic. The concept of the rule of law is traced back to the sixteenth century. Philosopher John Locke defined it as a restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws.<sup>2</sup> It contemplates the existence of an effective legal system, which entails laws and mechanisms or institutions entrusted with the implementation of such laws.<sup>3</sup> Saunders and Le Roy argue that the rule of law is based on three core principles, namely, governance of the polity by general rules laid down in advance; the application and enforcement of these rules; and, lastly, effective and fair resolution of disputes.<sup>4</sup>

COVID-19 has put the rule of law principle to a great test as states have had to apply laws and establish mechanisms to respond to a pandemic that was not foreseen at the time of the enactment of such laws. The disease was first reported in the city of Wuhan, China, in December 2019,<sup>5</sup> and the first positive case in Lesotho was registered on 13 May 2020,<sup>6</sup> making Lesotho the last African country to register the virus. Since December 2019, the virus has spread across the globe like wildfire. On 30 January 2020 the World Health Organisation (WHO) declared it a public health emergency

1 Universal Declaration Preamble para 3.

2 Stanford Encyclopaedia of Philosophy 'The rule of law' (2016), <https://www.plato.stanford.edu/entries/rule-of-law/> (accessed 7 August 2020).

3 C Saunders & K le Roy 'Perspectives on the rule of law' in C Saunders & K le Roy (eds) *The rule of law* (2003) 5.

4 As above.

5 HA Rothan & SN Byrareddy 'The epidemiology and pathogenesis of Coronavirus disease (COVID-19) outbreak' (2020) 109 *Journal of Autoimmunity* 1, <https://pubmed.ncbi.nlm.nih.gov/32113704/> (accessed 26 May 2020).

6 Lesotho National Emergency Command Centre 18 May 2020.

of international concern.<sup>7</sup> The spread of the virus and its devastating consequences left many states – Lesotho included – entangled in moral, ethical, human rights and legal dilemmas.<sup>8</sup>

From a legal front, Lesotho adopted a proactive approach towards the pandemic by acting prior to confirmation of any positive case in the country. This approach was two-pronged. First, a state of emergency was declared in terms of section 23 of the 1993 Constitution and later a disaster-induced state of emergency was declared in terms of sections 3 and 15 of the 1997 Disaster Management Act (DMA). The objective of this article is to assess this response against the three core principles of the rule of law as laid down by Saunders and Le Roy. First, the simultaneous declaration of the state of emergency and state of disaster is discussed in light of general rules laid down under both international and national legal frameworks. Subsequently, the emergency measures and their enforcement, including the deployment of the army and the establishment of the National Emergency Command Centre (NECC) and later National COVID-19 Secretariat (NACOSEC) are analysed against these general rules. Finally, judicial oversight and the enforcement of the measures adopted are discussed.

In order to achieve this objective, both descriptive and analytical approaches are adopted. The article is divided into five parts. The first part is an introduction; the second part provides a detailed account of the measures taken towards the pandemic; the third part analyses compatibility of these measures with national and international legal frameworks; the fourth part discusses the judicial oversight and accountability mechanisms; and the last part concludes with a summary and recommendations.

## 2 Lesotho's response to the pandemic

While the death toll and number of infections rapidly increased around the globe, the brunt of the virus itself was felt in Lesotho around July 2020 when the number of positive cases increased and Lesotho started recording COVID-19-related deaths. The first death was recorded on 9 July 2020. Compared to the rest of the world in

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7 Statement of the Director-General at the 2nd meeting of the International Health Regulations Committee regarding the outbreak of the novel Coronavirus, <https://www.who.int/news-room/detail> (accessed 26 May 2020).

8 R Robert et al 'Ethical dilemmas due to the COVID-19 pandemic' (2020) 10 *Annals of Intensive Care*, <https://annalsofintensivecare.springeropen.com/articles/10.1186/s13613-020-00702-7> (accessed 6 August 2020). In this article the authors discuss the critical ethical choices with which ICU caregivers have been confronted during the COVID-19 pandemic and the limits of such choices.

which the pandemic claimed many lives within a very short period, from May 2020, when the first case was registered in Lesotho, the number of positive and mortality cases did not rise rapidly. However, the ramifications of the pandemic remain dire due to the pre-existing political instability,<sup>9</sup> poverty,<sup>10</sup> inequality and a culture of human rights violations.<sup>11</sup> Due to the proactive steps that the government took prior to the recording of any cases, the socio-economic impact of the pandemic was already being felt. Human rights to movement, liberty and livelihood had already been limited by the state of emergency which operated four months prior to the recording of positive COVID-19 cases.

The proactive response was in the form of a declaration of a state of emergency by public notice with effect from 18 March 2020. This state of emergency was first declared verbally by the Prime Minister on 18 March and published through a legal notice on 27 March 2020 (Legal Notice 26).<sup>12</sup> The Legal Notice was to operate retrospectively from 18 March but did not stipulate the end period.<sup>13</sup> On the day of publication of Legal Notice 26, a 21-day lockdown was also imposed by the Prime Minister without the involvement of Parliament. Towards the end of the 21 days, Parliament confirmed the state of emergency and extended it by six months to 18 October 2020. A month later there was another publication of a state of emergency (Legal Notice 40) in terms of which the Prime Minister, acting in accordance with sections 3 and 15 of the DMA, declared a 'COVID-19 state of disaster-induced emergency' for a period of six months with effect from 29 April 2020 to 28 October 2020.

In terms of Legal Notice 40, lockdown measures imposed included movement restrictions; the prohibition of public gatherings; the

9 K Matlosa *Understanding political crisis of Lesotho post-2015 elections* (2017); see also Institute of Peace and Security Studies 'The Kingdom of Lesotho conflict insight' in which poverty, the fragmented multiparty system and disregard for the rule of law are identified as major causes of political instability in Lesotho, [www.ipss-addis.org/publications](http://www.ipss-addis.org/publications) (accessed 6 August 2020); see also RS Weisfelder *Free elections and political instability in Lesotho* (2015), <https://www.eisa.org.za/pdf/JAE14.2Weisfelder.pdf> (accessed 6 August 2020); see also Z Maundeni 'Political culture as a source of political instability: The case of Lesotho', <https://academicjournals.org/journal/AJPSIR/article-full-text-pdf/5F5BE7D40715> (accessed 6 August 2020).

10 According to UNDP, Lesotho is one of the least developed nations in the world; 57,1% of the population lives below the national poverty line; see also G Callander 'The complex causes of poverty in Lesotho' *Borgen Magazine* 4 November 2017, <https://www.borgenmagazine.com/complex-causes-of-poverty-in-lesotho/> (accessed 6 August 2020).

11 T Makatjane et al 'HIV/AIDS-related discrimination among females aged 15-24 in Lesotho' (2009) 13 *Review of Southern African Studies* 64 who illustrate the high level of double discrimination based on sex and HIV status against young females in Lesotho.

12 Declaration of COVID-19 State of Emergency Notice 26 of 2020.

13 As above.

closure of all businesses excluding essential services; and limitation of funeral attendees to 50. The Lesotho Defence Force (LDF) was deployed and authorised to ensure compliance with these measures. The Legal Notice further authorised the Minister of Health to publish regulations in line with international standards on the pandemic. The first Public Health (COVID-19) Regulations 2020 were published by the Minister of Health on 27 March 2020<sup>14</sup> and since then have been amended several times.<sup>15</sup> Over and above reiterating the lockdown restrictions, the Public Health (COVID-19) Regulations also contain offences and penalties in relation to the lockdown restrictions as well as the establishment of the NECC, with a mandate to oversee Lesotho's COVID-19 response. It should be noted, however, that the NECC was later disbanded and replaced by NACOSEC.

Amid the state of emergency, Prime Minister Thomas Thabane's coalition government collapsed owing to a vote of no confidence and a new coalition government headed by Dr Moeketsi Majoro was established. Among changes brought about by the Majoro regime to Lesotho's COVID-19 response is the establishment of NACOSEC and the adoption of a National COVID-19 Strategy. The question of whether the approaches adopted by the two regimes complied with the rule of law is discussed in the next part.

### 3 Compatibility of Lesotho's COVID-19 response with international and domestic legal standards

The exercise of emergency powers in order to save lives is an acceptable practice in democratic dispensations. Sunshine et al argue that 'emergency declarations are a vital legal authority that can activate funds, personnel and material and change the legal landscape to aid in the response to a public health threat'.<sup>16</sup> However, as Keith and Poe suggest, because human rights are more likely to be violated during a state of emergency, it is important that circumstances leading to a declaration of a state of emergency as well as powers resultant therefrom be subjected to the rule of law.<sup>17</sup> That is, the emergency powers must be exercised within the confines of pre-set legal standards. Hence, this part assesses Lesotho's COVID-19 response – the declaration of a state of emergency and state of disaster – against pre-set obligations contained in international

<sup>14</sup> Legal Notice 27 of 2020.

<sup>15</sup> Legal Notices 30, 31, 36, 38, 41, 43 & 46 of 2020.

<sup>16</sup> G Sunshine et al 'Emergency declarations for public health issues: Expanding our definition of emergency' (2019) 47 *Journal of Law, Medicine and Ethics* 95.

<sup>17</sup> LC Keith & SC Poe 'Are constitutional state of emergency clauses effective? An empirical exploration' (2004) 26 *Human Rights Quarterly* 1071.

treaties and domestic laws. With regard to international law, the article analyses the response against the International Covenant on Civil and Political Rights (ICCPR),<sup>18</sup> the African Charter on Human and Peoples' Rights (African Charter)<sup>19</sup> and the Paris Minimum Standards of Human Rights Norms in a State of Emergency (Paris Minimum Standards). The discussion in relation to domestic laws focuses on the Constitution and the DMA.

Lesotho has ratified both ICCPR and the African Charter. Although not all aspects of the African Charter have been incorporated into the national legal system, chapter two of the Constitution, which contains fundamental human rights and freedoms, is framed in terms similar to those of ICCPR and some civil and political rights provisions of the African Charter. However, unlike other countries, such as South Africa and Zimbabwe, where there are constitutional provisions that dictate the circumstances under which international instruments are to be applied, the Constitution of Lesotho is silent as to the place that international instruments occupy in the hierarchy of laws in the national legal system.<sup>20</sup> As in the case of many other countries that have inherited Roman-Dutch law and its legal traditions, Lesotho has been categorised as dualist.<sup>21</sup>

Despite the dualism debate that international treaties are only applicable upon their domestication into municipal law, cases decided by the High Court of Lesotho suggest that where human rights are concerned, the courts have leaned more towards emphasising Lesotho's obligation to comply with international human rights obligations than on an inquiry as to whether or not such human rights treaties have been domesticated. For instance, in the case of *Fuma v Lesotho Defence Force* the High Court of Lesotho specifically held that '[t]he unreservedly ratified United Nations Convention on the Rights of Persons with Disabilities stands not only as an aspirational instrument in the matter, but that by default, it technically assumes the effect of municipal law in the country'.<sup>22</sup>

18 Lesotho acceded to ICCPR on 9 September 1992.

19 Lesotho ratified the African Charter on 10 February 1992.

20 Sec 39 Constitution of South Africa; sec 326(1) of the Zimbabwean Constitution makes customary international law part of the law of Zimbabwe, while sec 327(3) states that international treaties ratified by the executive shall only become part of the law of Zimbabwe upon incorporation by an Act of Parliament.

21 WCM Maqutu & AJGM Sanders 'The internal conflict of laws in Lesotho' (1987) 20 *Comparative and International Law Journal of Southern Africa* 377; see also I Shale 'Historical perspective on the place of international human rights treaties in the legal system of Lesotho' (2019) 19 *African Human Rights Law Journal* 194.

22 Constitutional Case 8/2011 [2013] LSHC 68 para 22.

On the basis of the foregoing, this article proceeds on the premise that by ratifying ICCPR and the African Charter, Lesotho has created law for itself and, therefore, in terms of the *pacta sunt servanda* principle must comply with the standards contained in these instruments.<sup>23</sup> This approach is also supported by the fact that in relation to human rights protection, judicial practice – although it is not clear whether this was deliberate or not – has tilted towards the application of provisions of international instruments directly without probing into their domestication or otherwise.

### 3.1 Compliance with the International Covenant on Civil and Political Rights

Article 4 of ICCPR regulates states' power during emergencies. It defines circumstances in which a state of emergency may be declared as 'times of public emergency which threatens the life of the nation' and mandates that such a state must be declared officially.<sup>24</sup> According to WHO, the COVID-19 pandemic is a public health emergency, thus falling within the confines of article 4.<sup>25</sup> The legal notices that the government of Lesotho published signify the official declaration of a state of emergency as required by article 4.<sup>26</sup> Article 4 also lists rights from which states may not derogate even in times of emergencies. These are the right to life; freedom from torture and other cruel, inhuman and degrading treatment or punishment; freedom from slavery; and the right to freedom of thought, conscience and religion.<sup>27</sup> Lastly, it mandates that other states must be informed not only of the existence of the state of emergency but also the rights from which the state in question has derogated, the reasons for such derogation and the date on which there shall be a return to normalcy.<sup>28</sup>

Lesotho has partly complied with article 4. According to the Public Health (COVID-19) Regulations, some of the rights limited during the state of emergency with a view to flattening the curve of infections

23 Il Lukashuk 'The principle of *pacta sunt servanda* and the nature of obligations under international law' (1989) 3 *American Journal of International Law* 513.

24 Art 4(1). The Human Rights Committee, however, has warned in its General Comment 29 that not all situations call for such declarations and the consequent derogation of human rights. Human Rights Committee, CCPR General Comment 29: Article 4 Derogations during a state of emergency, 31 August 2001, UN Doc CCPR/C/21/Rev.1/Add.11, (HRC, GC 29) para 3.

25 See statement of WHO Director-General (n 7).

26 Legal Notice 26 which published a declaration of state of emergency under sec 23 of the Constitution and Legal Notice 40 which published a declaration of state of disaster-induced emergency under sec 15 of the DMA.

27 Art 4(2).

28 Art 4(3).

are freedom of movement, freedom of association and assembly. These rights are not among those shielded from derogation by article 4(2) and, therefore, to this extent there is compliance. The violation, however, is exhibited in the deployment of the army as a means to enforce adherence to these limitations. This is so because Lesotho was not at war and matters of public order are ordinarily within the mandate of the Lesotho Police Service (LMPS).<sup>29</sup> The deployment of the army to enforce the lockdown regulations led to their use of excessive force against members of the public which in turn violates article 7, the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment.<sup>30</sup> The excessive use of force is also a violation of article 4(2) because General Comment 29 lists the right to be treated with dignity and humanity as one of the rights from which there cannot be lawful derogation even during a state of emergency.<sup>31</sup>

Bearing in mind that the movement restrictions did not prohibit people from worshipping in their homes, the next question is whether the closure of places of worship through the Public Health (COVID-19) Regulations violates article 4(2) which lists article 18 – freedom of thought, conscience and religion – as one of the rights from which states may not derogate even in times of emergency. The right to freedom of religion is contained in article 18 of ICCPR. A limitation of this right is found in article 18(3). It states that the right to manifest one's religions and belief may be subject to 'only such limitations as are prescribed by law, and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others'. Because public gatherings were identified by the WHO as 'super spreaders' of the pandemic, their limitation was essential in order to reduce the number of infections 'to protect public ... health' as contemplated in article 18(3). People were still able to worship individually in homes and jointly through internet connections. Therefore, by restricting movement and enforcing

29 The separation of the army and the police is based on Adama's quote in which he said: 'There's a reason you separate the military and the police. One fights the enemies of the state, the other serves and protects the people. When the military becomes both, then the enemies of the state tend to become the people.' W Adama 'Battlestar Galactica, Miniseries quotes', <http://www.quotes.net/show/-1> (accessed 13 September 2020).

30 Eg, according to Mokobori, on 3 April 2020 a Mosotho man and an employee of one of the local security companies, Thabang Mohlalisi, was attacked and assaulted with rifle butts by members of the army at his home while polishing his work shoes. TB Mokobori "'Lockdown' brutality: A case for Lesotho' *Selibeng* 6 July 2020, <https://selibeng.com/lockdown-brutality-a-case-for-lesotho/> (accessed 13 September 2020). Several other cases are depicted on social media platforms such as Facebook and in Whatsapp in video clips where both the police and members of the army are seen assaulting individual citizens who were found in the streets during the lockdown period.

31 Human Rights Committee General Comment 29 (n 24).

the closure of places of worship, the Public Health (COVID-19) Regulations violate neither article 4 nor article 18 of ICCPR.

The last aspect of article 4 is that it mandates states to 'immediately' inform state parties to ICCPR of the declared state of emergency.<sup>32</sup> The purpose of this notification is to ensure monitoring of the situation by the Human Rights Committee, other state parties and stakeholders.<sup>33</sup> According to the United Nations Treaty Collection (UNTS), only 13 states have notified the UN Secretary-General on their derogations from ICCPR as part of the COVID-19 response. Lesotho is among many state parties to ICCPR that have 'resorted to emergency measures ... without formally submitting a notification of derogation'.<sup>34</sup> Therefore, in this regard there is non-compliance.

As far as ICCPR is concerned, it may be concluded that Lesotho violated its obligations in two ways. First, the deployment of the army and their excessive use of force as a measure to restrict freedom of movement and assembly went beyond the confines of articles 4(1) and (2) as well as article 7. Second, the failure to inform other state parties through the UN General Assembly of the declared state of emergency, the rights from which there has been a derogation and the reasons for such derogation as well as the time when such is expected to be lifted, contravened obligations contained in article 4(3).

### 3.2 African Charter on Human and Peoples' Rights

The main human rights instrument at the regional level is the African Charter on Human and Peoples' Rights of 1981 (African Charter).<sup>35</sup> Unlike the European Convention of Human Rights of 1950 and American Convention on Human Rights of 1969, the African Charter contains neither a clause that regulates states of emergency nor a derogation clause.<sup>36</sup> There are several opposing views regarding

<sup>32</sup> Art 4(3).

<sup>33</sup> Human Rights Committee *Statement on derogations from the Covenant in connection with the COVID-19 pandemic*, UN Doc CCPR/C/128/2, 24 April 2020 para 2(a).

<sup>34</sup> Human Rights Committee (n 33) para 1.

<sup>35</sup> According to its Preamble, it is based on 'historical values of African civilisation' and state parties undertake to 'eliminate colonialism, neocolonialism, apartheid, Zionism and to dismantle aggressive foreign military bases'; see also R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 675.

<sup>36</sup> *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLLR 66 (ACHPR 1995) para 40. In this communication the African Commission emphasised that the effect of this silence is that 'the Charter does not allow for state parties to derogate from their treaty obligations during emergency situations'.

the absence of a derogation clause in the African Charter.<sup>37</sup> This debate notwithstanding, in the case of *Constitutional Rights Project & Others v Nigeria* the African Commission on Human and Peoples' Rights (African Commission) stated that the rights contained in the African Charter may not be derogated from but may be limited in accordance with article 27(2), which provides that '[the rights] shall be exercised with due regard to the rights of others, collective security, morality and common interest'.<sup>38</sup> The African Commission further held that such limitations may only be justifiable if they are 'strictly proportionate with and are absolutely necessary for the advantages which follow'.<sup>39</sup>

That is, in order for the emergency measures adopted in Lesotho to comply with the African Charter, they must pass a three-pronged test: one, whether they are proportionate and necessary to protect the rights of others; two, whether they are meant to maintain collective security, morality or common interest; and, lastly, whether the measures do not erode the rights in question in a way that renders them illusory.

As illustrated under the discussion on compatibility with ICCPR, while the lockdown measures were meant to protect the lives of the people of Lesotho, the excessive use of force against those who failed to comply was not necessary and created a greater risk of losing lives than the pandemic itself. That is, in this regard the measures adopted fail the first test under article 27(2) of the African Charter. The measures pass the second test in that the movement restrictions and the enforcement of such were meant for the protection of a common interest, that is, public health. However, they also fail the third test, that they should not be such as to render the rights being limited illusory. In this regard, funds and efforts were not focused on the improvement of healthcare facilities and healthcare professionals so as to protect the rights to life and health. Rather, much focus was on the allocation of funds to *ad hoc* committees such as NECC

37 See AJ Ali 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights' (2013) 17 *Law, Democracy and Development* 78; see also L Sermet 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: A critical discussion' (2007) 7 *African Human Rights Law Journal* 159 who applauded the African Charter for not allowing states to derogate from human rights contained in its provisions as such would stand the risk of abuse and rampant human rights violations under the guise of a state of emergency; see also MA Tolera 'Absence of a derogation clause under the African Charter and the position of the African Commission' (2013-2014) 4 *Bahir Dar University Journal of Law* 229 who views this silence as a defect that needs to be corrected.

38 (2000) AHRLR 227 (ACHPR 1999); see also *Media Rights Agenda & Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) (*Media Rights case*) para 67.

39 *Constitutional Rights Project case* (n 38) para 42.

and NACOSEC, thus rendering the rights to life and health which in the first place were supposed to be protected, meaningless. The approach was also such that the people were viewed more as a problem rather than as a solution to the problem and, therefore, the limitation on movement in turn negatively impacted on other rights such as the right to livelihood as no arrangements were made as to how the people would live during the lockdown. This led to the common saying among the people that they would rather die of COVID-19 than of hunger.

### 3.3 Paris Minimum Standards of Human Rights Norms in a State of Emergency

The Paris Minimum Standards were approved by the International Law Association in Paris in 1984.<sup>40</sup> Although non-binding in nature, they provide a guideline as to what experts deem the proper exercise of powers during a state of emergency. The Paris Minimum Standards contain 16 articles that articulate non-derogable rights and freedoms. Among these are right to life; the right to liberty; freedom from torture; freedom of thought, conscience and religion; and the right to a remedy.<sup>41</sup> Most importantly, the Principles state that the duration of a state of emergency should not go beyond the period specified in the Constitution and the democratic control of the state of emergency should not change the basic institutions of the country.<sup>42</sup>

As illustrated under both ICCPR and the African Charter, the Public Health (COVID-19) Regulations did not in principle derogate from the non-derogable rights. However, in implementing the movement restrictions, excessive use of force was used in violation of the duty not to derogate from freedom from torture. Furthermore, by establishing NECC and NACOSEC as opposed to the use of the existing structures in the DMA, Lesotho, as Roepstorff warns, has changed the basic institutions of the country by replacing a statutory body with *ad hoc* structures established by the executive. This violates the first core principle of the rule of law that states must govern on the basis of pre-set legal standards.

40 RB Lillich 'The Paris Minimum Standards of Human Rights Norms in a state of emergency' (1985) 79 *American Journal of International Law* 1072.

41 Lillich (n 40) 1075.

42 K Roepstorff 'Terrorism as a public emergency and its impact on human rights' *Law and Development.org* 14, <http://lawanddevelopment.org/articles/terrorismhumanright.html> (accessed 16 September 2020).

## 4 Compliance with domestic laws

As Viljoen states, while most human rights are contained in international human rights instruments, it is at the domestic level that individuals are more able to access those rights.<sup>43</sup> Without their application at the domestic level, the international obligations remain mere aspirations. When assessing the importance of domestic law in the European human rights system and *vice versa*, Slaughter and Burke-White observe that while traditionally that was not the case, with the growing body of human rights law, international law has transcended into the domestic sphere to regulate the relationship between governments and their own citizens.<sup>44</sup> Hence, this part discusses the control of emergency powers at the national level as a means to protect rather than violate human rights.

In order to ensure the control of emergency powers, different scholars suggest various models, including constitutional,<sup>45</sup> legislative,<sup>46</sup> accommodation, law for all seasons, and the extra-legality model, among others.<sup>47</sup> In response to the COVID-19 pandemic, Lesotho has adopted both the constitutional and legislative models. In line with the constitutional model, a state of emergency was declared under section 23 of the Constitution, which provides:<sup>48</sup>

In time of war or other public emergency which threatens the life of the nation, the Prime Minister may, acting in accordance with the advice of the Council of State, by proclamation which shall be published in the Gazette, declare that a state of emergency exists for the purposes of this Chapter.

Section 23 also regulates by whom, when, how and for how long a state of emergency may be declared. Over and above the section 23 state of emergency, a state of disaster-induced emergency was declared under the DMA. The legislative regulation of same is contained in sections 3 and 15 of the DMA. Section 15 provides:

The Board shall –

...

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

44 A Slaughter & W Burke-White 'The future of international law is domestic (or European way of law)' (2006) 47 *Harvard International Law Journal* 327.

45 A Zwitter 'Constitutional reform and emergency powers in Egypt and Tunisia' (2015) 7 *Middle East Law and Governance* 257.

46 J Ferejohn & P Pasquino 'The law of exception: A typology of emergency powers' (2004) 2 *International Journal of Constitutional Law* 231.

47 O Gross & F Aolain *Law in times of crisis: Emergency powers in theory and practice* (2006) 2.

48 Sec 23(1) Constitution.

- (b) advise the Prime Minister, through the Minister, on the requirements for and the timing of a declaration of a disaster-induced emergency in accordance with the Constitution and to declare the country, any district or part thereof to be a disaster area ...

Based on this premise, this part assesses Lesotho's COVID-19 response against both the Constitution and the DMA with reference to other laws on financial accountability, including the Financial Management and Accountability Act 2011 and the Public Procurement Regulations 2007.

#### 4.1 Regulation of state of emergency under the Constitution

The importance of constitutional provisions for states of emergency is to limit governments' propensity to abuse emergency powers.<sup>49</sup> In terms of section 23 of the Constitution, where there is an emergency that threatens the life of a nation, the Prime Minister, acting in accordance with advice of the Council of State, may, by publication in a *Gazette* declare a state of emergency.<sup>50</sup> The state of emergency which began on 18 March 2020 was declared through a legal notice published in a *Gazette*, thus fully complying with section 23(1).<sup>51</sup> Further procedural compliance regarding the questions as to by whom and how a state of emergency may be declared is indicated by the fact that in its text, Legal Notice 26 states that a state of emergency is declared by the Prime Minister acting pursuant to the advice of the Council of State.<sup>52</sup> The challenge, however, is with regard to the silence in Legal Notice 26 as to when the state of emergency is to end. Section 23 explicitly states that a state of emergency declared under its provisions lapses at the expiration of 14 days,<sup>53</sup> which may be extended by Parliament for a period of not more than six months.<sup>54</sup> Legal Notice 26 states 18 March 2020 as the commencement date for the state of emergency, but does not state the end period. This anomaly was rectified by Parliament by extending the state of emergency to October. However, instead of articulating the date on which the state of emergency is to lapse as required under section 23, the Prime Minister published yet another *Gazette* which declared a state of disaster purportedly in terms of section 15 of the DMA. In Legal Notice 40 the Prime Minister makes no reference to section 23 of the Constitution and the earlier state of

49 Keith & Poe (n 17).

50 Sec 23(1).

51 Legal Notice 26 of 2020.

52 As above.

53 Sec 23(2).

54 Sec 23(5).

emergency published under Legal Notice 26, but declares a new state of disaster without following the requirements of section 23 of the Constitution as directed by section 15 of the DMA. This duplication of approaches does not comply with the rule of law principle, giving the impression that the state of emergency declared under section 23 remains indefinite and risks abuse, as Gowder warns, that an indefinite state of emergency may lead to unchecked executive powers and ultimately the demise of the rule of law.<sup>55</sup>

An argument may be advanced that the operative state of emergency is the latter one declared in Legal Notice 40. However, this argument cannot be sustained as the two Legal Notices are published pursuant to different laws, one being section 23 of the Constitution and the other being sections 3 and 15 of the DMA. Another reason why this argument collapses is that section 23(3) clearly states that a state of emergency declared in terms of section 23(1) may 'be revoked by the Prime Minister acting in accordance with the advice of the Council of State, by proclamation which shall be published in the *Gazette*'. Therefore, in the absence of a revocation of the state of emergency published in Legal Notice 26, in law Lesotho remains with two states of emergency, one declared under section 23 of the Constitution and another declared under section 15 of the DMA. Furthermore, a revocation of the section 23 state of emergency cannot be implied from the declaration of the DMA state of disaster for two reasons: First, the latter is silent about the status of the former; and, second, section 23 requires explicit revocation.

With a view to controlling emergency powers and protecting human rights during a state of emergency, section 21 of the Constitution regulates derogations from human rights and fundamental freedoms. It empowers government to derogate from the right to liberty (section 6) and equality and non-discrimination (sections 18 and 19). As a safeguard against the abuse of such powers, section 21(1) further provides that the measures of derogation must be done through an 'Act of Parliament' and must be 'necessary in a practical sense in a democratic society' for addressing the situation that led to the declaration of emergency. Applying section 21 to the COVID-19 situation, it is clear that extraordinary measures were necessary in order to reduce the rate of infections. However, the Constitution was not followed to the letter and there was no justification for the resort

<sup>55</sup> P Gowder 'Permanent state of emergency, unchecked executive power and the demise of the rule of law' (2017) 124 *Queen's Quarterly* 476.

to the DMA for a process and result that fall squarely within section 23 of the Constitution.

#### 4.2 Regulation of a disaster-induced state of emergency under the Disaster Management Act 1997

Prior to 1997 disasters in Lesotho were dealt with on an *ad hoc* basis in that a committee would be set up to deal with a particular disaster for its duration, whether such be a severe drought, heavy snowfall or a health pandemic such as COVID-19. The 1997 DMA was promulgated with the objective of establishing a permanent structure in the form of a Disaster Management Authority (Authority), to regulate emergencies arising out of disasters, including prevention, mitigation, preparedness, response and recovery measures for the protection of life and property against the effects of such disasters, and to vest responsibility of disaster management in the Authority and district secretaries which later were termed district administrators (DAs).<sup>56</sup> The DMA defines the two terms emergency and disaster as follows:<sup>57</sup>

‘Emergency’ means any occasion, instance or event for which, in the determination of the Prime Minister, exceptional assistance from the government is needed to supplement national, district, community or individual actions to save lives, protect property and public health and safety or to prevent or mitigate the threat of a catastrophe or extreme hazard in any part of Lesotho.

‘Disaster’ means a progressive or sudden, widespread or localised, natural or man-made event including not only prevalent drought but also heavy snowfalls, severe frosts, hailstorms, tornadoes, landslides, mudslides, floods, serious widespread fires and major air or road traffic accidents.

In the case of *David Mochochoko v The Prime Minister & Others* the Court stated *obiter* that COVID-19 falls within the above definition of ‘disaster’ in section 2 of the DMA.<sup>58</sup> In this case the applicant, a village chief, challenged the government’s decision to deal with the scourge of COVID-19 through channels other than the DMA. He challenged, in particular, the establishment of the NECC in that it was created outside the confines of the DMA as the Board established in terms of sections 13 and 14 of the DMA should be the one tasked to ‘deal with the management and administration of the Corona virus’.<sup>59</sup> The applicant also argued that the funds used

<sup>56</sup> Preamble.

<sup>57</sup> Sec 2.

<sup>58</sup> Lesotho High Court CIV/APN/141/2020 (unreported) para 4.

<sup>59</sup> *Mochochoko’s case* (n 58) para 1.

by the NECC had not been approved by Parliament as mandated by section 114 of the Constitution. Although the case was dismissed on the grounds that the applicant had no legal standing to sue, Mokhesi J stated *obiter* that '[i]t is clear that when Parliament enacted this Act, it envisaged a body which will be vested with *exclusive*<sup>60</sup> powers to manage disasters and not any other body created on an *ad hoc* basis'.<sup>61</sup>

The DMA contains extensive provisions with regard to the question as to by whom and the circumstances under which a state of disaster may be declared;<sup>62</sup> the emergency powers exercised by the Minister during such disaster-induced state of emergency;<sup>63</sup> the establishment and functions of the Authority and other task forces and working groups whose mandate is to prevent, mitigate, prepare for, respond to and implement recovery measures for the protection of life and property against the effects of disasters.

Despite the clear provisions of the DMA, when the pandemic hit Lesotho, the government responded by establishing the NECC which was later disbanded and replaced by NACOSEC. The argument in this article is that the establishment of NACOSEC was equally unlawful as the provisions of the DMA were not followed notwithstanding the statement in Legal Notice 61 that the Minister acted pursuant to the provisions of the DMA. It is argued that the permanent structures provided for in the DMA should have been used to respond to the pandemic as opposed to the creation of NACOSEC as a new *ad hoc* structure. The DMA clearly articulates that its objective is to vest the responsibility of disaster management in the Disaster Management Authority.<sup>64</sup>

The other argument is in relation to the delegation of section 4 powers of the minister to NACOSEC. In terms of section 4 of the DMA, the minister is empowered to perform various actions, including the suspension of the operation of certain statutes and regulations if such would hinder action in coping with the emergency; to use government resources; to transfer government personnel; and to receive, accept and account for donations and other funds that may be given to the Authority. In terms of Legal Notice 61, these

60 My emphasis.

61 *Mochochoko* case (n 58) para 4.

62 Sec 3(1).

63 Sec 4 empowers the minister to perform various actions including the suspension of operation of certain statutes and regulations if such would hinder action in coping with the emergency; to use government resources; to transfer government personnel; to receive, accept and account for donations and other funds that may be given to the authority.

64 Preamble.

powers are delegated to NACOSEC.<sup>65</sup> The contention is that these powers are vested in the minister by an Act of Parliament which is the DMA. Therefore, their delegation to NACOSEC through an executive order is unjustified and creates a platform for the abuse of public funds. The danger is that while the DMA states measures that ensure accountability in the exercise of such powers by the minister, NACOSEC is not expressly subjected to such accountability measures.

Section 11 of the DMA provides for the establishment of the Disaster Management Authority which, according to section 13, 'shall act as the central planning, coordinating and monitoring institution for disaster management and post-disaster recover'. According to section 14, the Authority shall be governed by a board whose functions are detailed in section 15. The use of the term 'shall' in section 13 suggests that it is mandatory that all situations that fall within the meaning of 'disaster' in section 2 of the DMA must be coordinated by the Authority. The establishment of NACOSEC through an executive order and giving it the mandate to perform functions of the Authority established in terms of an Act of Parliament thus contravenes section 13 as well as the principle of the rule of law. Although the Court dismissed the *Mochochoko* case on the ground that the applicant had no standing to sue, it, however, stated that when establishing the NECC, government had circumvented the provisions of sections 11 and 14 of the DMA which address the establishment of a Disaster Management Authority.<sup>66</sup>

Similarly to the challenges against the NECC in the *Mochochoko* case that the funds used by the NECC had not been approved by Parliament as mandated by section 114 of the Constitution, there are no clear guidelines as to how funds would be appropriated to NACOSEC and how such would be managed and accounted for. This has led to bickering between the executive secretary of NACOSEC and government. After two months of operations, conducting public consultations and drafting of a National COVID-19 Strategy, which had been adopted by Parliament, the squabbles about funds has led to the halting of operations as NACOSEC has no bank account and its procurement and recruitment processes have been terminated abruptly. The challenge with this is that while the power struggle continues, the virus keeps spreading, lives are being lost and no institution is taking charge of the situation.

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<sup>65</sup> Sec 3(a) Legal Notice 62/2020.

<sup>66</sup> *Mochochoko* case (n 58) para 5.

The power struggle between government and NACOSEC could have been avoided by following the provisions of the DMA in terms of which the Minister has the power to establish a Disaster Management Fund.<sup>67</sup> The fund would be maintained by the Accountant-General as a separate account for recording receipts including donations, monies appropriated by government for purposes of the disaster at hand<sup>68</sup> and disbursements required for liabilities and the discharge of functions of the Authority.<sup>69</sup> Because it is a permanent structure, the Authority already has an annual budget approved by the board in terms of section 39 of the DMA. Its technical, human and financial capacity should have been strengthened to deal with COVID-19.

Section 40 of the DMA also provides for the auditing of the books of the Authority by the Auditor-General. Therefore, the utilisation of the Authority and its financial structures could be in accordance with the rule of law, by complying with the DMA as well as Public Financial Management and Accountability Act 2011 the objective of which is 'to establish and sustain transparency, accountability and sound management of receipts, payments, assets and liabilities of the government of Lesotho'. The current approach, in terms of which a separate entity has been established with no guidelines on financial accountability, creates a fertile ground for corruption, the misuse of public funds, non-accountability and the violation of other legal regulations such as the Public Procurement Regulations 2007.

## 5 Judicial oversight

The last of the three core principles of the rule of law is that there should be an effective and fair resolution of disputes. In addressing the role of courts in response to the COVID-19 pandemic, Petrov argues that 'the deliberative ... dispute resolution function of courts are crucial not only for preventing the abuse of emergency measures, but also for increasing the effectiveness of emergency measures by improving conditions necessary for compliance' with such measures.<sup>70</sup> A few cases were decided in relation to Lesotho's COVID-19 response. These cases illustrate both the dispute resolution and the enforcement roles played by the judiciary in Lesotho's fight against the pandemic.

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67 Sec 34.

68 Sec 35.

69 Sec 36.

70 J Petrov 'The COVID-19 emergency in the age of executive aggrandisement: What role for legislative and judicial checks?' (2020) *The Theory of Practice and Legislation*, <https://www.tandfonline.com/loi/rtpl20> (accessed 20 September 2020).

The first is the case of *ABC & Others v The Prime & Others* (Prorogation case).<sup>71</sup> This case challenged the prorogation of Parliament which was done soon after the declaration of a state of emergency. On the evening of 20 March, two days after the verbal declaration of a state of emergency, Prime Minister Thabane requested the King to prorogue Parliament by 21:00. The King did not act as advised, and later that night the Prime Minister issued a *Gazette* proclaiming the prorogation of Parliament.<sup>72</sup> The Prime Minister claimed that the prorogation was aimed at curbing the spread of COVID-19 by avoiding large gatherings in Parliament. The All Basotho Convention (ABC), a political party led by the Prime Minister, the Basotho National Party (BNP), one of the four coalition parties, and some members of parliament challenged the prorogation on various grounds including the failure to consult coalition partners and the obstruction of Parliament from discharging its functions to disburse funds meant for the fight against the COVID-19 pandemic. The Court held that the Prime Minister had failed to follow section 92 of the Constitution which governs the prorogation of Parliament and also failed to consider Parliament's indispensable role in the fight against the pandemic.<sup>73</sup> The prorogation was declared unlawful and Parliament proceeded with its business, including the allocation of funds for the fight against COVID-19.

Following the establishment of the NECC in April, in May the case of *David Mochochoko v The Prime Minister & Others* was lodged, challenging the lawfulness of the NECC and the disbursement of funds to it without following the procedures contained in section 114 of the Constitution.<sup>74</sup> Although the case was dismissed on the ground that the applicant lacked legal standing to sue, the Court played the important role of highlighting the flaws in the government's COVID-19 response. In particular, the Court stated that the establishment of the NECC was outside the confines of the DMA.

Another case is *The Coalition of Health Professionals Association/ Health Committee & Others v The National Emergency Command Centre (NECC)/National COVID-19 Secretariat (NACOSEC) & Others*.<sup>75</sup> In this case health professionals sought orders that the hospitals be declared a hazardous environment from which they were entitled to withdraw until such places were rendered safe for their health

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71 Constitutional Case 6/2020, Lesotho High Court 17 April 2020 (LSHCONST) 1.

72 Prorogation of Parliament Legal Notice 21 of 2020.

73 Prorogation case (n 71) paras 89-95.

74 *Mochochoko* case (n 58).

75 CIV/APN/214/2020, Lesotho High Court, 21 July 2020 (unreported).

and that of their families. In order to avoid unnecessary deaths, the government, through NACOSEC and the Ministry of Health, were directed by the Court to ensure the safety, health and welfare of health professionals by maintenance and improvement of the working environment that is clean, safe and without risks to health and life and that they are not unreasonably exposed to the risks of COVID-19. This case also illustrates the oversight role played by the courts in support of the rule of law principle.

The courts have also played a crucial role with regard to the enforcement of the lockdown measures. For instance, within a period of one month of the total lockdown (29 March to 27 April 2020) there had been more than 80 cases involving 134 people countrywide.<sup>76</sup> The majority of the cases involved violations of the regulations on the sale and consumption of alcohol, the holding of church services and operating businesses outside the hours prescribed in the Public Health (COVID-19) Regulations. Penalties for these offences ranged from M500 00 to M10 000.00 while sentences were in the range of one to two months' imprisonment. In some cases suspended sentences were imposed.

## 6 Conclusion and recommendations

This article has illustrated that the pandemic has not only been a challenge to health and economy but has also put Lesotho's rule of law to a great test. Compared to other countries, Lesotho had the opportunity to better prepare in terms of legal and institutional frameworks since the virus arrived on the shores of Lesotho at a later date, at a time when other countries were not only grappling with the legal and ethical dilemmas, but also the spread of the virus and spiralling death tolls. The declaration of a state of emergency prior to the recording of a positive case created prospects of taking stock of the existing legal and institutional frameworks and capacity building of such institutions so as to better respond to the pandemic.

The two-pronged approach of declaring a state of emergency in terms of section 23 of the Constitution and later a state of disaster-induced emergency in terms of sections 3 and 15 of the DMA during the subsistence of the former was an unnecessary and uncalculated move which also trampled upon the principles of the rule of law. This reflects an approach that was a too hasty, wholesale importation

<sup>76</sup> 'Fines for breaching Lesotho's Public Health (COVID-19) Regulations' *Selibeng* 9 May 2020, <https://selibeng.com/fines-for-breaching-lesothos-public-health-covid-19-regulations/> (accessed 21 September 2020).

of what obtained in neighbouring South Africa and a disregard for the pre-set legal rules such as section 23 of the Constitution which already existed at the time of the pandemic. It leads to a conclusion that the Thabane regime, which was in place in the early stages of the pandemic, and the Majoro regime, which took over when the former was ousted by a vote of no confidence, treated the COVID-19 threat to health in a cavalier manner.

A disregard for the first and second core principles of the rule of law is also reflected in the institutional framework established in response to the pandemic. First of all, the government did not utilise the already-existing permanent structures established under the DMA but resorted to the establishment of NECC and later NACOSEC which both are *ad hoc* in nature. The delegation through an executive order of powers that are otherwise legislatively vested in the Authority and the Minister to NACOSEC is also against the principle of the rule of law.

With regard to the manner in which the lockdown measures were implemented, Lesotho has acted against the second core principle of the rule of law and also transgressed its international human rights obligations as contained in ICCPR and the African Charter in various ways. Examples are the failure to inform the Secretary-General of the United Nations of the declared state of emergency, as required by article 4 of ICCPR, and the excessive use of force by the army in an attempt to enforce the lockdown regulations in contravention of articles 7 and 5 of ICCPR and African Charter respectively. Article 27(2) of the African Charter was also contravened by employing measures that were not proportionate to the risk that was being averted.

On the basis of the foregoing and in line with the three core principles of the rule of law, it is recommended that Lesotho must comply with its obligations under international human rights instruments and domestic laws. Compliance with international human rights obligations would result in the filing of proper notice with the office of the Secretary-General of the United Nations about the state of emergency, the reasons for such, its duration and measures put in place to ensure the protection of human rights during the period of emergency. Compliance with national legal frameworks would have assisted in avoiding the current situation in which there exist the section 23 state of emergency and the DMA state of disaster-induced emergency without revocation of the former as required by the Constitution. The second recommendation, which is based on the second core principle, is that enforcement of the measures should be done within the confines of the existing legal frameworks. For

instance, the deployment of the army could have been avoided by recourse to laws governing public law and order that are enforced by the police service. It therefore is recommended that allegations of the use of excessive force by members of the army be investigated, the perpetrators punished and victims redressed in accordance with both national and international human rights obligations. Furthermore, adherence to the DMA could have resulted in use of the structures envisaged under the DMA instead of the establishment of the NECC and later the NACOSEC which are *ad hoc* in nature, while the DMA had envisaged a permanent structure, the Disaster Management Authority, and gave it the exclusive mandate to address disasters such as COVID-19.

The third and final recommendation is that oversight institutions such as the judiciary, civil society organisations and the media should be reinforced in order to enable checks and balances. Over and above this, the long overdue Human Rights Commission, which is provided for under the Constitution and the Human Rights Commission Act, should be established in order for it to also play a role in ensuring that laws are complied with and that the executive does not act outside the law and usurp its powers during a state of emergency as such poses a greater risk of human rights violations.

## Constitutional rights and their limitations: A critical appraisal of the COVID-19 lockdown in South Africa

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**Summary:** *The purpose of the rule of law, entrenched as supreme in section 1(c) of the South African Constitution, is to guard against tyranny. If the rule of law is conceptualised as a meta-legal doctrine that is meant to permeate all law in the promotion of certainty, predictability and accessibility, in the interests of safeguarding constitutional rights, this makes sense. Yet, the COVID-19 pandemic has seen the reach of state power expand at the expense of these rights. South Africa's COVID-19 lockdown, and within at least its first five months carrying the endorsement of the courts, has made a mockery of the rule of law so conceived. This article considers the constitutionality of South Africa's COVID-19 lockdown against the backdrop of the constitutional rights limitation regime within the broader theoretical framework of constitutionalism and the rule of law. This analysis is conducted in the context of some early challenges brought against the lockdown in four High Court cases. The article concludes that the South African government, with the partial endorsement of the courts, has strayed beyond the bounds of the Constitution and engaged in unjustified violations of constitutional rights.*

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## 1 Introduction

It is in the nature of the state to continuously wish to expand its power.<sup>1</sup> The course of South African history since the adoption of the South African Constitution<sup>2</sup> has been illustrative of this fact.<sup>3</sup> It is rare to see areas of state regulation and regimentation being totally repealed and replaced by the void of freedom, where civil society self-regulates.<sup>4</sup> Instead, where regulatory regimes have been repealed, they have been replaced by a different regime; but the more likely event has been that more regulation has simply been added on top of existing regulation.<sup>5</sup>

The global COVID-19 outbreak has offered a rare opportunity for the state, including South Africa, to substantially expand its power and domain over vast swathes of social and economic affairs.<sup>6</sup> The COVID-19 lockdown regulations are likely to be repealed when the pandemic has ended.<sup>7</sup> However, the event still offered governments an opportunity to determine how much resistance would be forthcoming from civil society in response to such a sudden and radical increase in power. Indeed, it is trite that constitutions in themselves are powerless to stop unconstitutional conduct, and require a vigilant citizenry aided by conscientious courts to facilitate constitutional accordance.

1 MN Rothbard *Anatomy of the state* (2009) 47.

2 Constitution of the Republic of South Africa, 1996.

3 For the tyrannical extent of state power during the tenure of the previous regime, see generally EH Brookes & JB MacAulay *Civil liberty in South Africa* (1958).

4 See LJ Wintgens 'Legisprudence as a new theory of legislation' (2006) 19 *Ratio Juris* 11, where Wintgens argues for a theory of legislation that permits state intervention only in those circumstances where it can be shown that such intervention is preferable to social self-regulation.

5 For discussions of an increasingly regulated social world, see J Šima 'From the bosom of Communism to the central control of EU planners' (2002) 16 *Journal of Libertarian Studies* 70; D Boaz *Toward liberty: The idea that is changing the world* (2002) 8; F Bastiat *Economic harmonies* (1850) 164 330.

6 V Geloso 'Disease and the unconstrained state' 22 April 2020, <https://www.aier.org/article/disease-and-the-unconstrained-state/> (accessed 24 July 2020).

7 As of 18 March 2020, the South African government has issued a multitude of regulations pursuant to the Minister of Cooperative Governance and Traditional Affairs having declared a state of national disaster in terms of sec 27(1) of the Disaster Management Act 57 of 2002 on 15 March 2020. These regulations collectively are popularly referred to as the 'COVID-19 lockdown' or simply the 'lockdown', and will be referred to similarly in this article. Throughout this article, 'regulation(s)' will be used as a catch-all term to include directives and other measures, other than Acts of Parliament or superior court judgments, introduced by government that demand compliance.

This article critically analyses the government's COVID-19 lockdown regime against the backdrop of South Africa's constitutional framework, particularly its commitment to freedom and the rule of law as stated in section 1 of the Constitution, and section 36 which regulates the degree to which government may invade the rights and freedoms contained in the Bill of Rights. A thorough consideration of existing constitutional law and of the COVID-19 regulations themselves, as challenged in four of the earliest court challenges to the lockdown,<sup>8</sup> will precede the critical analysis. The article enquires as to whether government has acted in contravention of the Constitution, despite case law to the contrary, and, if so, recommends certain measures to rectify such conduct for future disaster situations.

## 2 Constitutional framework

### 2.1 Section 1 and the law behind the Constitution

It has long been recognised, albeit contentiously, that a constitution's text simply is the point of departure, and that there are a multitude of principles, values and structural implications that, while not explicitly part of the text, certainly are part of that constitution.<sup>9</sup> Even positivists recognise that there are certain legal implications that may be deduced from the very nature of law, without those implications necessarily being required by the legal text.<sup>10</sup>

Section 1 of the Constitution partly brings the law behind the Constitution to the foreground, entrenching various values said to underpin South Africa's constitutional order. While it is trite that the Constitution must be read holistically, Malherbe argues that section 1 (as well as section 74) is the most important provision in the Constitution because of its deeper entrenchment than the remainder of the highest law. Section 1 can only be amended with a 75 per cent affirmative vote of the National Assembly, not the usual two-thirds majority required for other constitutional amendments.<sup>11</sup> It

8 At the time of writing the cases discussed were in various stages of appeal, review and settlement. This limitation is surmounted by the fact that the general principles discussed and stated in the judgments, rather than the peculiarities of the cases themselves, are the focus of this article.

9 See M Wiechers 'The fundamental laws behind our Constitution' in E Kahn (ed) *Fiat iustitia: Essays in memory of Oliver Deneys Schreiner* (1983) 389-392 and EFJ Malherbe 'Die wysiging van die Grondwet: Die oorspoel-imperatief van artikel 1' (1999) 2 *Journal of South African Law* 194.

10 JD van der Vyver 'Law and morality' in Kahn (n 9) 356-358.

11 Malherbe (n 9) 191-192. Six out of the nine provinces represented in the National Council of Provinces are required to approve an amendment, whether

would have been senseless for the most important provision in the Constitution to not have any enforceable or consequential effect – it cannot amount to empty words.<sup>12</sup> Other provisions throughout the Constitution that give concrete expression to some of the values in section 1 should be regarded as falling under the protective blanket of section 1, guarding them against a mere two-thirds majority amendment. This is called the ‘spillover effect’ of section 1,<sup>13</sup> showcasing the importance of background values to the South African constitutional order.

None of the values contained in section 1 are defined in the Constitution itself. Aspects of those values are given expression through other constitutional provisions, but it cannot be argued that those other provisions are exhaustive of the section 1 values. For instance, in *Fedsure v Johannesburg*, Chaskalson P implied *obiter* that the doctrine of the rule of law (section 1(c)) could have a broader content than what is currently known in positive law – chiefly the legality principle.<sup>14</sup> This, it is submitted, means that the scope of the section 1 values could potentially be far-reaching and entail wide-ranging legal implications that go beyond the textual provisions found throughout the remainder of the Constitution.

For present purposes, the two values of importance are, in section 1(a), the ‘advancement of human rights and freedoms’, and in section 1(c), the ‘supremacy of the Constitution and the rule of law’. These values are evidently relevant to the conduct of government, including judicial and legislative, particularly where such conduct interferes with entrenched constitutional rights, such as the response to COVID-19.

### 2.1.1 *Advancement of human rights and freedoms*

The values in section 1(a) permeate the remainder of the Constitution and, as a result, the whole legal order.<sup>15</sup> Indeed, the guarantee of civil liberty, or freedom under law, is one of the main aims of the rule

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it be a sec 74(1), (2) or (3) amendment.

12 Malherbe (n 9) 195. See also M van Staden ‘A comparative analysis of common-law presumptions of statutory interpretation’ (2015) 3 *Stellenbosch Law Review* 564.

13 Malherbe (n 9) 196-197. Malherbe is not arguing that secs 74(2) and (3) are redundant, but that if a constitutional amendment undermines or weakens a provision that is supposed to give effect to a sec 1 value (ie, values that are protected by sec 74(1)), then it would also need to comply with the requirements of sec 74(1).

14 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC) para 58.

15 *Kaunda & Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) para 66.

of law and constitutionalism.<sup>16</sup> Were this not the case, constraining government conduct through law would be a pointless exercise.

In the minority judgment of Khampepe J in *AB & Another v Minister of Social Development*, the judge explains freedom as a constitutional value:<sup>17</sup>

What animates the value of freedom is the recognition of each person's distinctive aptitude to understand and act on their own desires and beliefs. The value recognises the inherent worth of our capacity to assess our own socially-rooted situations, and make decisions on this basis ... Our Constitution actively seeks to free the potential of each person; a goal which can only be achieved through a deep respect for the choices each of us makes.

Ngcobo J expressed it most concisely in *Barkhuizen v Napier*: 'Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.'<sup>18</sup>

This important identification of freedom *as an inherent part of human dignity* must be borne in mind forthwith. It is clear that the Constitutional Court recognises that freedom is the medium through which individual South Africans realise their own potential and destinies. South Africa is not, or at least no longer is, a society where a person's potential and destiny is determined by government, from cradle to grave, but a society where these decisions rest with the people themselves.

It is trite, however, that under the Constitution freedom and individual rights are not unlimited. The various provisions of the Bill of Rights contain internal limitations on the rights they demarcate, and section 36, discussed below, contains general principles for the limitation of such freedoms. This is understandable, given that an unlimited conception of freedom would involve some negating the freedom of others.

Whatever one's conception of freedom, whether it is more limited or more ample, the language of section 1(a) puts it beyond question that human rights and freedoms must be *advanced*. Thus, human rights and freedoms may not be undermined or undone – outside

16 G Sartori 'Liberty and law' (1976) 5 *Studies in Law Institute for Humane Studies* 14. See also Brookes & MacAulay (n 3) 1.

17 *AB & Another v Minister of Social Development* [2016] ZACC 43 para 56 (citations omitted).

18 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 57. See also Langa CJ in *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 (1) SA 474 (CC) para 53.

of sections 36 and 37 – as it stands to reason that to do so would be unconstitutional.

### 2.1.2 *Supremacy of the Constitution and the rule of law*

It is trite that law and conduct inconsistent with the Constitution are invalid. This fact, deducible from section 1(c), is further explicitly reinforced by section 2 of the Constitution. However, the significance of the latter portion of section 1(c) – ‘and the rule of law’ – is rarely considered in any detail.<sup>19</sup>

The extent of the content of the rule of law has been the subject of widespread debate, but the basic content of the doctrine is relatively, albeit not absolutely, uncontroversial. Fuller’s eight elements that comprise the so-called ‘internal morality of the law’ capture this basic content aptly: The law must be general and of equal application, known and knowable, not be of retroactive effect, must be clear and understandable, not be contradictory or impose contradictory obligations, not require the impossible, must be certain and not change too frequently, and the execution and administration of the law must be consistent with the law itself.<sup>20</sup>

Mathews argued that the purpose of the rule of law is ‘the legal control of the government in the interests of freedom and justice’.<sup>21</sup> Without such legal control – constitutionalism – a citizenry with guaranteed civil liberties is impossible.<sup>22</sup> Van Schalkwyk mirrors this sentiment by submitting that ‘[t]he task of the rule of law ... is to secure the right to individual liberty against ... tyranny’.<sup>23</sup> The rule of law, then, reinforces the already-existing constitutional commitment to the advancement of human rights and freedoms.

In the South African juridical context, the most comprehensive expression of the content of the rule of law has been the minority judgment of Madala J in *Van der Walt v Metcash*. In this case the judge notes that, as with the advancement of human rights and freedoms,

19 For a comprehensive consideration of this phenomenon, see M van Staden *The Constitution and the rule of law: An introduction* (2019).

20 LL Fuller *The morality of law* (1969) 46, as discussed in Van der Vyver (n 10) 358-359.

21 AS Mathews *Freedom, state security, and the rule of law* (1986) xxix.

22 AS Mathews *Law, order and liberty in South Africa* (1971) 267-268. See also G van der Schyff ‘Die modaliteite van konstitusionele toetsing as ‘n uitwerking van konstitusionalisme: ‘n Kritiese en regsvergelykende beskouing van die Engelse reg in die Verenigde Koninkryk en die Suid-Afrikaanse reg’ (2010) 1 *Journal of South African Law* 86.

23 R van Schalkwyk ‘Babylonian gods, the rule of law and the threat to personal liberty’ 8 June 2017, <https://www.cnbcfrica.com/special-report/2017/06/08/ruleoflaw/> (accessed 7 July 2020).

the supremacy of the Constitution and the rule of law permeates the remainder of the Constitution, and as a consequence the whole of South African law. The rule of law's 'basic tenets' include 'the absence of arbitrary power', meaning that discretionary powers may not be unlimited; legal equality, meaning that everyone is subject to the same law before the ordinary courts; the protection of 'basic human rights'; legal predictability; and reasonableness.<sup>24</sup>

It should be uncontroversial to summarise the core (although perhaps not the full extent) of the rule of law as comprising the following imperatives, stated generally:

- The law must be clear and understandable.
- The law must be certain and predictable.
- The law must be general and of equal application.
- The law must place limits on the exercises of state power.<sup>25</sup>
- The law must not apply retroactively.
- The law must not be inconsistent with itself or other laws.
- The law must not require impossible conduct.
- There must be consistency between the law and its enforcement.
- The rights recognised in the Bill of Rights must be adequately protected.
- The separation of powers must be observed.

These mostly procedural limitations on government and parliamentary conduct fundamentally serve the ends of guarding the sphere of free action, over which legal subjects have the final say, from arbitrary interference. At a basic level, these limitations on government make it more burdensome and onerous for government to step into this sphere of free action, and thus act as a disincentive of sorts. These disincentives must be observed and not merely regarded as recommendations, particularly during times of crisis – wherein government power usually expands significantly – such as the COVID-19 pandemic.

Indeed, it is submitted that these imperatives, by virtue of the language of section 1(c), must be understood as being legally supreme alongside the remainder of the Constitution, even though they are not expressly written anywhere in the constitutional text.

<sup>24</sup> *Van der Walt v Metcash Trading Limited* 2002 (4) SA 317 (CC) paras 65-66.

<sup>25</sup> Mathews (n 22) 6 regards limited government and the rule of law as two sides of the same coin.

## 2.2 Limitation of rights and section 36 of the Constitution

Section 36(1) of the Constitution sets out the framework within which constitutional rights, provided for in the Bill of Rights and further entrenched in section 1(a), may be limited. It acts as the proviso to the unqualified commitment to human rights and freedoms in section 1(a). To be sure, section 36(1) is not meant to be an invitation to government to limit rights, but because state action almost invariably involves limiting freedom, section 36(1) *limits* the way in which the state may do so. Section 36(1), therefore, is part of the regime of rights protection, not rights infringement.<sup>26</sup>

The section provides that a right may be limited if it is reasonable and justifiable in an open and democratic society based on freedom, dignity and equality. To determine whether the state has satisfied this standard, the courts must conduct an analysis of the nature, extent and purpose of the right and its limitation, and ascertain the limitation's rationality and proportionality. The courts must also consider whether there were less restrictive means to achieve the purpose of the limitation. The courts must test every alleged infringement of a constitutional right against this formula.<sup>27</sup> Section 36(1), it is submitted, is (supposed to be) a strong, not a weak, limitation on exercises of state power, as the unavailability of less restrictive means in particular is a high bar to reach.

Section 36(2) provides that there may be no deviation from the rights enshrined in the Bill of Rights unless it is in terms of section 36(1) or another provision of the Constitution, most likely referring to section 37 which regulates derogation from constitutional rights during a declared state of emergency.

When a right is limited, the essential content of the right must be maintained and not extinguished.<sup>28</sup> The limitation must be construed narrowly, or strictly, in favour of the rights bearer.<sup>29</sup> The courts in such circumstances will have regard to the substance, not the form, of the limitation.<sup>30</sup> The implication of this is that rights limitations will be regarded objectively, with reference to the reality of the matter, rather than the subjective intentions or purposes for which those rights limitations were enacted. This principle must be borne in mind

26 G Erasmus 'Limitation and suspension' in D van Wyk et al (eds) *Rights and constitutionalism: The new South African legal order* (1996) 640.

27 As above.

28 Erasmus (n 26) 650.

29 Erasmus 629.

30 Erasmus 633.

particularly in the discussion on the early judicial challenges to the lockdown below.

Because the unmolested exercise (rather than the limitation) of guaranteed rights is the default position, government must 'restrain itself when regulating' such exercise<sup>31</sup> – freedom is the general rule, and limitation is the exception.<sup>32</sup> Such exceptional limitations must be for valid, constitutional, public purposes, rather than purposes not contemplated by the Constitution. Purposes that are unconstitutional, or simply extra-constitutional, are insufficient to justify rights limitations.<sup>33</sup>

Section 36 limitations do not apply to section 1 and the values discussed above. No argument based on section 36 can therefore be made that the imperatives of the rule of law or the necessity of advancing human rights and freedoms have been limited or suspended due to the COVID-19 pandemic. Those values must always be observed, without exception.

### 3 COVID-19 lockdown

#### 3.1 Disaster Management Act

The COVID-19 lockdown in South Africa was not embarked upon in terms of a state of emergency, but in terms of a national state of disaster as contemplated, declared, and gazetted in terms of section 27(1) of the Disaster Management Act (DMA). Any infringement of constitutional rights during the COVID-19 lockdown by government agents must therefore comply with section 36(1) of the Constitution, and its formula for determining the justifiability of a limitation of (not derogation or suspension of) rights. As a consequence of the declaration of a state of disaster, the power to derogate from rights as contemplated in section 37(4) of the Constitution does not vest in the DMA, but would require compliance with the prescripts of the State of Emergency Act after a state of emergency has been declared.<sup>34</sup>

Section 27(2) of the DMA enables the Minister of Cooperative Governance and Traditional Affairs to 'make regulations or issue directions or authorise the issue of directions' under the state of

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31 Erasmus 640.

32 Erasmus 642.

33 Erasmus 647.

34 State of Emergency Act (64 of 1997).

disaster. These regulations must concern one or more of 15 grounds for regulation listed in sections 27(2)(a)-(o). Section 27(2)(n) is a catch-all provision which allows for regulation concerning ‘other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster’.

### 3.2 Challenging the lockdown: The approach(es) of the superior courts

The National Disaster Management Forum classified the COVID-19 pandemic as a national disaster on 15 March 2020. In the same *Government Gazette*, the Minister of Cooperative Governance and Traditional Affairs (Minister) declared a national state of disaster in terms of section 27(1) of the DMA.<sup>35</sup> Three days later, the first set of regulations as contemplated in section 27(2) of the Act were published.<sup>36</sup> Over the next months, dozens of regulations, amendments to regulations, repeals of regulations, directives and notices were published by the Department of Cooperative Governance and Traditional Affairs, other cabinet departments, and government agencies.<sup>37</sup>

The overarching purpose of the regulations is to ‘flatten the curve’ and allow government time to build capacity before a wave of Coronavirus patients arrive at healthcare facilities.<sup>38</sup>

On 23 April 2020 the President announced the lockdown classification system. From that point onwards the 18 March to 30 April regulations were classified as Level 5 of the lockdown, the most restrictive level. Four other levels were also elaborated.<sup>39</sup> As of 21 September, and at the time of writing, South Africa was at Level 1 of the lockdown.<sup>40</sup>

35 Government Notice R313 of 15 March 2020.

36 Government Notice R318 of 18 March 2020 (Level 5 regulations).

37 The Parliamentary Monitoring Group maintains a catalogue of all regulations and directives from 15 April onward. See <https://pmg.org.za/page/COVID-19%20State%20of%20Disaster%20&%20Lockdown%20Regulations:%20A%20summarynew> (accessed 7 July 2020).

38 See *De Beer & Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184 para 5.2 (*De Beer*); MC Ramaphosa ‘South Africa’s response to coronavirus COVID-19 pandemic’ 13 May 2020, <https://www.gov.za/speeches/president-cyril-ramaphosa-south-africas-response-coronavirus-covid-19-pandemic-13-may-2020> (accessed 7 July 2020).

39 MC Ramaphosa ‘South Africa’s response to coronavirus COVID-19 pandemic’ 23 April 2020, <https://www.gov.za/speeches/president-cyril-ramaphosa-south-africas-response-coronavirus-covid-19-pandemic-23-apr-2020> (accessed 7 July 2020).

40 South African Government ‘Coronavirus COVID-19 Alert level 1’, <https://www.gov.za/covid-19/about/coronavirus-covid-19-alert-level-1> (accessed 28 September 2020).

The regulations themselves, found in a scattered body of *Government Gazettes*, are not specifically considered. Instead, four of the earliest lockdown judgments from the divisions of the High Court, dealing with the constitutionality and rationality of the regulations, are analysed. These four cases are divided into categories of those submitted to be the earlier, rights-centric judgments, and those submitted to be the later, executive-minded judgments. Some of these cases are in various stages of appeal and review, and might be overturned. However, they are merely utilised as useful vehicles to discuss general principles of constitutional law during crisis situations, particularly the apparent lacklustre executive and judicial approach to section 36 of the Constitution.

### 3.2.1 *Khosa and De Beer* cases: A hurrah for rights

The first notable case, *Khosa & Others v Minister of Defence and Military Defence and Military Veterans & Others*, was brought by the family of Collins Khosa. The applicants allege that Khosa ‘was brutalised, tortured and murdered by members of the security forces’ after soldiers – falling under the political responsibility of the Minister of Defence and Military Veterans – enforcing the lockdown accused Khosa of violating the regulations prohibiting the sale of alcohol and beat him severely for protesting their actions. The applicants challenged ‘lockdown brutality’, not the lockdown itself or any particular regulation.<sup>41</sup>

The Court per Fabricius J remarked that the lockdown regulations must not infringe on South Africans’ constitutional rights, and if they do, ‘the least restrictive measures must be sought, applied and communicated to the public’.<sup>42</sup> The Court was asked to confirm existing law, to ensure that government, and by implication the public, are aware of the requirements, particularly of the Constitution and international law.<sup>43</sup> The Court order declared, among other things, that anyone present in South Africa is entitled to various constitutional rights, even if a state of emergency is declared, such as the right to life and to not be tortured; and that the security services must comply with the Constitution, domestic and applicable international law.<sup>44</sup>

41 *Khosa & Others v Minister of Defence and Military Defence and Military Veterans & Others* (21512/2020) [2020] ZAGPPHC 147 paras 24 & 34 (Khosa). Reg 8 of the Level 5 regulations regulated the liquor and alcohol trade, but imposed no rules on the consumption or possession of alcohol on private property.

42 *Khosa* (n 41) para 7.

43 *Khosa* (n 41) paras 24 & 142.

44 *Khosa* para 146. ‘Security services’ is understood to encompass the police service, the national defence force and municipal police departments.

The Court's brief remarks about the economic consequences of certain lockdown regulations bear mentioning.

One of the cornerstones of the higher lockdown levels was the distinction between so-called 'essential' goods and services, on the one hand, and non-essential goods and services, on the other. All else being equal, those businesses that provide the former were allowed to continue operating while those that provide the latter were not.<sup>45</sup> These regulations, alongside others that undermined the sustainability and ability of businesses to operate efficiently, led to economic ruin.<sup>46</sup> Fabricius J *obiter* summarised the position as follows:<sup>47</sup>

The present lock-down measures will result in massive unemployment with all its consequences relating to the inability to provide each particular family with sustenance and an income. It is clear that thousands of small businesses have been adversely affected and many of them will probably never be re-established. Unemployment will become worse and many families, in fact most likely millions, will think about the future with a great deal of insecurity and despair. Added to that is that both the Commissioner of South African Revenue Services and the Minister of Finance have told the public about the billions of rand that are lost every month, unrecoverable in my view, as a result of the lock-down regulations, and the fact that thousands of businesses have ground to a halt.

In the second notable case, *De Beer & Others v Minister of Cooperative Governance and Traditional Affairs*,<sup>48</sup> the applicants – civil society organisations – in an urgent application sought, among others, to have the declaration of the national state of disaster, and the lockdown regulations promulgated as a consequence thereof – both emanating from the Department of Cooperative Governance and Traditional Affairs – set aside.<sup>49</sup> Briefly, the applicants argued that the declaration of the national state of disaster was an 'irrational reaction to the Coronavirus itself and the number of deaths caused thereby',<sup>50</sup> and that the lockdown regulations themselves were also irrational.<sup>51</sup>

45 See regs 11A and 11B of Government Notice R398 of 25 March 2020 (amended Level 5 regulations). Businesses that provided both were only allowed to continue providing essential goods and services. Other businesses in the manufacturing and production supply chain of essential goods and services were also allowed to continue operating.

46 See also, eg, regs 4 and 5 of Government Notice R350 of 19 March 2020 which activated provisions in the Competition Act 89 of 1998 and Consumer Protection Act 68 of 2008 prohibiting the charging of 'excessive' and 'unconscionable, unfair, unreasonable and unjust prices'.

47 *Khosa* (n 41) para 19.

48 *De Beer* (n 38).

49 *De Beer* (n 38) paras 1 & 3.

50 *De Beer* para 4.12.

51 *De Beer* para 6.4.

The Court per Davis J noted various inconsistencies and nonsensicalities in the regulations at the time, leading it to conclude that the regulations were ‘not only distressing but irrational’.<sup>52</sup>

Some of the regulations the Court considered were the following:

- the prohibition of persons to be around their family, even when a family member is terminally ill, as compared to the allowance of persons to attend funerals in groups of 50;<sup>53</sup>
- the prohibition on various forms of commerce where traders and workers come into little contact with others, again as compared to the allowance of persons to attend funerals, or be seated in minibuses, in large groups;<sup>54</sup> and
- the alleged burden imposed on those who care for children to ensure that the latter’s interests are taken care of.<sup>55</sup>

However, the Court also made it clear that not all the lockdown regulations were irrational,<sup>56</sup> and that the national state of disaster itself was rational.<sup>57</sup> The Court further explained that irrational measures would inherently be impermissible in terms of section 36 of the Constitution as a limitation of a constitutional right.<sup>58</sup>

It was all but admitted by counsel for the respondents that section 36(1) was not considered when the regulations at issue were formulated.<sup>59</sup> This the Court referred to as a ‘paternalistic approach, rather than a constitutionally justifiable approach’.<sup>60</sup>

52 *De Beer* paras 7.1-7.2. This refers to reg 35(2) of Government Notice R608 of 28 May 2020 (Level 3 regulations), prohibiting more than 50 persons from congregating at a funeral, read with the general prohibition on movement in reg 33 and the ‘specific economic exclusions’ in Table 2 of the Level 3 regulations. Further examples follow in the judgment.

53 Reg 33 of the Level 3 regulations prohibiting movement generally, read with reg 35 which allows funerals under certain conditions.

54 The Court did not name a specific regulation, but this evidently refers to reg 33 of the Level 3 regulations, the general prohibition on movement, and reg 39, which closed many commercial premises to the public.

55 Reg 34 of the Level 3 regulations regulated the movement of children in particular. A child could not be moved between municipalities or provinces without a permit, and a permit may only be issued by a magistrate *inter alia* if a birth certificate and written reasons why the movement was necessary were provided.

56 *De Beer* (n 38) paras 7.14-7.15. The Court specifically points to regs 36 (prohibition of evictions); 38 (prohibition of initiation practices); 39(2)(d)-(e) (forced closure of night clubs and casinos); and 41 (closure of borders).

57 *De Beer* (n 38) para 9.1.

58 *De Beer* para 6.6.

59 *De Beer* paras 7.16-7.17.

60 *De Beer* para 7.18.

The Court directed that the Minister undertake 'remedial action, amendment or review of the regulations',<sup>61</sup> which the Court 'declared unconstitutional and invalid'.<sup>62</sup>

While *De Beer* has been criticised for its lack of specificity as to which particular regulations were irrational or noncompliant with section 36(1),<sup>63</sup> there has also been qualified praise.<sup>64</sup>

### 3.2.2 *Esau and FITA: A cheer for executive power*

In *Esau & Others v Minister of Cooperative Governance and Traditional Affairs & Others* the applicants, being private citizens, sought to have the existence of the so-called National Coronavirus Command Council (Council) declared unconstitutional and inconsistent with the DMA, and that the Council's decisions as a consequence be declared invalid.<sup>65</sup> As in the case of *De Beer*, the applicants also argued that the lockdown regulations,<sup>66</sup> specifically 'regulations 16(1) to (4); 28(3) and 28(4), read with Part E of Table 1' of 29 April,<sup>67</sup> were unconstitutional and should be declared such. This argument was based on legality and rationality.<sup>68</sup>

The Court remarked *obiter* that 'the restriction on the movement of goods and services' amounts to 'a limitation on human dignity'.<sup>69</sup> This confirms the sentiment expressed in *Barkhuizen*, as quoted above, that freedom and human dignity are inextricably linked.

The Court, however, rejected the argument that the Council's existence was unlawful, as '[n]either the DMA nor the regulations

61 *De Beer* para 10.3.

62 *De Beer* para 11.3.

63 See eg *De Beer* (n 38) paras 9.2-9.5; J Brickhill 'The striking down of the lockdown regulations', <https://juta.co.za/press-room/2020/06/07/constitutional-implications-covid-19-striking-down-lockdown-regulations-issue-14/> (accessed 23 July 2020).

64 K Malan & I Grobbelaar-Du Plessis 'Regter Norman Davis se dapper uitspraak', <https://www.litnet.co.za/regter-norman-davis-se-dapper-uitspraak/> (accessed 24 July 2020).

65 *Esau & Others v Minister of Cooperative Governance and Traditional Affairs & Others* (5807/2020) [2020] ZAWCHC 56 paras 1.1-1.2 (*Esau*).

66 *Esau* (n 65) para 1.3. The applicants also sought other relief which is irrelevant for purposes of this article.

67 *Esau* (n 65) para 182.

68 *Esau* para 222. Regs 16(1)-(4) of Government Notice R480 of 29 April 2020 (Level 4 regulations) confined people to their residences and only allowed them to leave under a limited number of defined circumstances between 20h00 and 05h00. Movement across provincial and municipal borders was also strictly regulated. Regs 28(3)-(4) prohibited stores from selling any goods other than those listed in Table 1, and required those who performed essential or permitted services to carry with them a written designation (found in Form 2 of Annexure A) as an essential or permitted worker.

69 *Esau* (n 65) para 45.

infringe on the accountability duty of the Minister of CoGTA and DTIC have to Parliament' and that the Council simply is a committee of cabinet.<sup>70</sup> The Court held that the President need not reduce the establishment of a cabinet committee to writing.<sup>71</sup> Section 12(a) of the Promotion of Access to Information Act<sup>72</sup> also protects the confidentiality of discussions held in cabinet committees.<sup>73</sup> Regarding this contention Allie J held:<sup>74</sup>

*In casu*, the President established the NCCC which according to the Minister of CoGTA, comprised some Cabinet members and later all the Cabinet members were added. When the Minister asserts that minutes of Cabinet meetings as well as those of its committees including the NCCC are confidential, there is nothing sinister or un-transparent about it.

Cabinet, accountable to Parliament, has the lawful authority to accept, reject or modify decisions of the Council.<sup>75</sup> The Court held that '[t]he ultimate decision as to the formulation of disaster management regulations were made by the minister concerned, alone'.<sup>76</sup>

The Court rejected the applicants' comparison of the regulations with one another. Instead, the section 36(1) test for reasonable and justifiable limitations of rights should have been utilised.<sup>77</sup> Rather than itself undertaking a section 36(1) analysis, however, the Court only tested for rationality.<sup>78</sup> Without further ado and contrary to *De Beer*, the Court implied that government had itself undertaken a 'proportionality exercise' to determine the justifiability of the regulations.<sup>79</sup>

After satisfying itself that the regulations were rational and that the regulation-making power in the DMA must be construed broadly instead of narrowly, the Court held that the Minister's power to make regulations 'was lawful and in compliance with the Constitution' as the Minister 'correctly interpreted the purpose of the regulations as granting her the power to use necessary means to manage the national disaster'. A narrow interpretation would have been unacceptable as it would have operated 'to limit government's ability to' contain COVID-19.<sup>80</sup>

<sup>70</sup> *Esau* paras 81, 85-86.

<sup>71</sup> *Esau* para 88.

<sup>72</sup> Promotion of Access to Information Act 2 of 2000.

<sup>73</sup> *Esau* (n 65) para 90.

<sup>74</sup> *Esau* paras 92-93.

<sup>75</sup> *Esau* para 96.

<sup>76</sup> *Esau* para 98.

<sup>77</sup> *Esau* paras 230-231.

<sup>78</sup> *Esau* paras 236-244.

<sup>79</sup> *Esau* para 254.

<sup>80</sup> *Esau* para 253.

*Fair-Trade Independent Tobacco Association v President of the Republic of South Africa & Another (FITA)* was another mainly rationality-based challenge of certain lockdown regulations, particularly those prohibiting the sale of tobacco-related products.<sup>81</sup>

Since the amended Level 5 regulations became operative on 25 March, tobacco and tobacco-related products were not on the list of so-called 'essential' goods. This persisted under the Level 4 regulations, which now explicitly excluded tobacco and tobacco-related products in regulation 27, and the Level 3 regulations, which prohibited the sale of such goods, except in cases of export, in regulation 45.<sup>82</sup>

The applicants, representing a portion of the tobacco industry, in the course of their rationality argument also attempted to argue that there were less restrictive means that government could have employed to achieve the same sought-after objectives of preventing the overwhelming of healthcare facilities.<sup>83</sup>

The Court per Mlambo JP rejected this argument because the application was based on rationality, 'not whether better, or less restrictive means' were available.<sup>84</sup> The Court thus did not undertake a section 36(1) analysis that would involve an inquiry into whether there were less restrictive means available to government rather than infringing on the constitutional rights of South Africans, despite the fact that the applicants, perhaps errantly by subsuming it into a rational argument, put it to the Court. The Court, however, was satisfied that 'the Minister considered all the relevant medical literature' despite the Minister's admission that 'she discounted [the] reports' that the applicant submits were 'empirical medical literature that concludes that there is no evidence of a link between smoking and COVID-19'.<sup>85</sup>

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81 *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa & Another* (21688/2020) [2020] ZAGPPHC 246 para 13 (*FITA*).

82 *FITA* (n 81) paras 3-12.

83 The less restrictive means inquiry is an aspect of the sec 36(1) analysis for whether a limitation of a constitutional right is justified.

84 *FITA* (n 81) para 50.

85 *FITA* paras 51-53.

## 4 A critical analysis of South Africa's lockdown jurisprudence

### 4.1 Limitation of rights during a crisis situation

With the COVID-19 lockdown proceeding in terms of the legislative framework of the DMA – and, consequently, within the framework of section 36 of the Constitution – it follows that all infringements of constitutional rights must be justified in terms of section 36. Such infringements cannot otherwise be lawful, even if they are rational in the legal-technical sense of the term.<sup>86</sup> Indeed, in *Khosa* the Court noted that South Africans remained entitled to have their rights recognised and respected despite the circumstances. The Court further noted that certain rights – including the rights to equality, human dignity, life, freedom and security, and the rights of arrested, detained, and accused persons – ‘may not be derogated from even in a state of emergency’.<sup>87</sup> It has also been expressed by the Constitutional Court, and restated in *Esau*, that freedom is an inherent aspect of dignity.<sup>88</sup> This context is relevant to the following discussion.

### 4.2 Section 36, where art thou?

In an arguably correct criticism of *De Beer*, Brickhill writes that the COVID-19 pandemic does not ‘automatically [justify] the web of new regulations’ as against the standards of section 36(1). ‘Ultimately’, Brickhill continues, ‘every strand in the web must satisfy s 36’. In *De Beer* the converse happened, where the applicants appeared to challenge the regulatory regime as whole, which Brickhill argues is not permissible. The Court in that case did not undertake a section 36(1) analysis – despite it concluding in part on the strength of that provision that the regulations were unconstitutional – nor did the government undertake a section 36(1) justification.<sup>89</sup>

In *Esau*, despite the Court having specifically corrected the applicants for not relying on section 36(1), the judgment included no section 36(1) analysis. In *FITA*, too, the Court paid no heed to section 36(1), despite the fact that the applicant – errantly, perhaps – put it before the Court subsumed into a rationality argument.<sup>90</sup>

86 Sec 36(2) of the Constitution.

87 *Khosa* (n 41) para 19.

88 See nn 18 & 69.

89 Brickhill (n 63).

90 *FITA* (n 81) para 50.

It is most disturbing that in none of these three cases a section 36(1) analysis was conducted. Section 36(1) analyses appear to have been sacrificed in every instance at the altar of rationality analyses. It might be that none of the applicants argued expressly on the basis of section 36(1), but there is no rule of law that proscribes a court from *mero motu* giving effect to constitutional provisions even though those were not placed expressly before that court. In fact, the opposite is the case. In *CUSA v Tao Ying Metal Industries* the Constitutional Court held:<sup>91</sup>

Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality.

Section 165(2) of the Constitution provides that the judiciary is 'subject only to the Constitution and the law, which [the courts] must apply impartially without fear, favour of prejudice'. This must be read with sections 7(1) to (2) of the Constitution, which provide that the Bill of Rights 'is a cornerstone of democracy in South Africa' and that the state – of which the judiciary is a branch – 'must respect, protect, promote and fulfil the rights in the Bill of Rights'. More technically, the courts are the expounders and interpreters of law, particularly of the constitutional law that constituted them. Therefore, it cannot be averred that the relevance of section 36 to each of these cases was not apparent to the courts, and indeed in *Esau* the Court specifically made reference to the fact that the applicants ought to have made use of section 36(1).<sup>92</sup>

In one way or another each of these cases challenged lockdown regulations that infringed on constitutional rights. Particularly during a crisis situation such as COVID-19, when citizens and their constitutional rights are at their most vulnerable, there was no good reason for the courts to ignore section 36(1) and wait for it to be expressly placed before them at some future stage.<sup>93</sup>

91 *CUSA v Tao Ying Metal Industries & Others* 2009 (2) SA 204 (CC) para 67 (citations omitted). See also n 93 below on the general rule that courts may not stray from what is put before them.

92 *Esau* (n 65) para 231.

93 The general rule that the courts may not stray from the arguments put before them in an adversarial system is not disputed. It has been demonstrated that sec 36 in the aforementioned cases was put before the Court but inappropriately applied (*De Beer*); not put before the Court, recognised by the Court but then ignored (*Esau*); and incompetently put before the Court – by being subsumed into a rationality argument – but disregarded (*FITA*).

### 4.3 *Esau's* generous construction of the Disaster Management Act

The courts' missteps, it is submitted, went beyond the mere non-enforcement of section 36(1).

In *Esau* the Court undermined the legal protection of rights by framing enabling provisions that allow the limitation of rights generously rather than strictly. The applicants in that case correctly noted that '[t]he regulations ought to be narrowly construed in the terms set out in section 27(3) of [the DMA], namely, to (i) assist, protect and relieve the public; (ii) protect property and prevent disruption; or (iii) deal with the disaster's effects'.<sup>94</sup>

The Court, however, proceeded to effectively disregard section 27(3) by looking to section 59(1)(a)(ii), which allows the Minister to make regulations necessary for the effective implementation and enforcement generally of the Act's provisions. To the Court, this meant that government was authorised to take ancillary measures 'not expressly stated in the Act but which are necessary to achieve the implementation of [the] objects' of the Act.<sup>95</sup>

Provisions such as section 59(1)(a)(ii) are effectively standard form in Acts of Parliament.<sup>96</sup> It is rare to find an Act that does not contain such a regulation-making provision. It seems untoward that the Court would take such a general provision and use it to effectively override a specific provision, when the applicable legal principle of *lex specialis* is that the specific norm must be preferred over the general norm.<sup>97</sup> Indeed, the listing of permissible objectives in section 27(3) – which provides that disaster management regulations may be enacted 'only to the extent that [it] is necessary for the purpose of' the objectives listed in sections 27(3)(a)-(e) – could not have been intended to be redundant filler text that may be summarily disregarded in favour of a different, general provision in the Act.<sup>98</sup> Furthermore, interpretations that do not yield inequitable results must be preferred over those that do, unless legislative intention to the contrary is clear.<sup>99</sup> The wording of section 27(3) makes it clear that those objectives

94 *Esau* (n 65) para 245.

95 *Esau* paras 246-247.

96 See C Botha *Statutory interpretation: An introduction for students* (2012) 39, where Botha includes the regulations provision as an ordinary feature of the legislative structure.

97 Only where the specific is not applicable ought the general be applied. See L du Plessis 'Interpretation' in S Woolman & M Bishop (eds) *Constitutional law of South Africa* (2013) 32-144.

98 See Van Staden (n 12) 564.

99 Van Staden (n 12) 573.

represent a ceiling beyond which disaster management regulations cannot be made. Further, given that in this case the Court was dealing quite directly with regulations that deprive South Africans of their constitutionally-guaranteed rights, it seems obvious that the Court should have insisted on strict compliance with section 27(3) and construed the regulations narrowly to those objectives, rather than going on a fishing expedition in the remainder of the Act for a general provision that might be broad enough to empower government to limit rights generally. The latter course of action both renders section 27(3) redundant by applying a general provision at the direct expense of a specific one, and brings about inequitable results when a more appropriate interpretation was both possible and reasonable. This is even more problematic, as discussed above, given that the Court did not analyse the restrictions on rights against section 36(1) of the Constitution. Indeed, after a rationality analysis, the Court merely concluded that it is 'satisfied that the regulations are justified'.<sup>100</sup>

#### 4.4 *FITA's* weakening of the standard of necessity

In *FITA* the Court went a step further, by expressly rejecting the argument that infringements of constitutional rights in regulations could only be justified if they were *strictly* necessary. Rather, the Court adopted the view that mere *reasonable* necessity was sufficient.<sup>101</sup> In so doing, the Court departed not only from precedent, but also from the implicit structure of the Constitution, both departures of which are discussed in the next paragraphs.

In the first respect, the Constitutional Court held in the case of *Phoko v Ekurhuleni Metropolitan Municipality* that section 55(2)(d) of the DMA, which provides that local government is authorised to direct the removal of persons to temporary shelters 'if such action is necessary for the preservation of life', had to be construed narrowly, because a generous 'construction may adversely affect rights', particularly the section 26 right to housing in that case.<sup>102</sup> In *FITA* the Court attempted to distinguish the case before it from *Phoko* on the basis that *Phoko* concerned a local affair (with the word 'necessary' appearing under section 55 of the Act) and *FITA* a national affair (with the word 'necessary' appearing under section 27 of the Act).

<sup>100</sup> *Esau* (n 65) para 251.

<sup>101</sup> *FITA* (n 81) paras 84-85.

<sup>102</sup> *Phoko & Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) paras 36-37.

This submission by the Court is unconvincing. The Bill of Rights has national application, and as such it makes little sense to argue that when a right is limited locally and concerns a local affair, the limiting regulations must be construed strictly, but when a right is limited nationally concerning a national affair, the limiting regulations must be construed generously. The *Pheko* principle is not *if a local disaster management regulation may adversely affect rights, the provision must be construed narrowly*, but rather, *if any disaster management regulation may adversely affect rights, the provision must be construed narrowly*. Finally, the Constitutional Court has separately noted that where the same word is used more than once in a legislative text, it is rebuttably presumed to carry the same meaning throughout.<sup>103</sup> With 'necessary' meaning strict necessity in section 55, it must be presumed that 'necessary' also means strict necessity in section 27.

In the second respect, as discussed above, it is evident that section 1 of the Constitution envisages the advancement of human rights and freedoms as a constitutional imperative, and that departures from the rights and freedoms guaranteed in the Bill of Rights can occur only when it is strictly justified by an internal limitation in the right itself, the general limitation of section 36(1), or in terms of a declared state of emergency under sections 37(1) and (4). Finally, it would be nonsensical for infringements of rights to be strictly necessary during a state of emergency as contemplated in section 37(4)(a) of the Constitution, but only reasonably necessary during a state of disaster. States of emergency, as the Court observed in *Freedom Front Plus v President of the Republic of South Africa*, are for more severe public crises.<sup>104</sup> It stands to reason that government has a lesser reason to more severely affect rights adversely during a less severe crisis, whereas it has a greater reason to do so during a state of emergency. It therefore is submitted that strict necessity is the contemplated standard, as the Constitutional Court correctly deduced in *Pheko*.<sup>105</sup>

The Court's adoption of the lower threshold of reasonable necessity in *FITA* thus not only goes against established precedent but also undermines the very enterprise of setting out the circumstances under which entrenched rights may be limited. Indeed, one wonders what the use is of sections 1, 36, and 37 of the Constitution if rights

<sup>103</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & Others* 2010 (6) SA 182 (CC) para 52. See also Van Staden (n 12) 580-581.

<sup>104</sup> *Freedom Front Plus v President of the Republic of South Africa & Others* (22939/2020) [2020] ZAGPPHC 266 para 62. The Court also noted that had the Minister declared a state of emergency, it would likely have been unlawful, as the prerequisites for such a declaration had not been met (paras 75-77).

<sup>105</sup> *Pheko* (n 102) para 37.

may be summarily set aside by regulations that simply satisfy the low threshold of rationality and to the average person appear reasonable.

#### 4.5 *FITA's* weak standard of rationality

The Court's adoption of a particularly weak rationality analysis in *FITA* raises questions as to whether such a threshold could ever be sufficient for safeguarding the rule of law.

The Court held that despite the fact that the prohibition on tobacco-related products had not led to widespread cessation of smoking, and even that increased smoking of hazardous, black market-sourced cigarettes now was more prevalent, it is still rational because the prohibition was theoretically capable of achieving that end result.<sup>106</sup> In other words, the prohibition has had a contrary effect to that which it was intended to achieve. Rather than reducing smoking and thus sparing South Africa's healthcare facilities, it has contributed to even more smoking-related unhealthy behaviour, potentially straining healthcare facilities even more. This is the reality, the substance, of the situation.<sup>107</sup> However, because, in theory, the prohibition *could* have reduced smoking, it was allowed to stand, despite the facts. In other words, the Court adopted a form-over-substance analysis, rather than the arguably constitutionally superior substance-over-form method discussed below.

The Court also argued that the reality of the situation 'does not negate the overwhelming view that smoking affects the respiratory system and renders smokers more susceptible than non-smokers' to COVID-19.<sup>108</sup> However, this line of reasoning begs the question: It was the applicant's submission that the regulations have not had the effect of reducing smoking, and at worst have led to the smoking of even more harmful cigarettes.<sup>109</sup> The Court's satisfaction with the Minister's weak argument in this regard – with the Court also having heard that the Minister did not consider the evidence produced by the applicant – is regrettable.

It is submitted that it is a spurious conception of rationality that not the facts, but the theory, is relevant. It cannot be said that, *in fact*, there is a link between the means employed and the objective

<sup>106</sup> *FITA* (n 81) paras 50 & 69.

<sup>107</sup> M van der Merwe 'Cigarette market "in disarray", price war looms, and more people share smokes – Study' 21 July 2020, <https://www.news24.com/fin24/economy/south-africa/cigarette-market-in-disarray-price-war-looms-and-more-people-share-smokes-study-20200721> (accessed 24 July 2020).

<sup>108</sup> *FITA* (n 81) para 69.

<sup>109</sup> See Van der Merwe (n 107).

that was to be attained, when the introduction or enforcement of a measure has the opposite effect of that intended objective.

According to the positivist tradition, form takes precedence over substance, the latter of which can only be called upon within the framework of the formal.<sup>110</sup> Langa condemned formalist reasoning, as it 'prevents an inquiry into the true motivation for certain decisions and presents the law as neutral and objective when in reality it expresses a particular politics and enforces a singular conception of society'. Purely formal reasoning undermines the constitutional 'commitment to substantive reasoning'.<sup>111</sup>

#### 4.6 Imperatives of the rule of law fall by the wayside

Giving ministers or government agents the discretion to determine the extent of freedom is the antithesis of freedom under law. The law itself, not a delegated discretion, must set out the limitations on constitutional rights.<sup>112</sup> This is why laws of general application are not only required by the nature of the rule of law (as enshrined in section 1(c)), but also explicitly by section 36 of the Constitution. It is regrettable, therefore, that the DMA, in practice if not textually, has allowed ministers to shoot from the hip, as it were, in deciding when and how to deprive South Africans of their constitutional freedoms. This, it is submitted, is more akin to the rule of man, as opposed to the rule of law.<sup>113</sup> The Court's endorsement of this state of affairs in *Esau* as discussed above is even more regrettable.

It is arguable that it is appropriate for the DMA, because it makes provision for crisis situations, to bestow such wide discretion. This might have been acceptable had the DMA's discretion provisions not been examples of the default position in South African statutory law. In other words, the DMA's provisions are the rule, not the exception,<sup>114</sup> and as a result it would be incorrect to regard the DMA's grant of discretion in crisis situations as exceptional. Furthermore, even if the DMA's grant of discretion were exceptional, in any exercise of discretion that intrudes upon the constitutional rights of South Africans, ministers or government agents would have to bear

<sup>110</sup> Eg, inherent in the words of a statute. See MI Niemi 'Form and substance in legal reasoning: Two conceptions' (2010) 23 *Ratio Juris* 483-484.

<sup>111</sup> P Langa 'Transformative constitutionalism' (2006) 3 *Stellenbosch Law Review* 357.

<sup>112</sup> Brookes & MacAulay (n 3) 13.

<sup>113</sup> See also DV Cowen *The foundations of freedom, with special reference to Southern Africa* (1961) 197.

<sup>114</sup> See generally ch 4 in Van Staden (n 19).

the section 36 requirements foremost in mind, even during crisis situations, for that conduct to pass constitutional muster.

Reading and understanding the lockdown regulations themselves also leads to perplexion. Indeed, the regulations are spread over a messy, tangled web of *Government Gazettes*. If jurists such as the present author have struggled to make heads or tails of this concoction, it is fairly evident that lay South Africans have to rely exclusively on accurate press reporting to ensure that they are compliant with the state's order of the day. The regulations were changed multiple times in a short period. As regards the regulations and facts before the Court in *Minister of Cooperative Governance and Traditional Affairs, Davis J* expressed the fluidity of the regulations as follows: 'Amendments were effected prior to the delivery of the application for leave to appeal, again prior to the hearing thereof and yet again since the hearing of the application and during the few days that the judgment had been reserved.'<sup>115</sup>

It should be uncontroversial to regard this as a wholesale undermining of the rule of law imperative that the law must be certain, predictable, and accessible to those who are expected to comply with it. Absolute certainty, it is conceded, is impossible,<sup>116</sup> but on the continuum from absolute certainty to total chaos, the South African government has strayed unacceptably close to the latter.

The rule of law standard enshrined in section 1(c), as previously observed, is not subject to limitation or derogation, as it is outside of the Bill of Rights and is declared, explicitly, to be supreme. It is regrettable that this supremacy has not been observed.

#### **4.7 Locking down the ease with which government may invade rights**

A section 36(1) analysis by the superior courts would have been useful for the purposes of this article. In its absence, however, it is still submitted that the lockdown regulations go beyond what is contemplated as a limitation of rights in section 36(1) of the Constitution, and enter the realm of derogation from rights as contemplated in section 37(4). It appears evident that at least during the initial weeks under lockdown, on Level 5 and perhaps

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<sup>115</sup> *Minister of Cooperative Governance and Traditional Affairs v De Beer & Others* (21542/2020) [2020] ZAGPPHC 280 para 10.

<sup>116</sup> See *Affordable Medicines Trust & Others v Minister of Health* 2006(3) SA 297 (CC) paras 108-109.

Level 4, South Africa found itself in the midst of a *de facto*, that is, undeclared, state of emergency. The appropriate legal course of action government should have taken, as a result, was to declare a state of emergency in terms of section 1(1) of the State of Emergency Act.

This conclusion is reached because the various constitutional principles underlying the limitation, on the one hand, and the derogation, on the other, of rights have not been observed to any significant extent. As discussed above, when a right is limited, the core content of that right must persist; the limitation must be strictly necessary for a constitutional purpose; the substance (not form) of limitations must be given the lion's share of consideration; and the unrestrained exercise of rights is the point of departure, and limitation is the exception.<sup>117</sup> It is submitted that the core of various impinged rights, specifically the right to freedom of movement as contemplated in *De Beer* and *Esau*, had been effectively extinguished. A principle of 'what is not allowed is prohibited', which upends the notion of freedom under law,<sup>118</sup> was established. The strict necessity of some lockdown regulations was not shown, as illustrated in *De Beer*. Thus, even if a state of emergency had been declared, in the absence of proving strict necessity, the legality of the lockdown regime remains doubtful.

The apparent severity of the COVID-19 pandemic – and the fears associated therewith – has seemingly led the courts down the path of undue deference, where the rights protections guaranteed in the Constitution have amounted to empty promises. Allan argues that where legislation bestows a discretion upon government, the exercise of that discretion must 'be construed consistently with legal principles and individual rights'. Only strictly necessary invasions of rights must be allowed.<sup>119</sup> This ought to have been observed during the interpretation and construction of the DMA in *Esau* and *FITA*.

The rights to freedom of movement and human dignity, in particular, but also by implication the rights to privacy, property, association, freedom and security have arguably been ignored, without requisite section 36(1) analyses being conducted to determine whether those 'limitations' (but, it is submitted, in fact derogations) were justified. The barest of reasons provided by government for its actions have been accepted by the courts, with the apparently final conclusion

<sup>117</sup> As discussed in part 2.2.

<sup>118</sup> Brookes & MacAulay (n 3) 13.

<sup>119</sup> TRS Allan 'Deference, defiance, and doctrine: Defining the limits of judicial review' (2010) 60 *University of Toronto Law Journal* 55 (citations omitted).

essentially being that the Bill of Rights does not, *de facto*, exist during a pandemic.<sup>120</sup>

## 5 Conclusion and recommendations

Allowing grave situations to be employed as justification for the upending of constitutional devices, outside of the provisions that allow for the temporary limitation of or derogation from certain rights, undermines the supremacy of the Constitution and the rule of law. When a statute, and it is submitted particularly a supreme constitution, is interpreted, it cannot be 'averred that the particularity of circumstances requires that the generally applicable provisions should not be applied'.<sup>121</sup> The Constitution, indeed, with its general provisions, provides for *all eventualities*, meaning that whatever might happen, the Constitution's provisions and requirements must be complied with, letter and spirit.<sup>122</sup> For instance, even if an invasion from the planet Mars by an alien species were to take place – something the negotiators and drafters of the Constitution could never have anticipated – the military would still be required to comply with the prescripts of sections 200 to 202 of the Constitution and government would still be required to follow the state of national defence provisions in section 203. Indeed, it must be obvious that if the Constitution is to have any meta-objective, that would be to control the exercise of state power *particularly* in those situations where government's actions are perceived as necessary as a result of heightened public fear. The Constitution controls for the worst of times, so that we may more regularly enjoy the best of times.<sup>123</sup>

Neither Parliament nor the executive appeared cognisant of their obligations under the rule of law doctrine during the COVID-19 lockdown. Regulations were promulgated and withdrawn on a ministerial whim, and Parliament, primarily responsible for executive accountability,<sup>124</sup> appeared to stand by idly. It thus is recommended that Parliament adopt national legislation that specifically regulates the exercise of official discretion and regulation-making powers. Such legislation would ideally prohibit the too regular changing of regulations, and set out the *substantive* criteria with which executive functionaries must comply in order to amend or replace regulations.

120 See TRS Allan 'Human rights and judicial review: A critique of "due deference"' (2006) 65 *Cambridge Law Journal* 675-677.

121 Van Staden (n 12) 558.

122 Secs 1(c) and 2 of the Constitution.

123 See M Bagaric 'Originalism: Why some things should never change – or at least not too quickly' (2000) 19 *University of Tasmania Law Review* 187-186.

124 Sec 42(3) of the Constitution.

The changing of regulations cannot be prohibited outright, but a balance (according to standards set in the recommended legislation) must be struck between legal certainty and responding immediately to changing circumstances. Furthermore, the requirement of strict necessity for the promulgation of disaster management regulations should be restated, reinforced, and emphasised.

While it might be jurisprudentially superficial to recommend in the space of a single article a reconsideration of approaches to legal interpretation, these words by Allan bear mentioning:<sup>125</sup>

Deference properly accorded to legislation is a function of its true meaning, which in a liberal-democratic legal order is generally presumed to be compatible with constitutional rights. The greater the danger of unjustifiable injury to such rights, the more urgent is the task of interpretation or even reconstruction: the legislature should not readily be demeaned as the author of rights violations.

In other words, applied to the COVID-19 lockdown, the courts ought to have interpreted the DMA narrowly, because they must have presumed that Parliament's intention could never have been to sanction such incredible invasions of constitutional rights as were evident in the lockdown regulations. In South Africa's historical – and evidently present – context, it ought to be uncontroversial to recommend, and to hope, that the courts, going forward, adopt a less executive-minded and more rights-centric approach to statutory and regulatory interpretation.<sup>126</sup>

It might be argued that the exigencies of the COVID-19 pandemic justified a drastic expansion of state power, and that this article fails to address the important aspect of a justified versus a nakedly tyrannical increase in state power. However, no unconstitutional or authoritarian state institution, practice or intervention of the last century has been without justification. The Holocaust, the Holodomor, apartheid, the Great Leap Forward, are all phenomena for which the intellectual apologists of those regimes could write theses-long jurisprudential, political, economic and social justifications. The concern in this article has been to show, regardless of justifications provided, that when measured against the requirements of the Constitution and of constitutionalism, the lockdown regulations and certain High Court judgments fail to pass muster. The safeguards put in place to protect the fundamental dignity and liberty of the civilian population against

<sup>125</sup> Allan (n 120) 96.

<sup>126</sup> See MG Cowling 'Judges and the protection of human rights in South Africa: Articulating the inarticulate premiss' (1987) 3 *South African Journal on Human Rights* 192; J Hlophe 'The role of judges in a transformed South Africa: Problems, challenges and prospects' (1995) 112 *South African Law Journal* 25.

the heteronomous nature of the state have been ignored, too easily, and constitutional democracy might suffer for it in the future. As Fabricius J noted *obiter* in *Khosa*:<sup>127</sup>

It should not be the choice of either the public health or the state of the economy. It is a necessity to safeguard both ... what is the point if the result of harsh enforcement measures is a famine, an economic wasteland and the total loss of freedom, the right to dignity and the security of the person and overall, the maintenance of the rule of law[?] The answer in my view is: there is no point.

The judiciary came out strongly in favour of the rights-centric approach to the lockdown with *Khosa* and *De Beer*, but from thereon appeared to revert to executive-mindedness, particularly in *Esau* and *FITA*.<sup>128</sup> The critiques of superior court judgments in this article are intended as constructive criticism. Courts can and do make mistakes, and it is thus that they are allowed to depart from their own previous decisions if those decisions were clearly wrong.<sup>129</sup> The conscientious legal community thus has an obligation to assist the courts in rectifying these mistakes through appeal, review, or even reversal. This arguably activist challenge cannot merely proceed in courtrooms – it ultimately falls to constitutionalists, in general, and South African constitutionalists, in particular, whether inside or outside the legal profession, to insist on government compliance with the Constitution.

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127 *Khosa* (n 41) para 6.

128 As noted above, these judgments might still be overturned on appeal or review, given the quick pace of events in the midst of the lockdown.

129 See the remarks of Brand AJ in *Camps Bay Ratepayers and Residents Association & Another v Harrison & Another* 2011 (4) SA 42 (CC) para 28.

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## Livelihoods and legal struggles amidst a pandemic: The human rights implications of the measures adopted to prevent, contain and manage COVID-19 in Malawi

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**Summary:** *Malawi's COVID-19 response has evinced a measure of fluidity. This has been manifested by, among other things, the adoption of two sets of subsidiary legislation on COVID-19, the judicial intervention striking down proposed lockdown measures and the constant change in the institutional arrangements meant to spearhead the country's response. A key challenge that the response has had to contend with is the balance between saving lives and preserving livelihoods. This article analyses Malawi's response to COVID-19 and establishes that aside*

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*from its rather haphazard nature, serious questions of legality have been implicated by the measures adopted. Specifically in relation to lives and livelihoods, the articles focuses on the right to economic activity, to highlight some of the challenges that Malawi's response generated to the preservation of livelihoods. The human rights implications of some of the measures adopted are also briefly analysed.*

**Key words:** *livelihoods; state of disaster; promulgation of subsidiary legislation; limitation of rights; right to economic activity; socio-economic rights*

## 1 Introduction

While the World Health Organisation (WHO) declared COVID-19 a pandemic on 11 March 2020, Malawi only announced its first COVID-19 cases on 2 April 2020. Malawi thus became one of the last six African countries to formally announce COVID-19 cases.<sup>1</sup> It is not clear whether there were no cases prior to the announcement of the first three cases or if the lack of cases was due to inadequate testing. Ironically, at the time when Malawi's official count remained at zero, all its neighbouring countries continued to report cases. Given the rather porous borders with its neighbours – Mozambique, Tanzania and Zambia – and the intense cross-border movement, the possibility that infected persons were criss-crossing the borders during the time when no official cases were being registered remains real.<sup>2</sup>

On 20 March 2020, 12 days before the announcement of the first cases, Malawi declared a state of disaster on account of COVID-19.<sup>3</sup> The early declaration of a state of disaster, coupled with patent testing challenges, lends credence to the speculation that COVID-19 cases existed even before the official announcement of the first cases.

At the core of Malawi's legal response to the COVID-19 pandemic are two statutes, the Public Health Act<sup>4</sup> and the Disaster Preparedness

1 See 'These six countries in Africa have no reported cases of Coronavirus', <https://www.trtworld.com/africa/these-six-countries-in-africa-have-no-reported-cases-of-coronavirus-34999> (accessed 9 July 2020).

2 G Munthali & W Xuelian 'COVID 19 outbreak on Malawi perspective', [https://www.researchgate.net/publication/340425842\\_Covid-19\\_Outbreak\\_on\\_Malawi\\_Perspective](https://www.researchgate.net/publication/340425842_Covid-19_Outbreak_on_Malawi_Perspective) (accessed 15 July 2020).

3 R Kondowe 'A country with no Coronavirus cases has declared a national disaster and shut schools, large gatherings', <https://qz.com/africa/1824465/coronavirus-malawi-with-no-cases-declares-national-disaster/> (accessed 9 July 2020).

4 Ch 34:01 Laws of Malawi.

and Relief Act (DPRA).<sup>5</sup> Equally important are the Public Health (Corona Virus Prevention, Containment and Management) Rules, 2020 (Corona Virus Rules I) and the Public Health (Corona Virus and COVID-19) (Prevention, Containment and Management) Rules 2020 (Corona Virus Rules II).

Bearing in mind this legal framework, this article analyses the legality and human rights implications of some of the measures put in place to prevent, contain and manage COVID-19. Among other things, the article argues that it was unreasonable and unjustifiable to propose strict national lockdown measures at a time when confirmed cases were concentrated in one geographic location. The article also argues that containing the spread of COVID-19 necessitates the consideration of multiple policy factors and the striking of a proper balance between protecting lives and livelihoods. Central to this argument is the understanding that it is possible to protect both lives and livelihoods without undermining human rights. The article also demonstrates that socio-economic realities, and the absence of a comprehensive social security system in Malawi, compound the challenges related to the imposition of strict lockdown measures. The article, therefore, posits that Malawi's post-COVID-19 recovery policies and plans should focus on addressing existing socio-economic inequalities and building a more egalitarian society.

The article is divided into five parts with this background being the first. The second part presents the legal framework for dealing with public health emergencies in Malawi. The third part explores Malawi's response to COVID-19. This part chronicles all the major developments, including the judicial interventions, in the COVID-19 response. The legality of some of the measures implemented is also analysed in this part. The fourth part of the article scrutinises the human rights implications of the COVID-19 response for livelihoods. In illustrating these implications, it focuses on the impact of the COVID-19 response measures on the 'right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi'.<sup>6</sup> It also explores how these measures relate to the exercise of other rights such as the right to fair and safe labour practices; freedom of movement; the right to food, health and housing; and the right to education. The last part concludes the article.

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5 Ch 33:05 Laws of Malawi.

6 Sec 29 of the Constitution.

## 2 Stuck in the past? The legal framework for dealing with public health emergencies in Malawi

The legal framework for dealing with public health emergencies in Malawi is undergirded by the Public Health Act and the DPRA. Although other statutes also have relevance, these two remain pivotal.<sup>7</sup> As will be demonstrated shortly, all statutory standards dealing with public health emergencies must also be considered in light of the provisions of the Constitution of the Republic of Malawi (Constitution). This part of the article canvasses some elements of Malawi's legal framework for the management of COVID-19 as a public health emergency, starting with the Constitution.

The Constitution is the supreme law of Malawi. It stipulates that 'any act of government or any law that is inconsistent with [its provisions] shall, to the extent of such inconsistency, be invalid'.<sup>8</sup> In section 4 the Constitution confirms that it 'binds all executive, legislative and judicial organs of the state at all levels of government and all the peoples of Malawi are entitled to the equal protection of [the] Constitution, and laws made under it'. Given the supremacy of the Constitution, all COVID-19 response measures must pass the test of constitutional validity, which applies at two levels. First, any such measures should not contravene the procedures established by the Constitution. Second, such measures must substantively not undermine any entitlements conferred by the Constitution. This article's assessment of Malawi's COVID-19 response touches on the scheme for the limitation of rights under the Constitution, the procedure for the declaration of a state of emergency and the requirements for promulgating subsidiary legislation. These areas have featured prominently in the COVID-19 response and, therefore, deserve further analysis and discussion.

The Constitution has recognised that rights may be limited.<sup>9</sup> Under section 44(1), the Constitution stipulates that any limitation of a constitutional right is valid only if it is prescribed by law, reasonable, recognised by international human rights standards and necessary in an open and democratic society. These four conditions are cumulative and to be valid any limitation must fulfil all. Further, under section 44(2), any law prescribing a limitation on a right must

7 Other statutes include the Immigration Act, Cap 15:03, Laws of Malawi and the Local Government Act, Cap 22:01, Laws of Malawi.

8 Sec 5 of the Constitution.

9 For an insightful analysis of the limitation and derogation of rights in Malawi, see DM Chirwa 'Upholding the sanctity of rights: A principled approach to limitations and derogations under the Malawian Constitution' (2007) 1 *Malawi Law Journal* 3.

not negate the essential content of the right and must be of general application. The Constitution has also granted the High Court the power to invalidate any law that contravenes it.<sup>10</sup>

The procedure for the declaration of a state of emergency is contained in section 45 of the Constitution. The President can declare a state of emergency only upon the approval of the Defence and Security Committee of the National Assembly. The Constitution circumscribes the exercise of emergency powers and limits their invocation only in times of war, threat of war, civil war or widespread natural disaster.<sup>11</sup> While derogation from some rights is permissible during a state of emergency, some rights are non-derogable even during a state of emergency, namely, the right to life, the right to equality and recognition before the law and the prohibition of torture and cruel, inhuman or degrading treatment or punishment.<sup>12</sup> The Constitution in section 44(1) emphasises that any derogation from rights must be consistent with Malawi's obligations under international law. As a safety valve, the Constitution has granted the High Court the power to entertain challenges to the validity of the declaration of a state of emergency, any extension thereof, and any action taken thereunder.<sup>13</sup> Notably, no state of emergency has ever been declared since the adoption of the Constitution in 1994 and, thus, the High Court's power of review has yet to be tested.

The authority to adopt subsidiary legislation is contained in section 58 of the Constitution. This section provides for the delegation of powers to enact subsidiary legislation to the executive and the judiciary in accordance with specific Acts of Parliament. It restricts this power by prohibiting the delegation of legislative powers, which would 'substantially and significantly affect the fundamental rights and freedoms recognised' in the Constitution. Section 58 is an exception to section 48 of the Constitution, which vests all legislative powers in the National Assembly. For this reason, its terms must be construed strictly in order to ensure the constitutionality of subsidiary legislation.

Although enacted in 1948, the Public Health Act remains the primary law for dealing with the preservation of public health. Section 11 of the Public Health Act provides a list of 'notifiable diseases'<sup>14</sup> –

10 *Jumbe & Mvula v Attorney-General Constitutional Cases 1 and 2 of 2005* (unreported) and *Republic v Chinthiti & Others* (1997) 1 Malawi Law Reports 59.

11 Sec 45(3)(c) of the Constitution.

12 Sec 45(2) of the Constitution.

13 Sec 45(6) of the Constitution.

14 Among the diseases listed are the following: anthrax; blackwater fever; cerebro-spinal meningitis or cerebro-spinal fever; cholera; diphtheria or membranous

not surprisingly, COVID-19 is not listed. However, section 12 permits the Minister, by a notice published in the *Gazette*, to declare as a notifiable disease any infectious disease not mentioned in section 11. Part IV of the Act deals with the prevention and suppression of infectious diseases. This Part also prescribes the powers of medical officers (section 16); the cleansing and disinfection of premises (section 17); the provision of means of disinfection (section 19); the provision for conveyance of infected persons (section 20); and the provision for removal to hospital of persons suffering from infectious diseases where there is a risk of infection (section 21). Part V of the Act deals with formidable epidemic or endemic diseases and a list of such diseases is provided in section 30.<sup>15</sup> Under section 31 the Minister may, if it appears that a part of Malawi is threatened by any formidable epidemic or endemic disease, declare any such part an infected area. The Minister may then make rules pertaining to, among other things, the speedy interment of the dead; the removal of corpses; the regulation of persons entering or leaving the infected area; and the registration of persons residing there.

The Public Health Act is antiquated and many of its provisions are obsolete and of dubious practicability. It was drafted to deal with nineteenth century infectious diseases, many of which were caused by poor sanitation, water, housing and sewerage. It largely focuses on communicable diseases, thereby excluding non-communicable diseases such as cardiovascular diseases and diabetes.<sup>16</sup> Also excluded from the Act's definition of infectious diseases are viral haemorrhagic fevers such as Ebola and SARS. The Act is oblivious to current trends on the prevention, treatment and eradication of various diseases and overemphasises mandatory vaccination. Although a process to review the Act was initiated, this seems to have stalled.<sup>17</sup> The outdated nature of this Act has created complications as far as the COVID-19 response is concerned.

The other statute of relevance is the DPRA of 1991. It provides for the coordination and implementation of measures to alleviate the effects of disaster and the establishment of an institutional

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croup; dysentery (bacillary); encephalitis lethargica; enteric or typhoid fever (including paratyphoid); erysipelas; hydrophobia or human rabies; influenza; measles; plague; acute primary pneumonia; and yellow fever.

- 15 The diseases listed include smallpox; plague; cholera; yellow fever; cerebrospinal meningitis; and any other disease which the Minister may by notice declare to be a formidable epidemic or endemic disease.
- 16 E Sambala et al 'A review of the Public Health Act in Malawi: A case for reform and consolidation', <https://www.preprints.org/manuscript/202004.0017/v1> (accessed 15 July 2020).
- 17 See F Mkandawire 'Public Health Act, outdated', <https://www.manaonline.gov.mw/index.php/national/health/item/9249-public-health-act-outdated-madise> (accessed 15 July 2020).

framework for disaster management, the declaration of a state of disaster and the creation and management of a disaster appeal fund. A disaster under the DPRA includes a 'plague or epidemic disease that threatens life or wellbeing of the community'.<sup>18</sup> The coordination of disaster preparedness and disaster relief activities rests with the Commissioner for Disaster Preparedness and Relief established under section 3 of the Act. Part III of the Act deals with, among others, the establishment, composition and functions of the National Disaster Preparedness and Relief Committee.

Under Section 32(1) of the DPRA, if 'any disaster is of such a nature and extent that extraordinary measures are necessary to assist and protect the persons affected or likely to be affected by the disaster in any area within Malawi or that circumstances are likely to arise making such measures necessary', the President may declare a state of disaster. The declaration can be made through a notice in the *Gazette*. If it is not made through a notice in the *Gazette*, the President must expeditiously arrange for the declaration to appear in the *Gazette*. Once pronounced, the declaration remains in force for three months unless withdrawn earlier. The President may extend it by a notice published in the *Gazette* for further periods of three months at a time.<sup>19</sup> Once a state of disaster is declared, the primary responsibility for managing the response vests in the Minister responsible for disaster preparedness and relief, the National Disaster Preparedness and Relief Committee and the Commissioner for Disaster Preparedness and Relief.<sup>20</sup> The DPRA terms the response to a disaster 'civil protection'.<sup>21</sup> It is the Minister's responsibility to communicate the declaration of a state of disaster to the National Assembly.<sup>22</sup>

The DPRA predates the Constitution. Nonetheless, constitutional supremacy requires any interpretation of the DPRA to uphold the Constitution. As a corollary, any provisions of the DPRA that contradict the Constitution are invalid by operation of section 5 of the Constitution.

Two developments are worth noting in relation to the DPRA. First, section 47 envisages that the responsible Minister would 'make regulations providing for all matters which, in his opinion, are necessary or expedient for giving effect' to the DPRA. Although

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18 Sec 2 DPRA.

19 Sec 32(2) DPRA.

20 Secs 3, 4, 5 & 13 DPRA.

21 Sec 2 DPRA.

22 Sec 33 DPRA.

the DPRA has been in force for almost 30 years, no regulations have been adopted. This has made the Act less attuned to responding to the minute details relating to its implementation. Second, in 2014 a review of the DPRA led to the development of a draft replacement Bill.<sup>23</sup> However, the National Assembly is yet to consider this Bill. As a result, the country is left with a law that has largely been overtaken by time and events, thereby complicating national responses to emerging challenges.

Having sketched the legal framework for dealing with public health emergencies, the next part of the article chronicles Malawi's response to COVID-19.

### **3 Malawi's response to the COVID-19 pandemic: A tale of fits and starts?**

On 7 March 2020 the former President of Malawi, Peter Mutharika, established a Special Cabinet Committee on Corona Virus (Committee).<sup>24</sup> The Committee's mandate included receiving updates about COVID-19 and relaying these to the public; recommending proactive measures to prevent the occurrence and spread of COVID-19; facilitating oversight for cross-government initiatives on COVID-19; and facilitating the implementation of activities aimed at mitigating the impact of COVID-19 on the socio-economic development of the country. On 28 April 2020 the President reshuffled the Committee, allegedly to make it more inclusive, and decided to co-opt the then leader of the opposition in Parliament, among others.<sup>25</sup> The Committee was also renamed the Presidential Task Force on Corona Virus (Task Force).

On 20 March 2020 Mutharika, ostensibly acting under section 32 of the DPRA, declared a state of disaster for a period of three months.<sup>26</sup> He also announced several measures, including the redeployment of health personnel to all border posts to continue the screening and surveillance of persons; the suspension of the hosting of international meetings and banning civil servants from attending both regional and international meetings; advising the general public to avoid

23 See [https://www.unisdr.org/files/globalplatform/malawi\[1\].pdf](https://www.unisdr.org/files/globalplatform/malawi[1].pdf) (accessed 20 July 2020).

24 See <https://www.manaonline.gov.mw/index.php/sports/item/13723-statement-on-coronavirus-outbreak-covid-19> (accessed 7 July 2020).

25 Z Chilunga 'Mutharika shakes up Malawi's COVID 19 Committee: Opposition leader Lowe drafted in' 28 April 2020, <https://allafrica.com/stories/202004290084.html> (accessed 7 July 2020).

26 See <https://malawi.un.org/en/46778-declaration-state-disaster-malawi-president-peter-mutharika> (accessed 7 July 2020).

non-essential travel to affected countries; the restriction of public gatherings to fewer than 100 people; and the closure of all schools and colleges by 23 March 2020.<sup>27</sup>

Although the President announced these measures on 20 March 2020, the declaration of a state of disaster was only gazetted on 3 April 2020.<sup>28</sup> This triggered debate regarding the President's failure to comply with section 32 of the DPRA. A correct interpretation of this section, however, reveals that the President has latitude to declare a state of disaster and arrange for gazetting later. As a result, the failure to immediately gazette the declaration did not affect its legality.

On 1 April 2020 the Minister of Health, acting under the Public Health Act, declared COVID-19 a formidable disease. As pointed out earlier, under section 30 of the Public Health Act the Minister is empowered to declare a formidable epidemic or endemic disease by notice. The scheme under the Public Health Act envisages three steps for dealing with a formidable epidemic or endemic disease. First, the Minister is empowered to declare a formidable epidemic or endemic disease. Second, under section 31 the Minister can pronounce as an affected area any part of Malawi threatened by a formidable epidemic or endemic disease. Third, once an affected area has been declared such, the Minister may make rules, among others, for the interment of the dead or the provision of medical aid or accommodation. Thereafter, it becomes the responsibility of the applicable local authority to coordinate the response to the formidable epidemic or endemic disease.

On 9 April 2020 the Minister of Health, acting under section 31 of the Public Health Act, promulgated the Corona Virus Rules I. Subsequently, on 14 April 2020 the Minister of Health announced a planned national lockdown from 18 April 2020 to 9 May 2020 to be governed by the Corona Virus Rules I.<sup>29</sup> Some of the proposed measures included the requirement that all essential services be obtained within the locality of one's residence or, if not, a person would be required to first obtain a permit from the local government authority or any delegated person; a stay-at-home order except for those listed under Rule 11(3)(a)(i) of the Corona Virus Rules I; the closure of all central markets; and the suspension of all non-essential

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27 As above.

28 J Chauluka 'Government backs Peter Mutharika's declaration' 7 April 2020, <https://times.mw/government-backs-peter-mutharikas-declaration/> (accessed 15 July 2020).

29 See <https://malawi.un.org/en/46796-speech-minister-healths-additional-measures-covid-19>, 14 April 2020 (accessed 7 July 2020).

businesses or services.<sup>30</sup> It was also announced that a breach of these measures was an offence punishable by a fine. As explained later in the article, the planned lockdown never materialised since the High Court issued an order barring its implementation.

It also is important to note that on 23 June 2020 Malawi elected a new President, Lazarus Chakwera, following the nullification of the May 2019 presidential election. Meanwhile, during the intervening period when Malawians went to the polls, the state of disaster declared on 20 March 2020 expired on 20 June 2020 and no extension was announced. In a press statement issued on 14 July 2020 the Secretary to the President and Cabinet announced the creation of a COVID-19 office within the Office of the President and Cabinet as 'the governance structure for the management of the COVID 19 pandemic compris[ing] a reconstituted Presidential Task Force and a national secretariat'.<sup>31</sup> The press statement neither specified the law under which the President acted in creating this office nor provided any direction on the intention of the government to renew the expired state of disaster despite a surge in COVID-19 cases.

On 10 July 2020 the Task Force announced several measures to contain the spread of COVID-19. The introduction of new measures, it was stated, was spurred by the escalation of COVID-19 infections and deaths.<sup>32</sup> Strangely, these measures were based on the Corona Virus Rules I despite a prevailing High Court order that suspended their implementation. It is also striking that these measures mirrored the very measures that were part of the halted lockdown. In yet another twist of events, on 13 July 2020 the Attorney-General wrote to the Chairperson of the Task Force advising him to reverse the decision to implement the Corona Virus Rules I since the High Court had suspended these.<sup>33</sup> This effectively halted the second attempt at a lockdown.

On 7 August 2020 the government adopted the Public Health (Corona Virus and COVID-19) (Prevention, Containment and Management) Rules, 2020 (Corona Virus Rules II). These Rules revoked the Corona Virus Rules I and created a new COVID-19 response framework. The Corona Virus Rules II were adopted under

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30 As above.

31 See W Maingo 'Government reorganises COVID-19 governance structure' 15 July 2020, <https://allafrica.com/stories/202007160124.html> (accessed 17 July 2020).

32 See <https://www.nyasatimes.com/attorney-general-advises-against-enforcing-strict-covid-19-measures/> (accessed 17 July 2020).

33 As above.

section 31 as read with section 29 of the Public Health Act. Although the Corona Virus Rules II retain some features from the predecessor rules, they marked a new approach to dealing with COVID-19. For example, they make no provision for a lockdown and expand the list of essential services. They also contain detailed provisions for the management of suspected COVID-19 patients and deaths, the management of education institutions and guidelines for managing workplaces.

Overall, it is clear that since the COVID-19 pandemic is an evolving public health emergency, further developments are to be expected. Alongside the developments outlined above, the courts were also involved in assessing the various aspects of the COVID-19 response measures. In the next part, the article explores the judicial intervention in Malawi's COVID-19 response.

### 3.1 Judicial intervention in Malawi's COVID-19 response

Thus far, three High Court cases have dealt with Malawi's response to COVID-19. First, on 6 April 2020 the High Court delivered its ruling in *The State (on application of Lin Xiaoxiao, Liu Zhigin, Wang Xia, Tian Hngze, Huang Xinwang, Zheng Zhouyou, Zheng Yourong, Jia Huaxing, Lin Shiling and Lin Tingrong) and The Director-General, Immigration Services and Attorney-General (Ex Parte Lin Xiaoxiao & Others)*.<sup>34</sup> In this case the applicants sought an order preventing the defendants from either expelling or preventing them from entering Malawi. The applicants, all Chinese nationals, challenged the decision of the Director-General, Immigration Services, refusing their entry into Malawi on 18 March 2020 notwithstanding the fact that they had visa approval letters. The applicants also challenged the decision to book them on a flight out of Malawi subsequent to the entry refusal. Notably, at the time an interim order was granted to prevent the defendants from expelling the applicants, only four of the ten applicants remained in the country as the others had already been expelled.

This case commenced as a judicial review application, which follows a two-stage process.<sup>35</sup> The first stage is the application for permission to move for judicial review and the second is the substantive judicial review application. The Court is yet to pronounce itself in respect of the substantive judicial review application. In the

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34 Judicial Review Case 19 of 2020, HC LL (unreported), <https://malawilii.org/mw/judgment/high-court-general-division/2020/5> (accessed 18 August 2020).

35 AW Bradley & KD Ewing *Constitutional and administrative law* (2007) 765-767.

course of delivering its interim ruling, however, the Court flagged several issues regarding the handling of national disasters and states of emergency in the context of Malawi's COVID-19 response. For example, the Court highlighted the fact that the President only has the power to do that which he or she has been expressly authorised by the Constitution. In relation to a derogation from constitutional rights and the declaration of a state of emergency, the Court questioned whether the COVID-19 pandemic could be classified a 'widespread natural disaster' as envisaged by section 45(3)(c) of the Constitution. Although the Court did not provide a definitive answer to this question, it conceded that it is normal for a country to face a situation requiring emergency powers. The Court emphasised, however, that emergency powers must be exercised within the framework of the law.

In the end the Court confirmed its interlocutory order preventing the defendants from expelling the applicants pending the hearing of the substantive judicial review. Although the Court raised many issues about the legality of the COVID-19 response, being a ruling on an interlocutory application, no answers were provided to the questions raised. Procedurally, the judgment after the substantive hearing of the judicial review application will provide answers to all the questions raised by the application. The Court's ruling, however, was such that it hinted at procedural flaws in Malawi's COVID-19 response.

Second, on 7 April 2020 the High Court delivered another ruling, in yet another application for judicial review, challenging measures taken under the DPRA in response to COVID-19, in *The State and The President of the Republic of Malawi & Others Ex Parte Steven Mponda & Others (Ex Parte Steven Mponda & Others)*.<sup>36</sup> The applicants were students from the University of Malawi who approached the Court after the announcement to close the University as a precautionary measure against COVID-19. The applicants challenged the constitutionality of the presidential declaration of a state of disaster for allegedly violating their right to education. They argued that while the President had issued various directives during the declaration of a state of disaster, the DPRA did not empower him to do so. The applicants further argued that section 29(a) of the Public Health

36 Judicial Review 13 of 2020, HC, ZA, <https://malawilii.org/system/files/judgment/high-court-general-division/2020/6/Ex%20parte%20Steven%20Mponda%20et%20al%20%20President%20and%20UNIMA%20-%20COVID%2C%20school%20closure%2C%20R%20leave.pdf> (accessed 18 August 2020).

Act was unconstitutional as it empowers a Minister to derogate constitutional rights.<sup>37</sup>

The Court dismissed the applicants' request for judicial review. It reasoned that the President's declaration of 20 March 2020 was that of a state of disaster and not a state of emergency. The Court held that while the state of disaster did affect the applicants' right to education, any limitation thus inflicted was justifiable under section 44 of the Constitution. Interestingly, the Court highlighted, albeit *obiter*, the need to 'have a comprehensive discussion on the important matter of the law on states of disaster *vis-à-vis* states of emergency'. This concession, it is contended, speaks to problems of congruence between the Constitution and the DPRA, partly attributable to the fact that the DPRA predates the Constitution. Notably, in both *Ex Parte Lin Xiaoxiao & Others* and *Ex Parte Steven Mponda & Others*, the High Court suggested that there is a lack of clarity in terms of the distinction between a state of disaster and a state of emergency.

The last case is *The State (on application of Esther Cecilia Kathumba, Monica Chang'anamuno, Human Rights Defenders Coalition, Church and Society Programme of the Livingstonia Synod of the Church of Central African Presbyterian and Prophet David F Mbewe) and The President of Malawi, Ministry of the Malawi Government Responsible for Health, Inspector-General of the Malawi Police Service, Commander of the Malawi Defence Force, Attorney-General, Malawi Council of Churches (Ex Parte Esther Kathumba & Others)*.<sup>38</sup> The applicants challenged the proposed lockdown discussed earlier, and the decision to promulgate the Corona Virus Rules I. Specifically, the applicants questioned four decisions: first, the decision to declare a lockdown without declaring a state of emergency; second, the decision to declare a lockdown without first providing for social security interventions for marginalised groups; third, the decision to promulgate the Corona Virus Rules I and to implement these without parliamentary oversight; and, finally, the decision to promulgate and implement measures under the Corona Virus Rules I in excess of the powers under the parent Act.

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37 Sec 29(a) provides: 'The Minister may make Rules applicable to all infectious diseases or only to such infectious diseases as may be specified therein, regarding the following matters: (a) the closing of any school or any place of public entertainment, where deemed necessary for the purpose of preventing the spread of any infectious disease, and the regulation and restriction of school attendance.'

38 Judicial Review Cause 22 of 2020, HC, LL, <https://malawilii.org/mw/judgment/high-court-general-division/2020/8> (accessed 18 August 2020).

This case was also a judicial review application. When the application was lodged on 17 April 2020, the Court granted permission for the applicants to file for judicial review and simultaneously issued a seven-day interlocutory injunction prohibiting the implementation of the lockdown. During a subsequent hearing, to determine whether to sustain or discharge the interlocutory injunction, the Court noted that the application raised several critical issues, which required further judicial interrogation, for example, whether the Minister of Health could impose a lockdown without declaring a state of emergency. The Court thus extended the interlocutory injunction granted on 17 April 2020 until the determination of the substantive judicial review proceedings or a further order of the Court. Effectively, this ruling indefinitely suspended the implementation of the planned lockdown.

The judgment on the substantive judicial review application, in *Ex Parte Esther Kathumba & Others*, was delivered on 4 September 2020.<sup>39</sup> By the time of the judgment, however, the Corona Virus Rules I, which were at the centre of the challenge, had been repealed. The Court nevertheless felt that the matter was not moot given the likelihood of repeated and continuous violations of rights under the Corona Virus Rules II. In its judgment the Court faulted the Corona Virus Rules I on several fronts. The essence of the Court's findings was that the provisions of the Corona Virus Rules I exceeded the authority provided by the parent Act, namely, the Public Health Act. The Court specifically highlighted the absence of justification for a lockdown under the Public Health Act. It also found that the Corona Virus Rules I unjustifiably purported to make provision for matters that fell under the authority of local councils. In its concluding remarks the Court made a raft of recommendations to the government for dealing with COVID-19. These included the need to pass a new law on public health with comprehensive provisions for dealing with pandemics; that any future lockdown should be preceded by cogent research and consultations; and that there should be civic and health education at all levels of society about the COVID-19 pandemic.

The tale being told by the developments discussed above reveals a yet to be crystallised approach to dealing with COVID-19. As a prelude to the discussion on the human rights implications of the measures adopted to deal with COVID-19, the next part assesses the legality of some of the interventions adopted.

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<sup>39</sup> The matter having been certified as constitutional, it was heard by a panel of three judges pursuant to sec 9 of the Courts Act, Cap 3:02 Laws of Malawi.

### 3.2 Skirting around the borders of (il)legality?

Malawi's response to COVID-19 reveals a tension between using the law to regulate conduct during a pandemic and the need to take action to protect lives. This, however, need not be the case. It is possible to both protect lives and to act within the law. As a manifestation of the tension, the discussion in this part focuses on the manner in which the subsidiary legislation on COVID-19 was enacted and the difference between a state of disaster and a state of emergency, and their respective implications.

As noted earlier, the power to pass delegated legislation, and the limits thereto, are prescribed in section 58 of the Constitution. The judgment in *Ex Parte Esther Kathumba & Others* confirmed that the Corona Virus Rules I had not been lawfully promulgated. The Minister of Health exceeded the authority conferred on him by section 31 of the Public Health Act in promulgating these Rules. It must be recalled that section 58 of the Constitution requires that any subsidiary legislation must be 'within the specification and for the purpose laid out' in the parent Act. This edict finds further fortification in section 21(1)(b) of the General Interpretation Act, which states that 'no subsidiary legislation shall be inconsistent with the provisions of any Act and any such legislation shall be of no effect to the extent of such inconsistency'.

The sequence of events leading up to the promulgation of the Corona Virus Rules I is illuminative of the challenges encountered. The President declared a state of disaster on 20 March 2020, which is a power under section 32 of the DPRA. On 1 April 2020 the Minister of Health declared COVID-19 a formidable disease under section 30 of the Public Health Act.<sup>40</sup> The declaration of a state of disaster was gazetted on 3 April 2020 and the Corona Virus Rules I were adopted on 8 April 2020. The inter-relationship between the Public Health Act and the DPRA suggests that once the President had declared a state of disaster, the COVID-19 response no longer was simply a matter of dealing with a formidable disease under the Public Health Act but also a question of 'civil protection' under the DPRA. Jurisdiction for managing civil protection primarily vests in the Minister of Disaster Preparedness and Relief. In the circumstances, it is arguable that at the time the Minister of Health promulgated the Corona Virus Rules I, he did not have the authority to do so since the same was vested in the Minister of Disaster Preparedness and Relief. Additionally, since

40 See J Mhango 'Speech by Minister of Health on additional measures on COVID-19' 14 April 2020, <https://malawi.un.org/en/46796-speech-minister-healths-additional-measures-covid-19> (accessed 19 August 2020).

the Corona Virus Rules I followed from the declaration of a state of disaster, the correct statute for their promulgation was the DPRA and not the Public Health Act. Overall, it is clear that the promulgation of the Corona Virus Rules I was laced with illegality, especially for failing to follow the correct procedure.

Even assuming that the Corona Virus Rules I were properly promulgated, additional challenges arise in considering their relationship to the parent Act.<sup>41</sup> For example, the Corona Virus Rules I in Rule 2 designated an ‘enforcement officer’ as part of the response for dealing with COVID-19 as a formidable disease. This approach ignored the fact that a structure for dealing with a formidable disease already existed under the Public Health Act, which empowers local authorities to deal with exigencies arising from a formidable disease. The structure under the Public Health Act does not recognise an enforcement officer as created under the Corona Virus Rules I. In this sense, therefore, the Corona Virus Rules I contradicted the Public Health Act, making them invalid to that extent. It is clear, therefore, that the relationship between the measures prescribed in the Corona Virus Rules 1 and the DPRA was not well thought out.

The Corona Virus Rules II were adopted under sections 31 as read with section 29 of the Public Health Act. Combining sections 31 and 29 was a creative way of widening the ambit for the adoption of subsidiary legislation. Although there is a significant difference in approach between the two sets of Corona Virus Rules, some elements of the old Rules have been carried over, including the designation of an ‘enforcement officer’. The later Rules even broaden the category of individuals who can be designated as ‘enforcement officers’. The legal complexities in relation to the position of ‘enforcement officers’, therefore, persist. Additionally, there are inconsistencies with regard to the definition of a gathering. For instance, while Rule 2 prohibits any gathering of more than ten people whether ‘wholly or partially in open air or building’, it appears that markets (open air or in buildings) remain open unless the Minister of Health under Rule 17 declares a particular location a restricted area. Furthermore, under Rule 7(2) (b), a community health worker is under an obligation to ensure that no more than ten people attend the burial of a person who dies from COVID-19. However, Rule 11(4) provides that not more than 50 people may attend the funeral of a person who dies of any

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41 In a letter dated 20 April 2020 sent to the Office of the President and Cabinet, the Malawi Law Society comprehensively reviewed the Corona Virus Rules I and concluded that they were invalid and illegal since they attempted to usurp the provisions of the parent legislation and also because they, in parts, undermined fundamental rights (copy of letter on file with authors).

cause other than COVID-19. This distinction is irrational because if the Rules assume that it is possible to ensure social distancing during a funeral attended by 50 people, then it should be possible to do so at any funeral irrespective of whether or not the deceased died of COVID-19. The same logic should apply to any gathering other than a funeral. Furthermore, under Rule 17, hospitality and recreational events are subjected to restrictions provided for in the sixth schedule of the Rules. While Rule 17 lists sporting facilities as subject to the restrictions in the sixth schedule, the latter only prescribes restrictions applicable to bars, restaurants and food outlets and does not provide guidance on the management of sporting facilities. The logic for this arrangement is unclear.

It should also be noted that two expressions have been widely used in relation to COVID-19 in Malawi. These are 'state of disaster' and 'state of emergency', which regimes are governed by the DPRA and the Constitution, respectively. The DPRA in section 2 defines a disaster as

- an occurrence (whether natural, accidental or otherwise) on a large scale which has caused or is causing or is threatening to cause –
- (a) death or destruction of persons, animals or plants;
  - (b) disruption, pollution or scarcity of essential supplies;
  - (c) disruption of essential services;
  - (d) influx of refugees into or out of Malawi;
  - (e) plague or epidemic of disease that threatens the life or well-being of the community.

Under section 32 of the DPRA, therefore, a state of disaster is any disaster, as defined under section 2, of 'such a nature and extent that extraordinary measures are necessary to assist and protect the persons affected or likely to be affected'. However, under section 45(3) of the Constitution, the President can declare a state of emergency only 'in times of war, threat of war, civil war or widespread natural disaster'.<sup>42</sup>

The High Court in *Ex Parte Steven Mponda & Others* held that the COVID-19 pandemic fell under the DPRA as it does not qualify as a natural disaster within the context of section 45(3) of the Constitution. *Ex Parte Steven Mponda & Others* reveals the potential contradictions in the usage of the terminologies 'state of disaster' and 'state of emergency'. Although no definite judicial clarification as yet exists, it is clear that a 'state of disaster' is different from a 'state of emergency' and not simply because the DPRA predates the Constitution. Under the Constitution, the conditions necessitating the pronouncement of

<sup>42</sup> Sec 45(3)(c) of the Constitution.

a state of emergency are more circumscribed than those for a state of disaster under the DPRA. The Constitution is also clear on which rights may be derogated from subsequent to the pronouncement of a state of emergency. Legally, a state of disaster is different from a state of emergency because the former takes place under a state of normalcy where it is impermissible to derogate or suspend the exercise of rights although certain human rights may be limited.<sup>43</sup> However, President Mutharika's declaration of a state of disaster, especially considering the breadth of the measures announced, namely, closure of all schools, banning all public gatherings of more than 100 people and deploying the security services to enforce these measures, legitimately raised concern as to whether Malawi fell under a state of emergency or a state of disaster. The litigation that subsequently challenged the proposed lockdown highlighted the challenges of differentiating between a state of disaster and a state of emergency. As alluded to earlier, the difference between the two is substantive and not simply nomenclative. For example, the powers given to the government during a state of emergency are more far-reaching than during a state of disaster. In practice, however, the lack of clarity creates the risk that a crafty government may impose a state of emergency surreptitiously even when the situation only necessitates the declaration of a state of disaster. Additionally, there is also the danger that the government could implement measures applicable only during a state of emergency even when what has been declared is a state of disaster.

The legal status of the various bodies charged with spearheading the COVID-19 response also is not very clear. The failure to refer to the specific law(s) under which such bodies have been established adds to the confusion. For example, former President Mutharika first created the Committee to coordinate the COVID-19 response, which he subsequently reconstituted and renamed the Task Force. After the change of government, an office within the Office of the President and Cabinet was created to coordinate the response. All these efforts do not correspond with any structures under either the DPRA or the Public Health Act. While the Constitution vests extensive powers in the presidency, it is important to bear in mind that the President only has such power to act within the law. There is, therefore, a fundamental question of legal propriety in respect of the various COVID-19 response bodies.

43 *Freedom Front Plus v The President of South Africa*, Case 22939/2020 (High Court, Gauteng Division) para 63, <http://www.saflii.org/za/cases/ZAGPPHC/2020/266.pdf> (<http://www.saflii.org/za/cases/ZAGPPHC/2020/266.pdf> (accessed 21 July 2020)).

The emerging picture suggests that overall, limited attention has been paid to constitutional and legal imperatives in framing the COVID-19 response. Given the dangers and public health challenges of COVID-19, the rather chaotic response is surprising. The answer to this, arguably, lies in the recent political dynamics in Malawi. The presidential declaration of a state of disaster came on the heels of a High Court judgment delivered on 3 February 2020, which nullified the May 2019 presidential election and ordered a fresh presidential election within 150 days.<sup>44</sup> As a result, all political parties started posturing for the fresh election and proceeded on this path when the Supreme Court of Appeal affirmed the order to hold a fresh presidential election.<sup>45</sup> It is arguable, therefore, that all major political actors singularly focused on the presidential elections such that the COVID-19 pandemic became a tangential issue.<sup>46</sup> The fresh election created uncertainty about the presidency which, arguably, contributed to a failure to meaningfully coordinate the COVID-19 response. Not surprisingly, while the number of COVID-19 infections was relatively low between February 2020 – when the presidential election was annulled – and June 2020, when a new President was elected, subsequent to the change of government, the infection rates spiked. This spike, arguably, was simply due to the fact that national attention had finally returned to dealing with the pandemic and that testing for COVID-19 had improved. In the same vein, the Corona Virus Rules II should be seen as an attempt by the new government to shape its own COVID-19 response, thereby marking a break with the efforts by the predecessor regime.

#### 4 Livelihoods and the human rights implications of Malawi's response to COVID-19

The COVID-19 pandemic is a threat to human rights but it also highlights the interdependent character of human rights and their utility in addressing the pandemic in a holistic manner that is respectful of human dignity.<sup>47</sup> Integrating human rights into COVID-19 responses is critical to meaningfully addressing any emerging public

44 *Chilima & Chakwera v Mutharika & Electoral Commission*, Constitutional Reference 1 of 2019, HC, LL (unreported).

45 *Mutharika & Electoral Commission v Chilima & Chakwera*, Constitutional Appeal 1 of 2020, MSCA (unreported).

46 See, eg L Masina 'Malawi politicians ignore COVID-19 measures for elections', <https://www.voanews.com/africa/malawi-politicians-ignore-covid-19-measures-elections> (accessed 17 September 2020).

47 A Spadaro 'COVID-19: Testing the limits of human rights' (2020) 11 *European Journal of Risk Regulation* 317–318.

health and other concerns.<sup>48</sup> It is also important to reflect on the human rights implications of COVID-19 responses since these of necessity affect the enjoyment of several rights.<sup>49</sup> A focus on human rights allows states to adopt responses that maximise benefits for the populace while minimising any negative effects.

The discussion below focuses on the impact of the Corona Virus Rules I and II on the right to economic activity as enshrined in the Constitution and its implications for other human rights that affect people's livelihoods, such as the right to food, work, health, housing and education. Central to the exercise of the right to an economic activity is the freedom of movement, which the proposed lockdown measures sought to significantly curtail. In this context, the argument advanced in *Ex Parte Esther Kathumba & Others* regarding the lack of efforts to provide for social security measures to cushion people's livelihoods during the lockdown is germane to the analysis regarding the government's responsibility to ensure the protection of the core content of the affected rights.

International human rights law permits the limitation of human rights.<sup>50</sup> Limitations to civil and political rights are permissible only if they are provided by law, necessary, proportional and non-discriminatory.<sup>51</sup> With respect to socio-economic rights, any limitations must be necessary, reasonable and proportionate.<sup>52</sup> However, the core content of socio-economic rights prescribes the minimalist standard below which states cannot fall in their efforts to progressively realise these rights.<sup>53</sup> The proportionality test requires the adoption of the least intrusive measures if they can achieve the same objective being pursued.<sup>54</sup> These prescriptions from international human rights law conform to the general limitation

48 WHO 'Addressing human rights as key to the COVID-19 response' 21 April 2020, <https://www.who.int/publications/i/item/addressing-human-rights-as-key-to-the-covid-19-response> (accessed 16 July 2020).

49 United Nations 'COVID-19 and human rights: We are all in this together' April 2020, <https://unsdg.un.org/resources/covid-19-and-human-rights-we-are-all-together> (accessed 16 July 2020).

50 Certain human rights cannot be limited under any circumstances, such as rights related to the prohibition of torture, slavery and on retroactive criminal laws. See United Nations Civil and Political Rights: The Human Rights Committee, Fact Sheet 15 (Rev1), <https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf> (accessed 18 July 2020).

51 United Nations (n 50).

52 ESCR Committee 'Statement on the Coronavirus disease (COVID-19) pandemic and economic, social and cultural rights', <https://undocs.org/E/C.12/2020/1> (accessed 18 July 2020).

53 L Chenwi 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) *De Jure* 742 753.

54 United Nations 'The Siracusa principles on the limitation and derogation of provisions in the International Covenant on Civil and Political Rights', <https://undocs.org/pdf?symbol=en/CN.4/1985/4> (accessed 18 July 2020).

scheme in the Constitution, which provides that no restrictions on any rights and freedoms may be placed ‘other than those prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society’.<sup>55</sup>

According to Section 29 of the Constitution, ‘[e]very person shall have the right freely to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi’. Section 29 protects a compound right which subdivides into three interrelated but separable rights, namely, the right to pursue a livelihood; the right to engage in economic activity; and the right to work.<sup>56</sup> Following this typology, the right to pursue a livelihood, at a minimum, imposes a duty on the state not to interfere with the means by which people earn a living.<sup>57</sup> Economic activity embraces work and employment, but it also extends to business ventures, enterprises and various trades through which people eke out their living.<sup>58</sup> The duty on the state is not to interfere with people’s legitimate economic activities and the means by which they undertake those activities. The right to work is a species of economic activity and a means of earning a living. Under the Constitution, the right to work has both vertical and horizontal applicability.<sup>59</sup> The state has the duty to promote, protect and respect the right to work, to facilitate its realisation including the realisation of rights that are dependent on the right to work, such as the right to education, housing, food and health.

While COVID-19 primarily is a public health challenge, the crisis also has economic and social dimensions. The various response measures have revealed the socio-economic inequalities and other vulnerabilities in society.<sup>60</sup> The lives over livelihoods debate best captures the quagmire engendered by the crisis, which offers very dire options in an impoverished country such as Malawi.

A review of the COVID-19 response measures and the Corona Virus Rules I reveals the extent of the tension between Malawi’s response and the right to economic activity, which is a pivotal vector right that facilitates the enjoyment of numerous other rights. The totality of the proposed lockdown measures, for example, drastically reduced economic activity making it difficult for people to pursue livelihoods. It is clear from the response that the state’s primary objective was

<sup>55</sup> Sec 44(1) of the Constitution.

<sup>56</sup> DM Chirwa *Human rights under the Malawian Constitution* (2011) 304.

<sup>57</sup> *Du Chisiza v Minister of Education and Culture* [1993] 16(1) Malawi Law Reports 81.

<sup>58</sup> Chirwa (n 56) 305.

<sup>59</sup> Chirwa 310-311.

<sup>60</sup> United Nations (n 49).

to curb the spread of COVID-19. It seems to have been forgotten, however, that any measures limiting the exercise of the right to economic activity must be necessary to combat the public health crisis posed by COVID-19 and be reasonable as well as proportionate to the pursued objective. The constant starting point is to pursue the least intrusive measures that attain the same objective, in this case, containing and managing the spread of COVID-19.

The Corona Virus Rules I prescribed measures that, among other things, would necessitate the closure of all central markets and the suspension of all non-essential businesses or services, and the closure of informal trading activities, entertainment places and restaurants, fast food outlets, cafes and coffee shops except for the purpose of providing take-away services.<sup>61</sup> While these measures are necessary to curb the spread of COVID-19, they fail to pass the proportionality test on different fronts.<sup>62</sup> First, at the time of their promulgation, there were only three recorded cases in one district, yet the geographical scope of the measures was not circumscribed.<sup>63</sup> The government opted to limit the exercise of the right to economic activity of everyone, including the closure of all schools irrespective of their location. Critical to efforts to reduce the spread of COVID-19 are measures that restrict the movement of people. There was no effort to restrict movement in the district(s) with positive cases and to subject some of the proposed lockdown measures to a specific geographic location. This is also the case with the Corona Virus Rules II which, although introducing less restrictive measures, subject every geographic location declared a 'restricted area' to the same restrictions without adopting a precisely segregated approach to the imposition of restrictions.<sup>64</sup> It is also not insignificant that the term 'restricted area' does not appear in the Public Health Act, which instead employs the term 'infected area'. The difference in terminology creates uncertainty as to whether the Rules and the Act are referring to the same thing.

Second, the list of essential services allowed to operate excluded equally important sectors that could have operated without

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61 Rule 11, Corona Virus Rules I.

62 The proportionality test as applied in Malawian constitutional law requires, among others, that any measure limiting a right be rationally connected to the objective sought to be achieved and to impair as little as possible the right at issue; see *Mayeso Gwanda v The State* Constitutional Cause 5 of 2015 HC PR, <https://malawilii.org/mw/judgment/high-court-general-division/2017/23> (accessed 16 September 2020).

63 The first three cases were all recorded in Lilongwe District and were connected to one family; see <https://medicalxpress.com/news/2020-04-malawi-coronavirus-cases.html> (accessed 24 July 2020).

64 Rule 17, Corona Virus Rules II.

stymieing the objective of containing the spread of COVID-19. These included players in agricultural production that are critical for food security.<sup>65</sup> Instead, the measures unreasonably subjected everyone to a stay-at-home order irrespective of whether or not the nature of their work exposed them to COVID-19. Arguably, the least intrusive measure at this stage was to promote social distancing, mask wearing, handwashing and other health protocols recommended by the WHO to attain the same protective function instead of sledgehammer restrictions. On this score, the Corona Virus Rules II are a clear improvement and correctly include among essential services 'agricultural produce and products supplies, farming supplies'.<sup>66</sup>

The potential impact of the lockdown measures on rights and livelihoods should also be understood in the context of Malawi's socio-economic situation. Poverty is widespread with 51 and 70 per cent of Malawians living below the national and international poverty line respectively.<sup>67</sup> The closure of enterprises and workplaces could have led to lay-offs, and informal traders who live off daily earnings would not be able to sustain their livelihoods. The overall supply chain disruptions due to the lockdown measures would further stifle the struggling industries, thereby pushing livelihoods into serious precarity. Economic activity enables people to access other rights such as that to food, housing, health care and education which are intrinsically linked to people's everyday survival. For instance, the closure of schools not only affects the earning capacity of workers at educational institutions due to the risk of lay-offs, but also a large proportion of children who benefit from the school feeding programme.<sup>68</sup> In South Africa, for example, the High Court drew an ineluctable link between the right to education and the school feeding programme, which threatened to deprive around nine million children from a daily nutritious meal due to COVID-19.<sup>69</sup> The Court ordered the Department of Basic Education to ensure that the National School Nutrition Programme continued to provide a daily

65 United Nations Secretary-General Policy Brief 'The Impact of COVID-19 on Food Security and Nutrition', [https://www.un.org/sites/un2.un.org/files/sg\\_policy\\_brief\\_on\\_covid\\_impact\\_on\\_food\\_security.pdf](https://www.un.org/sites/un2.un.org/files/sg_policy_brief_on_covid_impact_on_food_security.pdf) (accessed 18 July 2020).

66 Seventh Schedule, Corona Virus Rules II.

67 World Bank, <http://documents1.worldbank.org/curated/en/723781545072859945/pdf/malawi-scd-final-board-12-7-2018-12122018-636804216425880639.pdf>, December 2018 (accessed 18 July 2020).

68 See K Nanchukwa & B Mphande 'Piloting a sustainable model for home-grown school meals in Malawi' May 2015, <https://www.enonline.net/nex/5/pilothomegrownmealmalawi> (accessed 18 July 2020).

69 *Equal Education & Others v Minister of Basic Education & Others* (High Court, Gauteng Division) Case 22588/2020, <https://equaleducation.org.za/wp-content/uploads/2020/07/Judgment-Equal-Education-and-others-v-Minister-of-Basic-Education-and-others-22588-2020.pdf> (accessed 18 July 2020).

meal to all qualifying learners whether or not they were attending school.<sup>70</sup>

While the Corona Virus Rules II impose less restrictive measures than the predecessor Rules, the closure of all educational institutions across the country is unreasonable. For example, geographic locations that are remotely located and have limited intercourse with urban areas are subjected to the same restrictions as locations that have recorded COVID-19 cases. Rationality would demand the adoption of guidelines and restrictions applicable to specific geographic locations to ensure the continuation of education and normal economic activities. It is in this regard that Rule 17 of the Corona Virus Rules II may become handy as it would permit the Minister to declare specific locations restricted areas and impose necessary restrictions, including the movement of people therein, while opening up unaffected districts or locations to education and other activities.

Stay-at-home orders are just as fatal as COVID-19 itself for low wage earners, particularly those in the informal sector of employment. Inflexible lockdown measures also create a high risk of non-compliance that would lead to the uncontrollable spread of COVID-19 as people pursue all means possible to sustain livelihoods. As a recent study has established, most Malawians are more afraid of hunger than of contracting COVID-19, which is indicative of the likelihood of non-compliance if the state introduced strict measures that ground economic activity to a halt.<sup>71</sup> Equally, the strict enforcement of a hard lockdown would push a large population into extreme poverty and starvation, which the state cannot support considering the limited coverage of its social security programmes.<sup>72</sup>

It is important that both a special social safety net programme, and the tempering of strict lockdown measures to designate certain sectors as essential service providers, should guide policy decisions on the COVID-19 response. This is because social safety net measures can only cover a small proportion of poor people due to fiscal constraints,<sup>73</sup> which makes it imperative to introduce specific

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70 As above.

71 See C Adriaanse 'Over 80% of Malawians fear hunger more than COVID-19, study shows' 2 June 2020, <https://www.iol.co.za/news/africa/over-80-of-malawians-fear-hunger-more-than-covid-19-study-shows-48878410> (accessed 17 July 2020).

72 See Government of Malawi et al 'Social protection in Malawi: Summary of the assessment based national dialogue report', [https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---ilo-lusaka/documents/publication/wcms\\_493326.pdf](https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---ilo-lusaka/documents/publication/wcms_493326.pdf), December 2018 (accessed 18 July 2020).

73 As above.

interventions that protect people's health as they continue to engage in economic activity. Human rights law provides tools to ensure the protection of people from the pandemic while upholding their rights. For instance, section 31(1) of the Constitution provides that '[e]very person shall have the right to fair and safe labour practices and to fair remuneration'. Three critical components are highlighted in this provision, namely, fair labour practices, safe labour practices and equal remuneration.<sup>74</sup> The constitutional safeguard for fair labour practices protects employees' welfare and interests in a broad sense, covering contracts of employment and general workplace ethos. This includes occupational safety, health and working environment. The duty is on the employer to provide a working environment free of hazards and on the state to develop a comprehensive framework for regulating the same.

Rule 13 of the Corona Virus Rules I recognised the need to ensure a safe working environment when it provided that the Minister may prescribe measures to employers and employees such as the operation of shifts for employees; the spacing between shifts for employees at a workplace; and restrictions on the number of persons at a workplace at any time. A similar concession is made in Rule 13 and the fourth schedule of the Corona Virus Rules II, which recognise a number of obligations and responsibilities of employers and employees. These provisions can be utilised to effect the least intrusive measures on the exercise of rights by employees and employers and provide the option to protect both people's health and livelihoods. Similarly, the introduction of open-air and spaced-out market stalls to permit informal and other traders to eke out a living, in strict compliance with enforceable health protocols, would mitigate the challenges presented by hard lockdowns that require every person to stay at home where they risk starvation and evictions. The lack of household income, which stay-at-home orders would engender for many families, limits people's capabilities to access a wide range of socio-economic rights, including those to food, health care and education.

Prevailing scientific knowledge posits that controlling COVID-19 requires breaking the chain of infections, and restricting people's movement and contact is critical to attaining this objective.<sup>75</sup> While clearly valuable in containing the spread of COVID 19, strict stay-at-home orders constrict the exercise of the right to economic activity. Many Malawians, the majority of whom work in the informal sector,

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74 Chirwa (n 56) 318-325.

75 See 'COVID-19: Breaking the chain of infection', <https://ph.ucla.edu/news/fsph-news/covid-19-breaking-chain-infection> (accessed 16 September 2020).

need to constantly travel out of their homes as a matter of necessity.<sup>76</sup> A failure to leave home for any extended period of time would be akin to a death sentence by starvation. There was, therefore, a need to rethink restrictions to movement as other less restrictive measures exist that would have attained the same objective while people exercised the right to economic activity. For example, under Rule 15 of the Corona Virus Rules I, the Minister of Health could have prescribed measures for the operation of public transportation and the regulation of traffic.<sup>77</sup> Instead of a blanket stay-at-home order, the Minister could have prescribed applicable rules regarding public transport and the movement of people that comply with health protocols on containing the spread of COVID-19. Such measures could have included the mandatory wearing of masks, reduced capacity for purposes of social distancing, regular disinfection of vehicles and monitoring compliance. On this score, the Corona Virus Rules II offer a complete departure from the previous Rules. Rule 15 and the fifth schedule in detail prescribes guidelines on the provision of transport services. Since the sustenance of livelihoods hinges on people's ability to move and engage in economic activity, the imposition of certain minimum restrictions in order to adhere to COVID-19 health protocols are preferable to those that immobilise the entire country.

In Malawi the complexity of defining the appropriate COVID-19 response that protects both lives and livelihoods is principally due to the socio-economic realities. COVID-19 has exposed the depth of the fissures of socio-economic inequality neglected over the years by successive governments that have failed to deliver on the constitutional promise to realise socio-economic rights.<sup>78</sup> According to Oxfam, in 2004 the 'richest 10 per cent of Malawians consumed 22 times more than the poorest 10 per cent. By 2011 this had risen to see the richest 10 per cent spending 34 times more than the poorest.'<sup>79</sup> Dysfunctional systems in the labour, education, health and other sectors, *inter alia*, are responsible for poor outcomes in these areas that continue to push more people into extreme poverty. It is not surprising that social security programmes are limited and cannot possibly sustain all that need support during a pandemic. The Corona Virus Rules II are to be commended for attempting to strike

76 Over 89% of the labour force in Malawi is in the informal sector. National Statistical Office 'Malawi labour force survey 2013', [http://www.nsomalawi.mw/index.php?option=com\\_content&view=article&id=209&Itemid=97](http://www.nsomalawi.mw/index.php?option=com_content&view=article&id=209&Itemid=97) (accessed 24 July 2020).

77 Under the Corona Virus Rules II the corresponding provision is Rule 15 and the Fifth Schedule.

78 See [https://www-cdn.oxfam.org/s3fs-public/file\\_attachments/rr-inequality-in-malawi-261115-en.pdf](https://www-cdn.oxfam.org/s3fs-public/file_attachments/rr-inequality-in-malawi-261115-en.pdf) (accessed 18 July 2020).

79 As above.

a meaningful balance by introducing necessary restrictions to curb the spread of COVID-19 while facilitating the exercise of economic activity.<sup>80</sup>

While COVID-19 threatens to substantially shrink the economy, it provides an opportunity to build back better by rethinking the developmental trajectories previously pursued that have succeeded only in widening the gulf of inequality. There is a need to ensure inclusive development guided by the principles enshrined in the Constitution and various international standards and frameworks, including the Sustainable Development Goals, in order to bridge the gap between the rich and the poor. This requires efforts to harness all available resources at the national, regional and international levels to deliver on the promises of the Constitution and international human rights law to realise socio-economic rights, particularly for those farthest behind. The government should focus on key socio-economic rights that spur immediate growth and development, including education and skills development; the strengthening of healthcare and food security systems; and, most importantly, democratising wealth within communities to enhance peoples' capabilities to access a whole range of socio-economic rights.<sup>81</sup>

## 5 Conclusion

The challenges brought about by COVID-19 are unprecedented even at the global level. Due to resource constraints, countries such as Malawi find themselves faced by additional challenges in devising appropriate measures to both contain COVID-19 and to uphold human rights. An obsolete legal and institutional framework for responding to pandemics complicates an already dire situation. There clearly is tension between the DPRA and the Public Health Act when a pandemic also requires the declaration of a state of disaster. The haphazard response witnessed this far is partly due to the lack of clarity regarding the appropriate legal regime that the authorities ought to apply in addressing a pandemic, which would require the invocation of both the Public Health Act and the DPRA.

The announcement of a lockdown that ordered a national stay-at-home except for a few essential service providers at a time when the country had only recorded three cases was disproportional. The lockdown sought to subject everyone to a straightjacket measure

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80 From the first schedule through to the seventh schedule an attempt has been made to navigate the balance between lives and livelihoods.

81 As above.

when COVID-19 was confined to a specific geographic location. Therefore, it is not surprising that the threat that the lockdown presented to people's livelihoods and the absence of appropriate social security interventions to alleviate the impact of restrictions on economic activity led to litigation that sought to remind the government of its constitutional obligations towards people's livelihoods.

An effective COVID-19 response requires the adoption of appropriate strategies that not only conform to the Constitution but also protects lives and livelihoods. This necessitates a delicate balancing act since, in the absence of a comprehensive social protection system, strict lockdown measures would render a significant proportion of the population destitute. Any health response that neglects the protection of livelihoods reduces people's capabilities to access various socio-economic rights, such as rights to health, housing, education and food, the consequences of which for an impoverished country are as fatal as the COVID-19 pandemic itself. The respect of human rights should be at the centre of the response, including any recovery plans in order to uphold the right to live in dignity which finds expression in the right 'to engage in economic activity, to work and to pursue a livelihood anywhere in Malawi'. The COVID-19 pandemic has not only exposed the dire socio-economic conditions prevalent in Malawi but also the limited options for enforcing a hard lockdown that would require hefty social security investments to sustain a large number of livelihoods.

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## Assessing the implications of digital contact tracing for COVID-19 for human rights and the rule of law in South Africa

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**Summary:** *The article argues that the establishment of centralised and aggregated databases and applications enabling mass digital surveillance, despite their public health merits in the containment of the COVID-19 pandemic, is likely to lead to the erosion of South Africa's constitutional human rights, including rights to equality, privacy, human dignity, as well as freedom of speech, association and movement, and security of the person. While derogation clauses have been invoked, thereby limiting International Covenant on Civil and Political Rights clauses and enabling the mass collection of location data only for contact tracing purposes under the Disaster Management Act, a sustained breach of these rights may pose an impending threat to the human rights framework in South Africa. Any proposed digital contact tracing technologies in their design, development and adoption must pass the firm legal muster and adhere to human rights prescripts relating to user-centric transparency and confidentiality, personal information, data privacy and protection that have recently been enacted through the latest development on Protection of Personal Information Act.*

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**Keywords:** *digital contact tracing; COVID-19; Protection of Personal Information Act*

## 1 Introduction

The main objective of this article is to canvass the arguments around the human rights implications of digital COVID-19 contact tracing in South Africa. As evident in many countries across the globe, digital contact tracing has come with an expanded mass surveillance regime, the limitation of individual rights, and the stigma and shame associated with exposing the most private details of possible carriers. The second part of the article provides an overview of digital contact tracing in the age of COVID-19 in human rights terms, surveying the implementation of mobile phone-based contact tracing tools in South Africa since the Coronavirus outbreak. The latter half of the article explores a robust human rights advocacy framework and formulates legal regulatory safeguards that could be implemented in addition to currently existing data privacy laws to protect citizens from extended human rights violations. Legal and technical recommendations are embedded throughout the article.

The article also examines the compatibility of South Africa's proposed tracing database and associated applications with domestic and international privacy and data protection principles, including the Protection of Personal Information Act 4 of 2013 (POPIA) – which very recently became effective on 1 July 2020 – and the European Union (EU) General Data Protection Regulation (GDPR). Adopting a global comparative approach is key to replicating the successes and avoiding the failures that have arisen in other countries.

Crucially, the article finds that the establishment of centralised and aggregated databases and applications enabling mass digital surveillance – despite their public health merits in helping contain the COVID-19 pandemic – is likely to lead to the erosion of South Africa's constitutional human rights, including rights to equality, privacy, human dignity, as well as freedom of speech, association and movement, and security of the person. Any proposed digital contact tracing frameworks in their design, development and adoption must pass the legal muster and adhere to normative human rights prescripts relating to user-centric transparency and confidentiality, data privacy and protection, public accountability, non-discrimination and equality, concern and respect for the persons most affected in the process, whether in advocacy and monitoring or service provision.

## 2 Background on contact tracing in the age of COVID-19

Case and case-contact tracing has been frequented as a public health approach in government strategy to control the spread of the 2019 Coronavirus (COVID-19).<sup>1</sup> Employed previously to contain the 2014 Ebola virus outbreaks in Africa, the main purpose of this practice is to rapidly identify secondary cases caused by the first probable or confirmed cases, to track possible routes of infection, mitigate the flaws of detection based only on symptoms, and break the chain of onward transmission.<sup>2</sup> The key steps of contact tracing involves contact identification, listing and follow-up, in an attempt to 'effectively measure the actual number of infected members of the population'.<sup>3</sup> Compelling public health reasons – namely, that COVID-19 is transmitted via respiratory droplets and direct contact with infected carriers<sup>4</sup> – pave the way for exit strategies for a phased lifting of lockdown regulations that require contact tracing in synergy with other measures such as rapid testing and social distancing.<sup>5</sup>

Conventionally, contact tracing has been performed in a manual setting, where a public health worker would engage in a phone conversation with each diagnosed carrier to retrace preceding weeks of the carriers' lives. Exercising careful discretion, the health worker would afterwards identify those in close contact with the carriers and notify those close contacts to isolate and seek testing.<sup>6</sup> In South Africa approximately 20 000 people have been trained to assist with manual contact tracing.<sup>7</sup> At this stage of the COVID-19 outbreak, however, manual contact tracing has many setbacks due to its labour-intensive processes and the limited testing kits available. Manual contact tracing may also be fraught with memory errors.

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1 Johns Hopkins University 'Coronavirus Resource Center', [www.coronavirus.jhu.edu/](http://www.coronavirus.jhu.edu/) (accessed 1 October 2020).

2 WHO 'Contact tracing during an outbreak of Ebola virus disease' September 2014, [www.who.int/csr/resources/publications/ebola/contact-tracing-during-outbreak-of-ebola.pdf](http://www.who.int/csr/resources/publications/ebola/contact-tracing-during-outbreak-of-ebola.pdf) (accessed 1 October 2020).

3 WHO 'Contact tracing in the context of COVID-19' 10 May 2020, [www.who.int/publications/i/item/contact-tracing-in-the-context-of-covid-19](http://www.who.int/publications/i/item/contact-tracing-in-the-context-of-covid-19) (accessed 1 October 2020).

4 WHO 'Modes of transmission of virus causing COVID-19: implications for IPC precaution recommendations' 29 March 2020, [www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations](http://www.who.int/news-room/commentaries/detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations) (accessed 1 October 2020).

5 UN 'Technical Guidance on contact tracing for COVID-19 in the WHO African region' April 2020, [www.afro.who.int/publications/technical-guidance-contact-tracing-covid-19-world-health-organization-who-african](http://www.afro.who.int/publications/technical-guidance-contact-tracing-covid-19-world-health-organization-who-african) (accessed 1 October 2020).

6 As above.

7 IM Viljoen et al 'Contact tracing during the COVID-19 pandemic: Protection of personal information in South Africa' (2020) 13 *South African Journal of Bioethics and Law* 15.

New and emerging methods of contact tracing have included mobile phone applications or Bluetooth networks which could expedite an existing manual contact tracing operation and make it more accurate by finding close contacts that were unknown to or forgotten by carriers; additionally, digital applications can anonymously and automatically alert potentially exposed users.<sup>8</sup> One such example is Google and Apple's decentralised approach, which puts to the fore in its design principles of user privacy and security. Proponents of (at least certain forms of) digital contact tracing argue that technological automation can at least supplement the work of manually identifying those who have been exposed to COVID-19.<sup>9</sup> Digital surveillance has played an essential role in containing the COVID-19 pandemic in China, Singapore, Israel and South Korea, among others.<sup>10</sup>

Databases gathered from contact tracing investigations have been collated and analysed to view larger patterns, including transmission sites, attack rates, and the effectiveness of mitigation measures, contributing to a better understanding of the epidemiology of COVID-19 and assisting with policy formulation. Each country has been advised to adapt their rapid response based on the local epidemiological situation and its available resources.<sup>11</sup>

## 2.1 Deployment of digital contact tracing tools for COVID-19 in South Africa

Upon the identification of the first cases in South Africa, President Cyril Ramaphosa swiftly declared a national state of disaster on 15 March 2020, invoking section 27(1)(b) of the Disaster Management Act 57 of 2002 (DMA) and declaring contact tracing

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8 M Ienca & E Vayena 'On the responsible use of digital data to tackle the COVID-19 pandemic' (2020) 26 *Natural Medicine* 463-464. The article shows the effectiveness of mobile phone data and big data analytics in predicting the spatial spread of cholera during the 2010 Haiti cholera epidemic and during the 2014-2016 Western African Ebola crisis; See, eg, Apple and Google 'Privacy-preserving contact tracing' (2020), <https://covid19.apple.com/contacttracing> (accessed 1 October 2020).

9 See J Valentino-DeVries et al 'A scramble for virus apps that do no harm' *The New York Times* 3 June 2020, [www.nytimes.com/2020/04/29/business/coronavirus-cellphone-apps-contact-tracing.html](http://www.nytimes.com/2020/04/29/business/coronavirus-cellphone-apps-contact-tracing.html) (accessed 1 October 2020).

10 L Bradford, M Aboy & KL Liddell 'COVID-19 contact tracing apps: A stress test for privacy, the GDPR, and data protection regimes' (2020) 7 *Journal of Law and the Biosciences* 1; J Valentino-DeVries 'Translating a surveillance tool into a virus tracker for democracies' *The New York Times* 19 March 2020, [www.nytimes.com/2020/03/19/us/coronavirus-location-tracking.html](http://www.nytimes.com/2020/03/19/us/coronavirus-location-tracking.html) (accessed 1 October 2020).

11 European Centre for Disease Prevention and Control 'Contact tracing: Public health management of persons, including healthcare workers, having had contact with COVID-19 cases in the European Union – Second update' 8 April 2020.

as ‘crucial and non-negotiable’.<sup>12</sup> The government shortly thereafter, on 18 March 2020, published amended regulations for contact tracing in the Government Gazette.<sup>13</sup>

South Africa has since joined several governments in passing regulations that allow for the identification of infection hotspots using technology, surveillance data, epidemiological mapping, as well as the collection and storage of data from mobile companies. On 26 March 2020 the Minister of Communications and Digital Technologies directed the operations of the electronic communications sector as essential services to combat the spread of COVID-19 in South Africa, pursuant to regulation 10(8) of the Regulations issued in relation to section 27(2) of the DMA. Part of these directions includes ‘individual track and trace’ under sections 8(1) and 8(2) according to which the internet and digital sectors must provide location-based services to ‘track and trace individuals that have been infected and such other persons that may have been in direct contact with such infected persons. A database may be correlated with other sources from government and private sector.’<sup>14</sup>

Health data safeguards under the Protection of Personal Information Act 4 of 2013 (POPIA) – which has been a work in progress since it was designated for implementation by the South African Law Reform Commission in 2005 – were due to take effect on 1 April 2020, but POPIA has been postponed in light of the COVID-19 outbreak.<sup>15</sup> Although only certain provisions of POPIA were legally binding in the early stages of COVID-19, the remaining provisions of POPIA have since become effective, starting on 1 July 2020, with provisions relating to the oversight of the access to information commencing on 30 June 2021.<sup>16</sup> Given POPIA’s large-

12 C Ramaphosa ‘South Africa’s response to Coronavirus COVID-19 pandemic’ 13 May 2020. In the speech, South Africa’s President Ramaphosa enlists a number of Coronavirus prevention measures two months after the declaration of a national state of disaster as a result of COVID-19.

13 Department of Cooperative Governance and Traditional Affairs ‘Declaration of a national state of disaster. Government Notice 313 in Government Gazette 43096’ 15 March 2020. See also South Africa’s Coronavirus guidelines, including core lockdown regulations, directions, disaster management guidelines and notices, and the Disaster Management Act amendments.

14 See *Government Gazette* ‘Electronic communications, postal and broadcasting directions issued under Regulation 10(8) of the Disaster Management Act, 2002 (Act No 57 of 2002)’ 26 March 2020.

15 Protection of Personal Information Act (POPIA) 4 of 2013, 26 November 2013. Sec 26 of POPIA provides restraints on the processing of special personal information and requires the consent of the data subject. This clause would remain in place unless processing is necessary for the exercising of a right or obligation in law.

16 ‘South Africa’s Protection of Personal Information Act, 2013, goes into effect July 1’ *The National Law Review* 29 June 2020, [www.natlawreview.com/article/south-africa-s-protection-personal-information-act-2013-goes-effect-july-1](http://www.natlawreview.com/article/south-africa-s-protection-personal-information-act-2013-goes-effect-july-1) (accessed 1 October 2020); N Bowan ‘After 7-year wait, South Africa’s Data

scale impact on privacy rights, it is required that all processing of personal information must conform with its set out provisions within one year after its commencement, that is, a 12-month grace period that ends on 1 July 2021. In the meantime, POPIA's implications for digital contact tracing yet remain in limbo, which gives all the more reason to ensure that the handling of personal data in digital contact tracing complies with these new regulations. The situation is very much still developing, as POPIA has recently been enacted in the midst of the 12-month grace period for compliance. In view of a roadmap and concrete implementation plans, organisations subject to POPIA and GDPR regulations must be flexibly willing to adjust their operational capabilities and governance structures. Given that there is no silver bullet solution to data protection compliance when it comes to GDPR or POPIA, it is important to retain flexibility when assessing and identifying mitigating controls.

In addition, section 14 of the Bill of Rights (Chapter 2 of the Constitution), or the common law, both recognise and protect the right to privacy.<sup>17</sup> Given that privacy laws in South Africa are in their early stages of enshrinement, residual concerns remain about how personal information is being handled and protected during the outbreak.

Building on earlier developments, on 2 April 2020 South Africa established the COVID-19 tracing database, a new electronic database collected by electronic communication service providers (ECSPs) licensed under the Electronic Communications Act 36 of 2005. At the written request of the Director-General of Health, ECSPs must provide the location or movements of any person known or reasonably suspected to have contracted COVID-19. The tracing database includes the collection of names, identity and passport numbers, cellphone numbers, and test results for those tested for COVID-19 and their known or suspected contacts. The purpose of this database is 'to enable the tracing of persons who are known or

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Protection Act enters into force' IAPP, <https://iapp.org/news/a/after-a-7-year-wait-south-africas-data-protection-act-enters-into-force/> (accessed 1 October 2020). POPIA's secs 2 to 38, secs 55 to 109, sec 111 and sec 114 have entered into full force. These new additions to POPIA provide eight essential conditions for lawful processing of data: (i) accountability; (ii) processing limitation; (iii) purpose specification; (iv) further processing limitation; (v) information quality; (vi) openness; (vii) security safeguards; and (viii) data subject participation.

17 See Constitution of the Republic of South Africa, 1996, amended on 11 October 1996 by the Constitutional Assembly. The final version of the South African Bill of Rights states that its provisions bind the judiciary (sec 8(1)), natural and juristic persons (sec 8(2)) and oblige a court 'in applying the provisions of the Bill of Rights to natural and juristic persons' to develop the common law 'to the extent that legislation does not give effect to that right' (sec 8(3)).

reasonably suspected to have come into contact with any person known or reasonably suspected to have contracted COVID-19'.<sup>18</sup>

The South African government in partnership with the University of Cape Town has developed and launched a smartphone contact tracing application, COVi-ID, which tracks individuals who have come into contact with others who have tested positive. The application lets users prove their COVID-19 status through QR codes which retrieve the user's health status. On 2 May 2020 the Department of Health also launched COVIDConnect, a WhatsApp and SMS-based symptom reporting process, which works on any mobile phone.<sup>19</sup>

Most recently, South Africa's health department launched Covid Alert SA, a mobile phone application that draws from Apple and Google's Bluetooth-based exposure notification Application Programming Interface (API). The application uses Bluetooth to pick other users who are in the same radius and lets each user build an 'encounter history' of those they have encountered.<sup>20</sup>

These changes have resulted in the creation of a personal electronic contact tracing database in which carriers and individuals suspected of having been infected with COVID-19 or coming into contact with infected persons could be collected. Mobile operators have been obligated to provide mobile data by using digital surveillance technologies to manage the COVID-19 outbreak.<sup>21</sup> The new COVID-19 regulations have authorised the Director-General of Health to issue and oversee tracking orders. Significantly, the legal regulations establishing the use of individualised data for contact tracing goes beyond the initial reported intention of the Council for Scientific and Industry Research (CSIR), which is to aggregate location data for analytical purposes and to provide evidence for rational crisis response and policy making.

18 J Klaaren et al 'South Africa's COVID-19 tracing database: Risks and rewards of which doctors should be aware' (2020) 110 *South African Medical Journal* 617-620.

19 Z Mkhize 'Reduction in the isolation period for patients with confirmed COVID-19 infection' Department of Health, Republic of South Africa 17 July 2020, [www.sacoronavirus.co.za/2020/07/17/reduction-in-the-isolation-period-for-patients-with-confirmed-COVID-19-infection](http://www.sacoronavirus.co.za/2020/07/17/reduction-in-the-isolation-period-for-patients-with-confirmed-COVID-19-infection) (accessed 1 October 2020); R Lake et al 'Contact tracing apps in South Africa' Norton Rose Fulbright 11 May 2020.

20 'Health launches COVID-19 contact tracing app' *SA News* 2 September 2020, <https://www.sanews.gov.za/south-africa/health-launches-covid-19-contact-tracing-app> (accessed 1 October 2020). The application has proven legally sound through consultation with Justice Catherine O'Regan, the COVID-19 designated judge.

21 W Strachan & T Cohen 'South Africa: Coronavirus (COVID-19): Obligations and roles of the electronic communications sector published' *ENSight: Technology, Media, Telecommunications* 27 March 2020.

## 2.2 Technical challenges, implementation concerns and scope-based limitations

Given the fact that only around one-third of the country's population regularly use smartphones,<sup>22</sup> the larger remainder of the population is vulnerable to lack of access, contributing to low penetration rates and limited application while deepening socio-economic divides. Furthermore, as South Africa relies on the triangulation of cell tower metadata supplied by ECSPs, this is problematic both for rural areas that have few towers and urban areas where buildings scatter signals.<sup>23</sup> Oxford researchers predict that while a 60 per cent take-up of digital contact tracing would work best, a lower rate of engagement might still contribute to a reduction in cases.<sup>24</sup> Given these limitations of viable options, effectiveness and accuracy must be improved so as to suture inequalities.

That said, even with sufficient scientific evidence that contact tracing applications contribute to securing the rights to life and health, policy makers must not be lured by the false pretense that technology will allow them to sidestep difficult ethical and human rights dilemmas. Policy makers must be mindful that privacy-preserving protocols may overlook those who cannot afford reliable mobile connections for reasons of age, disability or poverty.<sup>25</sup>

## 3 Human rights framework

The COVID-19 outbreak has brought debates concerning human rights to the centre of public discourse. The proliferation of unprecedented technologies – including geolocation, biometric data, facial recognition, artificial intelligence, big data – have

22 Estimates by Statista show that around 20 to 22 million people in South Africa regularly use a smartphone, [www.statista.com/statistics/488376/forecast-of-smartphone-users-in-south-africa/](http://www.statista.com/statistics/488376/forecast-of-smartphone-users-in-south-africa/) (accessed 1 October 2020); S Stolton 'EU data watchdog very worried by Hungary's GDPR suspension' *Euractiv* 18 May 2020, [www.euractiv.com/section/data-protection/news/eu-data-watchdog-very-worried-by-hungarys-gdpr-suspension/](http://www.euractiv.com/section/data-protection/news/eu-data-watchdog-very-worried-by-hungarys-gdpr-suspension/) (accessed 1 October 2020).

23 MS Pepper & M Botes 'Balancing privacy with public health: How well is South Africa doing?' *The Conversation* 24 June 2020, [www.theconversation.com/balancing-privacy-with-public-health-how-well-is-south-africa-doing-140759](http://www.theconversation.com/balancing-privacy-with-public-health-how-well-is-south-africa-doing-140759) (accessed 1 October 2020).

24 University of Oxford Research 'Digital contact tracing can slow or even stop Coronavirus transmission and ease us out of lockdown' 16 April 2020, [www.research.ox.ac.uk/Article/2020-04-16-digital-contact-tracing-can-slow-or-even-stop-coronavirus-transmission-and-ease-us-out-of-lockdown](http://www.research.ox.ac.uk/Article/2020-04-16-digital-contact-tracing-can-slow-or-even-stop-coronavirus-transmission-and-ease-us-out-of-lockdown) (accessed 1 October 2020).

25 A Toh & D Brown 'How digital contact tracing for COVID-19 could worsen inequality' *Just Security* 4 June 2020, [www.justsecurity.org/70451/how-digital-contact-tracing-for-covid-19-could-worsen-inequality/](http://www.justsecurity.org/70451/how-digital-contact-tracing-for-covid-19-could-worsen-inequality/) (accessed 1 October 2020).

offered significant potential to track impacted populations, enforce COVID-19 self-isolation rules in South Africa, and meet fundamental human rights principles concerning the rights to life and health.<sup>26</sup> International human rights law guarantees every person the right to the highest attainable standard of health and recognises that in the context of serious public health threats to the life of the nation, restrictions on some rights may be justified. All the while, these measures, if taken beyond the scope of necessity, may incur enormous trade-offs on human rights and constitutional freedoms.<sup>27</sup>

While the right to privacy and mobility clearly is being limited in light of exceptional public health circumstances, including the right to health, many of the deployed digital technologies have been excessively data-intensive and prone to abuse by corporate and government entities.<sup>28</sup> In addition, the process of imposing emergency COVID-19 regulations have often overlooked usual procedures of democratic deliberation and the consultation of persons concerned. Thus, the digital contact tracing efforts must be monitored and limited by the rule of law, fulfilling the conditions set by human rights conventions. The legal and medical community must be aware of the vast mass surveillance regime and its looming risk to human rights. Neither the right to privacy nor the right to health and the freedom of science bears an absolute precedence over the other. Hence, these rights and freedoms must be carefully and responsibly balanced, broaching an outcome that respects the essence of both sides.

The mission creep of large-scale digital surveillance paves the way for corporate entities or the government to potentially abuse personal information and further alienate communities that have already

26 Under the International Covenant on Economic, Social and Cultural Rights (ICESCR), which South Africa ratified in January 2015, everyone has the right to 'the highest attainable standard of physical and mental health'. Effective steps must be taken for the 'prevention, treatment and control of epidemic, endemic, occupational and other diseases'. Human Rights Watch 'Human rights dimensions of COVID-19 response' 19 March 2020, [www.hrw.org/news/2020/03/19/human-rights-dimensions-COVID-19-response](http://www.hrw.org/news/2020/03/19/human-rights-dimensions-COVID-19-response) (accessed 1 October 2020); L Forman 'The evolution of the right to health in the shadow of COVID-19' (2020) 22 *Health and Human Rights Journal* 375.

27 International Bar Association 'Digital contact tracing for the COVID-19 epidemic: A business and human rights perspective' (2020), [www.business-humanrights.org/sites/default/files/documents/LPRU-Digital-contact-tracing-COVID-19-June-2020.pdf](http://www.business-humanrights.org/sites/default/files/documents/LPRU-Digital-contact-tracing-COVID-19-June-2020.pdf) (accessed 1 October 2020).

28 In China a lack of transparency has caused an environment of fear and bewilderment amid suspicions that monitoring tools have outlasted their original purpose. Neither the contact tracing company nor Chinese officials have been transparent about how the system classifies individuals, and users suspect that the application carries the risk of reporting personal data to the police. P Mozur, R Zhong & A Krolik 'In Coronavirus fight, China gives citizens a color code, with red flags' 1 March 2020, [www.nytimes.com/2020/03/01/business/china-coronavirus-surveillance.html](http://www.nytimes.com/2020/03/01/business/china-coronavirus-surveillance.html) (accessed 1 October 2020).

suffered longstanding human rights violations.<sup>29</sup> Such tracking, if extended by bad actors beyond the immediate COVID-19 response, can upscale invasive mass surveillance practices, limit individual rights and freedoms, discriminate against specific populations or marginalised groups, and expose stigmatising personal details about diagnosed carriers of the virus.<sup>30</sup> Human rights limitations occurring outside of the standard democratic process must be minimal and treated as exceptions to the norm, subject to careful scrutiny and justification.<sup>31</sup>

Current built-in safeguards against the outlasting of data privacy risks in South Africa (as of 7 August 2020) include a strict duration requirement and reporting requirements to a COVID-19 designated judge. The amended disaster management regulations created shortly thereafter, on 2 April 2020, limit the scope of the collection of mobile data only for the purposes of contact tracing, accessible specifically by the Director-General of the Department of Health. The Minister of Justice and Correctional Services has appointed Justice Kate O'Regan, a retired judge of the Constitutional Court, to serve as the COVID-19 designated judge.<sup>32</sup> Extended safeguards must be instituted to prevent the normalisation of data privacy infringements.

The United Nations (UN) has acknowledged that human rights provide a critical framework for the COVID-19 outbreak response because '[human rights] put people at the centre and produce better outcomes'.<sup>33</sup> Observing COVID-19 digital contact tracing tools through a human rights lens ensures a focus on how to preserve human dignity for those who are most vulnerable while ensuring that the design and deployment of digital contact tracing applications are tested against the principles of necessity, proportionality and legality

29 See YN Harari 'The world after Coronavirus' 19 March 2020, [www.ft.com/content/19d90308-6858-11ea-a3c9-1fe6fedcca75](http://www.ft.com/content/19d90308-6858-11ea-a3c9-1fe6fedcca75) (accessed 1 October 2020). One of two particularly important choices that he lists is the choice between totalitarian surveillance and citizen empowerment. Harari writes: 'One of the problems we face in working out where we stand on surveillance is that none of us know exactly how we are being surveilled, and what the coming years might bring.'

30 Diagnosed carriers, when identified publicly, have been subjected to public stigmatisation and social repercussions. In South Korea, eg, data sent out by the South Korean government to inform residents about the GPS movements of diagnosed carriers has caused online witch hunts, creating an atmosphere of fear. See MS Kim 'South Korea is watching quarantined citizens with a smartphone app' MIT Technology Review 6 March 2020, [www.technologyreview.com/2020/03/06/905459/coronavirus-south-korea-smartphone-app-quarantine/](http://www.technologyreview.com/2020/03/06/905459/coronavirus-south-korea-smartphone-app-quarantine/) (accessed 1 October 2020); 'Coronavirus privacy: Are South Korea's alerts too revealing?' *BBC News* 5 March 2020, [www.bbc.com/news/world-asia-51733145](http://www.bbc.com/news/world-asia-51733145) (accessed 1 October 2020).

31 See Viljoen et al (n 7).

32 Government of South Africa 'Minister Ronald Lamola appoints Justice Kate O'Regan as Coronavirus COVID-19 designate judge' 3 April 2020.

33 UN 'COVID-19 and human rights: We are all in this together' (2020).

as required by South Africa's Constitution and its undertakings in international law.<sup>34</sup> Other international watchdogs and human rights organisations have followed suit by drafting statements and guidelines for ethical data management during the outbreak.<sup>35</sup>

### 3.1 Limitation and derogation of international human rights under an extended state of emergency

The right to privacy, enshrined in article 17 of the International Covenant on Civil and Political Rights (ICCPR), is a qualified right that may be restrained under certain conditions.<sup>36</sup> According to article 4 of the ICCPR, during a state of public emergency which threatens the life of the nation, state parties can exceptionally and temporarily curtail certain rights recognised by ICCPR. The 1984 Siracusa Principles, building on the applicable derogation clause in ICCPR, call for the authoritative limitation of certain rights in response 'to a pressing public or social need' such as public health.<sup>37</sup>

In order for a state to derogate under these principles, the following six conditions must be met: (i) the existence of a public emergency threatening the life of the nation; (ii) the measures adopted must be strictly necessary by the exigencies of the situation; (iii) the measures must not be discriminatory; (iv) derogating measures are only permissible if not inconsistent with other international obligations; (v) it cannot be justified for non-derogable rights; and

34 M Hunter 'Cops and call records: Policing and metadata privacy in South Africa' Media Policy and Democracy Project, March 2020.

35 Human Rights Watch 'Joint civil society statement: State's use of digital surveillance technologies to fight pandemic must respect human rights' 2 April 2020, [www.hrw.org/news/2020/04/02/joint-civil-society-statement-states-use-digital-surveillance-technologies-fight](http://www.hrw.org/news/2020/04/02/joint-civil-society-statement-states-use-digital-surveillance-technologies-fight) (accessed 1 October 2020); United Nations Office of the High Commissioner on Human Rights 'COVID-19: States should not abuse emergency measures to suppress human rights' (2020); Human Rights Watch 'Human rights dimensions of COVID-19 response' 19 March 2020, [www.hrw.org/news/2020/03/19/humanrights-dimensions-COVID-19-response](http://www.hrw.org/news/2020/03/19/humanrights-dimensions-COVID-19-response) (accessed 1 October 2020); S Zarifi & K Powers 'Human rights in the time of COVID-19: Front and centre' International Commission of Jurists 6 April 2020, [www.icj.org/human-rights-in-the-time-of-covid-19-front-and-centre/](http://www.icj.org/human-rights-in-the-time-of-covid-19-front-and-centre/) (accessed 1 October 2020).

36 See International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966, 999 UNTS171 (ICCPR). Non-derogable rights listed under sec 2 of art 4 include the right to life (art 6); prohibition of torture, cruel, inhuman and degrading treatment (art 7); prohibition of medical or scientific experimentation without consent (art 7); prohibition of slavery, slave trade and servitude (art 8); prohibition of imprisonment because of inability to fulfil contractual obligation (art 11); principle of legality in criminal law (art 15); recognition everywhere as a person before the law (art 16); freedom of thought, conscience and religion (art 18).

37 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights April 1985; A Ghose & DD Sokol 'Unlocking platform technology to combat health pandemics' (2020) *Yale Journal on Regulation* 3.

(vi) these derogations also require that states formally declare a state of emergency and, in the case of ICCPR, formally notify the UN Secretary-General.<sup>38</sup>

In addition, the Siracusa Principles require that the essence of the right must not be undermined; the legal rules limiting the exercise of human rights must pursue a legitimate aim; must be prescribed by a 'clear and accessible' law; must 'not be arbitrary or unreasonable'; and that 'adequate safeguards and effective remedies' be provided against the imposition of abusive limitations. The measures must also be purpose-limited to the specific aim of 'preventing disease or injury or providing care for the sick and injured'.<sup>39</sup>

On 30 April 2020, the UN Human Rights Committee issued the 'Statement on derogations from the Covenant in connection with the COVID-19 pandemic' in which the Committee highlighted that states have resorted to emergency measures by severely restricting fundamental rights and freedoms. In contrast, the African Charter on Human and Peoples' Rights (African Charter) does not mention or contain any derogation provisions, although state parties may derogate from certain rights in times of emergency.<sup>40</sup>

The South African Bill of Rights, including section 14 on privacy, also contains a derogation clause in section 36: These fundamental rights may only be limited in terms of law of general application, that is, 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.<sup>41</sup> Relevant factors to be considered for limitation include the nature of the right, the purpose and extent of limitation, how the limitation relates to its purpose, and whether there are less restrictive alternative means to achieve the purpose.

### 3.2 Transparency principles and international guidelines

A number of other important yet overlooked principles that were absent from South Africa's COVID-19 disaster regulations included principles of transparency and data security. POPIA's older cousin in Europe could be considered: the OECD Privacy Guidelines and

38 UN Commission on Human Rights 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' 28 September 1984, E/CN.4/1985/4, <https://www.refworld.org/docid/4672bc122.html> (accessed 1 October 2020).

39 As above.

40 Max Planck Encyclopedia of Public International Law *African Charter on Human and Peoples' Rights* (1981).

41 South African Constitution Ch2: Bill of Rights.

the European Commission's (EU) General Data Protection Regulation (GDPR), which came into effect on 25 May 2018 (although GDPR was formally adopted in May 2016).<sup>42</sup> GDPR is hailed as the aspirational global legislative standard for protecting the rights of individuals whose personal information enters the digital world. GDPR has been cited by legal analysts as one of the main reasons for the delay of POPIA, which gave South African privacy regulators time to develop operational capabilities.<sup>43</sup> POPIA and GDPR currently align and overlap in most areas, which means that compliance with GDPR should result in nearly full compliance with POPIA.

GDPR's comprehensive fundamental rights include the right to transparency and information (that is, organisations must in a clear, fair, and transparent manner provide data subjects with information about who has access to their personal data, for what purpose it will be used, who the recipients will be, and the period for which the information will be stored); the right to be forgotten (that is, individuals may request that their personal information be released without undue delay subject to the grounds that the usage of the personal data is no longer relevant for the original purpose for which it was collected and processed); the right to restrict data processing (that is, individuals may contest the lawfulness and accuracy of the information); and the right to access (that is, individuals should be informed whenever an organisation processes their information within a reasonable time period, receive a copy of their information, and be afforded the opportunity to lodge a complaint against undue collection and processing).<sup>44</sup>

On 21 April 2020 the European Data Protection Board (EDPB), which oversees consistent compliance with GDPR, issued legal guidelines on the processing of health data for scientific research purposes in the context of the COVID-19 outbreak.<sup>45</sup> The document

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42 The GDPR does not have general effect in South Africa as it is not a local law of the country, but certain parties that process information in South Africa might still need to comply with GDPR due to its 'extraterritorial application'. See OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 23 September 1980 C(80)58/FINAL 1980 (OECD Guidelines). This was revised as OECD Privacy Framework in 2013, [www.oecd.org/sti/ieconomy/oecd\\_privacy\\_framework.pdf](http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf) (accessed 1 October 2020).

43 DLA Piper 'Data protection laws of the world: South Africa vs United Kingdom' 29 September 2020.

44 B McKenzie 'General Data Protection Regulation (GDPR) in Africa: So what?' 4 July 2019, [www.bakermckenzie.com/en/insight/publications/2019/05/general-data-protection-regulation](http://www.bakermckenzie.com/en/insight/publications/2019/05/general-data-protection-regulation) (accessed 1 October 2020).

45 European Data Protection Board 'Guidelines 03/2020 on the processing of data concerning health for the purpose of scientific research in the context of the COVID-19 outbreak' adopted 21 April 2020; European Data Protection Board 'Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak' adopted 21 April 2020.

notes that GDPR data protection rules themselves do not hinder the public health effort in the fight against the COVID-19 outbreak.<sup>46</sup> The GDPR, as a broad piece of legislation, foresees the handling of personal data for the sole purpose of scientific research in compliance with the fundamental rights to privacy and personal data protection.<sup>47</sup>

### 3.3 Personal data protection in South Africa

The GDPR provides South Africa with an overarching yardstick by which to measure its own respective national privacy laws.<sup>48</sup> By way of comparison, the delay of POPIA has left South Africa exposed to a number of human rights violations since the COVID-19 outbreak.<sup>49</sup> In view of the fact that POPIA is in its early stages as binding law, it is legally permissible to collect, store and use the aforementioned personal data without the subject's consent in line with the Disaster Management Act.<sup>50</sup> Furthermore, Regulation 15(2) of the Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions, issued in terms of the National Health Act 61 of 2003,<sup>51</sup> allows the head of a provincial health department to apply for an appropriate court order if a person who is a confirmed carrier refuses to be tested or subjected to a medical examination. The information

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- 46 European Data Protection Board 'Statement on the processing of personal data in the context of the COVID-19 outbreak' 20 March 2020, [https://edpb.europa.eu/our-work-tools/our-documents/outros/statement-processing-personal-data-context-COVID-19-outbreak\\_en](https://edpb.europa.eu/our-work-tools/our-documents/outros/statement-processing-personal-data-context-COVID-19-outbreak_en) (accessed 1 October 2020).
- 47 All processing of personal health data must be in line with principles relating to the proceedings set out in art 5 of GDPR. See arts 6 and 9 of GDPR for legal grounds and derogations.
- 48 See J Burchell 'The legal protection of privacy in South Africa: A transplantable hybrid' (2009) 13 *Electronic Journal of Comparative Law*; for earlier guidelines on information privacy, see *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) where the Constitutional Court listed general guidelines that govern data protection, including whether the information was obtained in an intrusive manner, whether the information contains intimate aspects of the subject's personal life, and whether it was disseminated to the press or general public from whom the subject 'could reasonably expect such information would be withheld'.
- 49 Secs 19 to 22 of POPIA provide for various security measures on 'integrity and confidentiality of personal information, the processing of information, security measures to be taken and the notification requirements in case of any security compromises'.
- 50 Regarding organised criminal activity, cellular phone data can be accessed under secs 7(1) and (2) of the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 (RICA), and under sec 205 of the Criminal Procedure Act 51 of 1977. However, provided the circumstances of civilians, these two laws do not seem relevant here. See Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 and Criminal Civil Procedure Act 51 of 1977.
- 51 National Department of Health of South Africa 'Regulations relating to the surveillance and the control of notifiable conditions' *Government Gazette* 40945:604 30 June 2017, [www.nicd.ac.za/wp-content/uploads/2017/12/41330\\_15-12\\_Health-compressed.pdf](http://www.nicd.ac.za/wp-content/uploads/2017/12/41330_15-12_Health-compressed.pdf) (accessed 1 October 2020).

required by the contact tracing database may be lawfully obtained without the consent of the infected or supposedly infected individual.

### 3.4 Impact on marginalised groups and victims of domestic abuse

In a joint white paper, domestic abuse and violence against women and girls (VAWG), experts were concerned that digital contact tracing could become a 'tool for abuse' in the case that contact and location details of survivors could be leaked to perpetrators.<sup>52</sup> In addition, domestic violence and child abuse has spiked in number, frequency and intensity during COVID-19 lockdowns.<sup>53</sup> As a signatory of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), South Africa must take all adequate steps to ensure that information obtained from digital contact tracing does not get leaked to perpetrators of violence and domestic abuse.<sup>54</sup> Digital contact tracers must be mindful of the diverse array of impacts that their technology could have on marginalised and vulnerable groups, whereas digital contact tracing applications should be designed with the aim of empowering rather than stigmatising and repressing individuals.

## 4 Legal recommendations

The framework of how digital contact tracing will operate should be set out in primary legislation. Providing human rights instruments as safeguards is indispensable for increased uptake, social acceptability and public trust, causing people to be more likely to follow public health advice and recommendations.<sup>55</sup> The government must invoke safeguards to ensure that such personal information is collected, stored, assessed, distributed and processed in accordance with human rights principles and thereon balances the imposed

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52 'COVID-19 contact tracing apps could be turned into tools for domestic abuse' *Forbes* 22 June 2020, [www.forbesafrica.com/technology/2020/06/22/warning-covid-19-contact-tracing-apps-could-be-turned-into-tools-for-domestic-abuse/](http://www.forbesafrica.com/technology/2020/06/22/warning-covid-19-contact-tracing-apps-could-be-turned-into-tools-for-domestic-abuse/) (accessed 1 October 2020).

53 Oxford Human Rights Hub 'COVID-19 and domestic violence in South Africa' 28 April 2020, [ohrh.law.ox.ac.uk/COVID-19-and-domestic-violence-in-south-africa/](http://ohrh.law.ox.ac.uk/COVID-19-and-domestic-violence-in-south-africa/) (accessed 1 October 2020).

54 United Nations 'Convention on the Elimination of All Forms of Discrimination against Women' 18 December 1979; T Peacock et al 'The law during a state of disaster and human rights risks' C19 People's Coalition.

55 Scottish Human Rights Commission 'COVID-19: Human rights implications of digital contact tracing technology' 18 May 2020; PR Ward 'Improving access to, use of, and outcomes from public health programs: The importance of building and maintaining trust with patients/clients' (2017) 5 *Public Health* 22.

COVID-19 restrictions fairly and justifiably. The implementation of these principles must constantly be verified and updated.

The drafting of primary legislation – or at least a guidance note – should address the following issues, namely, the justification of data collection; narrow limitations around who will have access to the database (non-disclosure agreements, access logs, and strict access role distribution); a guarantee of secure storage and deletion of sensitive data when no longer needed (storage timelines); transparent measures that inform data subjects about the type of information collected; robust review and independent oversight mechanisms; and confirmation of an individual's ability to exercise other fundamental rights and freedoms once lockdown measures are eased.<sup>56</sup> Part of this framework would include granting the implementation of the relevant sections of POPIA about the processing of personal information in terms of aforementioned GDPR provisions, and using this opportunity to leverage the implementation of stricter data privacy protections. Instead of invoking narrow sector-focused rules, which may involve bridging difficulties in the middle of a national emergency, the comprehensive principle-based approach of international data protection standards can provide expansive scope and flexibility.<sup>57</sup>

Where possible, digital application designers should attempt to build pseudonymisation, decentralisation and encryption protections into the data collection processes themselves, for instance, by avoiding centralised databases, not identifying proximity or interaction data, and adopting Bluetooth exposure notification systems and QR code scanning.<sup>58</sup> Concomitant with these human rights principles, professional technical expertise must be hired to ensure the adequate enforcement of security and secrecy. Knowledge sharing of best practices among cross-sectorial interventions should be encouraged in order to maintain responsible data collection and processing standards.<sup>59</sup> Any restriction of the rights of monitored individuals must be applied only insofar as it is strictly necessary.

Independent oversight of all measures introduced in response to the COVID-19 outbreak is needed beyond the appointment of

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56 Ienca & Vayena (n 8) 463-465; Bradford et al (n 10).

57 R Raskar et al 'Apps gone rogue: Maintaining personal privacy in an epidemic' PrivateKit: MIT 19 March 2020. MIT's Private Kit: Safe Paths is a privacy-first, open-source contact tracing technology that works with a 'pull model' where 'users can download encrypted location information about carriers ... self-determine their likely exposure to COVID-19 and coordinate their response with their doctor using their symptoms and personal health history'.

58 Ada Lovelace Institute 'Exit through the App Store?' 20 April 2020.

59 Klaaren et al (n 18) 617-620.

Justice Kate O'Regan, supplemented with constant comparisons of national and international privacy laws using GDPR as a baseline. The overseeing judge should also have the right to inspect the databases and look at the security of those databases. More oversight is required around the use, effectiveness, inspection and privacy provisions of any contact tracing applications and databases. Policy makers and application designers should be held accountable for extended encroachment on human rights.

The principles of equality, dignity and non-discrimination are the bedrock of human rights law, recognised as norms in both the domestic and international framework. South Africa must interpret and apply these principles consistently in its laws and regulations. The collection, retention and deletion of data should in particular consider the circumstances of the most vulnerable and disadvantaged groups impacted by COVID-19 contact tracing applications – those groups that are less likely to access a contact tracing application for a number of reasons including, but not limited to, disability, poverty and age. To help those suffering under domestic violence, helpline services must be expanded, while hotel rooms for abuse victims and makeshift counselling centres should be provided in accordance with CEDAW and other legal structures that remain operational during the lockdown. Adopting interoperable frameworks, guided by EDPB's response to the use of digital contact tracing applications during the pandemic, can ensure compliance with international legal standards for human rights protections.

## 5 Conclusion

The COVID-19 outbreak has paved the way for the introduction of a number of rapid response restrictions of individual freedoms, adversely impacting carriers' enjoyment of their human rights in countries all over the world. The use of digital contact tracing is an essential piece of a wider strategy to combat the virus. However, it is important to secure limits around the governance of data and technology by setting these out clearly in law, ensuring that any mass data collection is necessary and proportionate, time-bound and limited in duration, respectful of human dignity, non-discriminatory in application, and subject to ongoing review and public scrutiny. Transparent public communication about digital contact tracing protocols for the common good should be issued in conjunction with independent oversight. More than ever, human rights practitioners, medical professionals and contact tracers from all walks must be prepared to move with force in defending human rights standards and protect the communities that are most

vulnerable to infection and rights infringement. Following South Africa's implementation of the relevant sections of POPIA and the National Department of Health's launch of the COVID-19 Alert SA exposure notification framework, international human rights law must be carefully observed and applied through and by all relevant actors, strengthening the interpretation and application of human rights norms, especially that of privacy. African states, including South Africa, must continue to carefully monitor new forms of digital contact tracing and stay updated on the technical architecture so as to circumvent a serious threat to human rights globally.

# COVID-19 and the inclusion of learners with disabilities in basic education in South Africa: A critical analysis

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**Summary:** *This article examines the extent to which basic education, which is compulsory under international law, was inclusive of learners with disabilities during the COVID-19 pandemic. To this end, it examines measures taken by the government to ensure the continuity of basic education and the extent to which these measures are inclusive of learners with disabilities. It argues that moving education to online platforms, and conducting classes via radio and television are not accompanied by related reasonable accommodation measures to ensure the inclusion of learners with disabilities. Among others, study material and numerous resources, online platforms and media are not in accessible formats, and learners with disabilities do not have access to data or internet broadband. In addition, the parents of these learners with disabilities are not trained to assist their children to study from home. The exclusion from school of learners with special needs is also characterised by a limited number of special schools in the country. In making its case, the article relies on South African and foreign jurisprudence on equality and inclusive education to inform the analysis. Ultimately the article finds that learners with disabilities are not included in the education system*

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*in the time of COVID-19. It explores general lessons learned during the pandemic which could be considered as an opportunity to re-think how emergency education planning can be inclusive of children or learners with disabilities in the future. While the discussion focuses on South Africa, lessons learned apply across Africa where persons with disabilities generally are marginalised.*

**Key words:** *COVID 19; disability rights; basic education; inclusive education*

## 1 Introduction

The COVID-19 pandemic poses one of the severest global challenges that the world has in recent times experienced. To deal with this crisis, empowered by the South African Disaster Management Act 57 of 2002 (DMA), the executive on 15 March 2020 declared a state of disaster which paved the way for the national lockdown declared on 23 March 2020. This extraordinary measure led to the limitation of gatherings, a partial or total shutdown of businesses and, importantly, the complete closure of schools. The latter became even more necessary when it emerged that the children of the first person who tested positive for the Coronavirus attended a school in Hilton, KwaZulu-Natal which had to shut down, although those exposed children tested negative.<sup>1</sup> Similarly, another school based in Sandton, Johannesburg also closed its doors for a day after it appeared that one of its staff members had been in contact with a person who had tested positive for the virus.<sup>2</sup> Therefore, the closure of schools was unavoidable.

However, given the significant role of education in fostering human development,<sup>3</sup> the closure of schools was mitigated with a shift to online education. The government through the Department of Basic Education (DBE) took several measures to ensure the continuity of schooling through television, online methods and e-learning solutions. This approach raises questions as to the inclusiveness of these methods. In other words, to what extent is online based education in time of COVID-19 inclusive of learners with disabilities? This question is important because South Africa is

1 B Macupe 'Ramaphosa closes schools as country grapples with Coronavirus' *Mail & Guardian* 15 March 2020, <https://mg.co.za/article/2020-03-15-ramaphosa-closes-schools-as-country-grapples-with-coronavirus/> (accessed 25 June 2020).

2 As above.

3 BR Akinbola 'The right to inclusive education: Meeting the needs and challenges of children with disabilities' (2010) 10 *African Human Rights Law Journal* 47.

party to the International Covenant on Economic and Social, Cultural Rights (ICESCR), the African Charter on Human and Peoples' Rights (African Charter), the African Charter on the Rights and Welfare of the Child (African Children's Charter) and the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD). These instruments provide for a compulsory right to basic education to all without discrimination, this right being enshrined in the South African Constitution as well as numerous policy instruments. It is against this backdrop, without engaging with the legality of the lockdown regulations, that this article will explore the extent to which learners with disabilities are included in online schooling which characterises education in general and basic education in particular during the time of COVID-19. Its focus is on basic education which is free, compulsory and to be realised immediately under international law despite the ongoing COVID-19 pandemic circumstances.

As part of assessing the inclusion of learners with disabilities in South African basic education during the COVID-19 pandemic, the article critically examines legal and policy documents as well as state practice pertaining to basic education. Among the criteria used to determine the inclusiveness of education is whether it is discriminatory and whether it provides learners with disabilities with adequate resources for learning as compared to their peers with no disabilities. In this exercise, the article examines the measures taken to give effect to the right to basic education, assesses whether these measures consider the plight of learners with disabilities, with special attention to the nature of reasonable accommodation measures adopted, if any. It then proceeds to examine the plight of learners with special needs, and the extent to which parental support is conducive to ensuring that all learners enjoy the right to basic education without discrimination. In the process, challenges experienced to implement an inclusive education are examined and general lessons for the future explored with COVID-19 considered as an opportunity to re-think how emergency education planning for the future can be inclusive of learners with disabilities. In making its case, the article also relies on South African and foreign jurisprudence on equality and inclusive education to inform the analysis.

The article is divided into five parts including this introduction. The second part of the article examines the legal, policy and theoretical frameworks that underpin inclusive education in South Africa. The third part demonstrates the exclusion of learners with disabilities from schools during the implementation of online learning measures during COVID-19 where neither reasonable accommodation measures were provided for learners with disabilities nor parental

and professional support made available for learners with special needs. The fourth part of the article draws lessons for the future. To this end, it examines systemic deficits in South Africa's 'inclusive' education system. It offers recommendations to remedy the situation and prepare for future pandemics. The fifth part summarises the article in the form of concluding remarks.

## **2 Inclusive education in South Africa: Legal, policy and theoretical frameworks**

This part presents the legal, policy and theoretical frameworks of inclusive education in South Africa. As far the legal and policy framework is concerned, it demonstrates that the Constitution provides for the right to education for 'everyone' and that many policies were adopted to give effect to this constitutional provision. As for the theoretical framework, the part shows that South Africa espouses inclusive education in mainstream as well as in special schools. The part is divided into two main sections. The first part explores the legal and policy framework for inclusive education and the second part examines the theoretical framework.

### **2.1 Legal and policy framework**

Under article 24 of CRPD, state parties, including South Africa,

recognise the right of persons with disabilities to education, and shall ensure that ... [they are] not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability; and receive the support required, within the general education system, to facilitate their effective education.

Although the South African Constitution was adopted before CRPD, inclusion in mainstream schools was already captured by the drafters. In other words, it provides for inclusive education in section 29 as follows:

- (1) Everyone has the right
  - (a) to a basic education, including adult basic education; and
  - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable.

At the centre of this provision is the notion of 'everyone'. This is a clear prohibition of discrimination in the provision of the right to education. This means that everybody, including persons with disabilities, is entitled to the right to basic education as well as other forms of education. The inclusive feature of section 29 of the Constitution on the right to education was clarified by the Constitutional Court in *Ex parte Gauteng Provincial Legislature* in these terms:<sup>4</sup>

Section 32(a) [of the 1993 interim Constitution, now section 29(1) of the 1996 Constitution] creates a positive right that basic education be provided for *every person* and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.

Put differently, the government is required to provide basic education to all including learners with disabilities. This entails making all resources available for the realisation of this right. Boezaart explains this as follows:<sup>5</sup>

In the context of disability, section 29(1) obliges the government to provide basic education (including adult basic education) to *everyone*. The unqualified and absolute nature of the right requires that the state implement measures and make budgetary allocations to give effect to the right as a matter of priority.

While Kamga also recognises the sanctity of the right to education for everyone, he notes that

any limitation of this right can only be justified under section 36 of the Constitution which clearly provides that the rights in the Bill of Rights can be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society.<sup>6</sup>

This means that any limitation of the right to education and basic education is subject to very strict conditions.

To ensure that the constitutional promise of inclusive education becomes a reality, the government adopted numerous policy and legislative measures, including the White Paper on Education and Training,<sup>7</sup> the White Paper on an Integrated National Disability

4 *Gauteng Provincial Legislature in re: Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) para 9 (my emphasis).

5 T Boezaart 'A constitutional perspective on the rights of children with disabilities in an educational context' (2012) 27 *SA Public Law* 458.

6 SD Kamga 'Inclusion of learners with severe intellectual disabilities in basic education under a transformative constitution: A critical analysis' (2016) 49 *Comparative and International Law Journal of Southern Africa* 37; sec 36 of the South African Constitution.

7 Department of Education 1995, <http://www.education.gov.za/LinkClick.aspx?fileticket=855f9w3A2U%3D&tabid=191&mid=484> (accessed 24 July 2020).

Strategy,<sup>8</sup> the South African Schools Act,<sup>9</sup> White Paper 6: Special Needs Education, Building an Inclusive Education and Training System<sup>10</sup> and the 2015 White Paper on the Rights of Persons with Disabilities.

All these measures were adopted to underline the inviolability of the right to equality as far as access to education is concerned. They are a clear signal that the right to education for all, including persons with disabilities, cannot be compromised. After establishing that there is a legal and policy framework to ensure an inclusive education in the country, it is important to explore which theory underpins the normative framework.

## **2.2 Theory of inclusive education in South Africa: Reliance on inclusion in mainstream and special schools**

Under White Paper 6 on inclusive education, which is the core policy instrument for equal access to education in South Africa, inclusive education can take place in mainstream or in special schools.

### **2.2.1 Inclusion in mainstream education**

The notion of inclusive education highlights the need to educate all learners in the same schools. Dukes and Lamar-Dukes define inclusive education to mean that all students should be admitted to school without discrimination based on disabilities, but with the much-needed support as far as students, parents, educators and families are concerned to foster their education.<sup>11</sup> In other words, all learners of the same grade should be included in the same classroom without considering their background or specificities, and any disability should be regarded as an element of human diversity. In this context, teachers should be trained, with the curriculum adjusted to cater for all learners in the classroom.

This inclusive approach is well catered for by White Paper 6 which unambiguously recognises diversity in the classroom and underlines the need to provide appropriate support needed for all learners to succeed. This approach is informed by the

8 Office of the Deputy President 1997, [http://www.gov.za/sites/www.gov.za/files/disability\\_2.pdf](http://www.gov.za/sites/www.gov.za/files/disability_2.pdf) (accessed 24 July 2010).

9 South African Schools Act 84 of 1996.

10 Department of Education 2001.

11 C Dukes & P Lamar-Dukes 'Special education: An integral part of small schools in high schools' (2006) 89 *The High School Journal* 4.

acceptance of principles and values contained in the Constitution ... human rights and social justice for all learners; participation and social integration; equal access to a single, inclusive education system; access to the curriculum, equity and redress; community responsiveness; and cost-effectiveness.<sup>12</sup>

To ensure 'equal access to a single, inclusive education system', White Paper 6 creates 'full-service schools' or 'mainstream' schools that accommodate learners with different needs within a school district.<sup>13</sup> These schools are equipped to ensure the inclusion of learners with disabilities with strong attention to reasonable accommodation measures necessary for their success.<sup>14</sup> In these schools, learners with different disabilities will be educated together with those without disabilities. The success of these learners will depend on the adequacy of support provided to overcome learning challenges.<sup>15</sup> One way around this is to adopt the universal learning design which caters for the preparedness of non-teaching staff, 'teachers, planning, designing curriculum and teaching and assessing students to meet various needs in the classroom'.<sup>16</sup> Capturing the need to include all learners in the mainstream education, the UN Special Rapporteur on Disability Rights writes:<sup>17</sup>

Learners with disabilities ... have a right not to be excluded from the general education system on the basis of disability and to reasonable accommodation for the individual learner's needs. This not only means that learners have a right to attend mainstream schools and not be relegated to segregated schools, it also means that the special education needs of persons with disabilities must be taken into account in the general education system. This goes beyond grouping all learners together in one classroom to ensuring the provision of effective individualised support that maximises academic and social development.

Outside South Africa, the idea of 'full service school' echoed by White Paper 6 was clarified by the European Court of Human Rights in the *Sofia* case.<sup>18</sup> In this case it was held that the equal right to education of learners with disabilities is violated if the school does not offer an appropriate or favourable environment for their education. This

12 Department of Education 'Education White Paper 6: Special needs education building an inclusive education and training system' Statement by the Minister of Education (2001) 5.

13 White Paper 6 (n 12) 8.

14 Department of Basic Education 'Guidelines on Full Service Inclusive Schools' (2010) 7.

15 Department of Basic Education (n 14) 10.

16 Kamga (n 6) 37.

17 Report of the United Nations High Commissioner for Human Rights on progress in the implementation of the recommendations contained in the study on the human rights of persons with disabilities (2007) [A/HRC/4/75] para 36.

18 Case 13789/06, decision of 18 May 2007.

means that the mainstream setting should not benefit only learners without disabilities.<sup>19</sup> In a similar vein, the failure to implement the 'full service' school was declared unlawful by the European Committee of Social Rights in the Bulgarian case of *Mental Disability Advocacy Centre v Bulgaria*.<sup>20</sup> In this case the Bulgarian government decided to put learners with mental disabilities in a different setting instead of mainstreaming them in ordinary schools. The Court found this unacceptable.

Although 'full inclusion' is the ideal, its implementation can be extremely challenging. In this respect, ensuring the readiness of non-teaching staff and teachers, and the availability of appropriate materials and tools for all learners in the classroom is a complex mission.<sup>21</sup> In addition, as correctly argued by Boston-Kemple, the challenge of full inclusion is aggravated by the teaching method which may entail having two teachers working simultaneously in the same classroom as this can be very disruptive for some learners, and even for one of the teachers or both.<sup>22</sup> In other words, in some circumstances, including learners with disabilities in mainstream schools could be counterproductive. Sharing this view, Ngwena and Pretorius write:<sup>23</sup>

Learning and other support for learners who are disabled may militate against teaching learners under the same roof. At the end of the day, substantive equality demands a recognition of, and responsiveness to, difference rather than mechanical standardisation. The particular needs and circumstances of the individual learner rather than integrated learning, per se, should remain the primary focus.

Mindful of the dangers of 'full inclusion', to their credit the drafters of White Paper 6 also cater for the inclusion of learners with disabilities in special schools where their specific and unique needs can be fully catered for.

19 Kamga (n 6) 38.

20 *Mental Disability Advocacy Centre v Bulgaria* Complaint 41/2007, decision rendered on 3 June 2008.

21 EM Dalton et al 'The implementation of inclusive education in South Africa: Reflections arising from a workshop for teachers and therapists to introduce Universal Design for Learning' (2012) 1 *African Journal of Disability* 33; Kamga (n 6) 38.

22 TE Boston-Kemple 'A conceptual analysis of key concepts in inclusive education' PhD thesis, University of Iowa, 2012 29-30, <http://ir.uiowa.edu/etd/2828> (accessed 30 September 2020).

23 C Ngwena & L Pretorius 'Substantive equality for disabled learners in state provision of basic education: A commentary on *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*' (2012) 28 *South African Journal on Human Rights* 90.

### 2.2.2 Inclusion in special schools

The drafters of White Paper 6 were aware of the fact that in some cases, it was in the best interests of the child or the learner with a severe disability to be sent to a special school. Kader Asmal, the Minister of Education during the adoption of White Paper 6, underlined the need to strengthen special schools so as to ensure that they are able to accommodate learners with severe disabilities to foster their inclusiveness.<sup>24</sup> To ensure that learners with disabilities are given opportunities equal to those of their counterparts without disabilities, in 2005 the government adopted the Screening, Identification, Assessment and Support (SIAS) Strategy to detect which child needs specific assistance and how this could be provided. Ngwena and Pretorius describe the SIAS strategy as ‘a tool for determining the nature and level of support for learners with “special” education needs [and] to determine which learners could be admitted to special schools and which learners could not’.<sup>25</sup> The government’s commitment was further highlighted when in 2007 the National Department of Education published guidelines to transform all special schools into fully-functional special school resource centres where learners with disabilities receive an education similar to that of all other learners in indifferent schools.<sup>26</sup>

While at first glance the use of the special school seems discriminatory, its objective is to ensure that no child is left behind as it helps to cater for learners with severe disabilities. In the Irish case of *O’Donoghue v The Minister for Health*<sup>27</sup> the Irish High Court recognised the sanctity of inclusion in mainstream education but also noted that special schools in some cases could be the solution for effective inclusion. The Court held:<sup>28</sup>

In the case of the child who is deaf, dumb, blind, or otherwise physically or mentally handicapped, a completely different programme of education has to be adopted and a completely different rate of progress has to be taken for granted, than would be regarded as appropriate for a child suffering from no such handicap.

This position was also supported by the Canadian Supreme Court in *Eaton v Brant Country Board of Education*.<sup>29</sup> The Court held that

24 Department of Education ‘Education White Paper 6: Special needs education building an inclusive education and training system’ Statement by the Minister of Education, Kader Asmal (2001) 3.

25 Ngwena & Pretorius (n 23) 88.

26 Kamga (n 6) 18.

27 *O’Donoghue v The Minister for Health; The Minister for Education, Ireland and the Attorney-General* [1993] IEHC2; [1996] 2 IR 20 (27 May 1993).

28 *O’Donoghue* (n 27) para 25.

29 *Eaton v Brant Country Board of Education* [1997] 1 SCR 241.

sending a child with multiple disabilities, including cerebral palsy, an inability to communicate through speech, sign language or other alternative communication methods, visual and mobility impairment, to a special school was in the best interests of the child. In these circumstances, special schools become a means to advance the right to equality of learners in these settings. Therefore, a blanket ban cannot be placed on special schools because in some cases, a failure to use these schools amounts to keeping learners with special needs away from schools or qualifying them as 'uneducable'.

However, special schools should never be dumping grounds where learners with special needs are abandoned in settings with no adequate infrastructure to foster meaningful learning. These schools should not become a pretext for governments to avoid taking responsibility to include learners with disabilities in full service schools. They should not be used to enhance the exclusion and invisibility of learners with disabilities. This was the position of the American case of *Daniel RR v State Board of Education*.<sup>30</sup> In this case the Court was very prescriptive in setting conditions under which a learner with disabilities should be accommodated in a special school. For this to happen, the government has to answer the following questions:<sup>31</sup>

- (1) Can education in the regular classroom, with the use of supplementary aids and services, be achieved satisfactorily for a particular student?
  - (a) Has the school taken sufficient steps to accommodate the student in the regular classroom with the use of supplementary aids and services and modifications?
  - (b) Will the student receive educational benefit from the regular education?
  - (c) What will be the effect of the student's presence in the regular education classroom on the education of the other students?
- (2) If the student is to be removed from a regular education classroom and placed in a more restrictive setting, has the student been mainstreamed to the maximum extent appropriate?

These questions unambiguously clarify the state's obligation as far as the use of special schools is concerned. Put differently, sending a child to a special needs school entails attempting everything possible to reasonably accommodate him or her in the mainstream school in the first place. Only after failing to successfully educate the learners

30 *RR v State Board of Education & Others* 874 F 2d 1036; 53 Ed Law Rep 824 (5th Cir 1989).

31 *RR* (n 30) 1048-1049. For more elaboration on this case, see Kamga (n 6) 44.

in mainstream schools can the special school become an option as last resort.<sup>32</sup>

In the South African context, it could be argued that the government has taken precautions at least normatively. To this end, White Paper 6 requires that 'full-service schools' or 'mainstream schools' receive learners with several needs inside a school district, where measures will be taken to consider specific needs in providing services to learners.<sup>33</sup> To summarise, its commitment to transform South African education into an inclusive one with a strong emphasis on inclusion in 'full-service' schools, White Paper 6 declares its vision to<sup>34</sup> (i) transforming all aspects of the education system; (ii) developing an integrated system of education; (iii) infusing 'special needs and support services' throughout the system; (iv) pursuing the holistic development of centres of learning to ensure a barrier-free physical environment and a supportive and inclusive psycho-social learning environment, developing a flexible curriculum to ensure access to all learners; (v) promoting the rights and responsibilities of parents, educators and learners; (vi) providing effective development programmes for educators, support personnel, and other relevant human resources; (vii) fostering holistic and integrated support provision through intersectoral collaboration.

However, as will be demonstrated later, in practice very little has been done. Normatively, the government has committed to ensuring that inclusive education takes place in mainstream schools and in special schools when necessary. Theoretically, the government has adopted 'a reconciliatory approach between inclusion in mainstream schools and the use of special schools'<sup>35</sup> to ensure that no child is left behind as far as education is concerned.

### 3 Exclusion of learners with disabilities from schools in time of COVID-19

This part of the article will be divided into two sections, both seeking to show the extent to which learners with disabilities were excluded from schools during COVID-19. It demonstrates that disabled learners have been excluded, on the one hand, from mainstream schools and, on the other, also from special schools.

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32 *Oberti v Board of Education* 995 F 2d 1204 (3rd Cir 1).

33 White Paper 6 (n 12) 8.

34 White Paper (n 12) 6.

35 Kamga (n 6) 35.

### 3.1 Exclusion of learners with disabilities from mainstream schools

Under CRPD, state parties are obliged to ensure that ‘persons with disabilities are not excluded from *the general education system on the basis of disability*, and that children with disabilities are not excluded from *free and compulsory primary education*, or from secondary education, on the basis of disability’.<sup>36</sup> In other words, learners with disabilities should be included in mainstream schools and for this to happen, reasonable accommodation measures should be provided,<sup>37</sup> whereby these learners are given all necessary support in the general education so as to ensure their successful education.<sup>38</sup>

Reasonable accommodation is at the centre of inclusion. It is defined as

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>39</sup>

Put differently, the adoption of reasonable accommodation measures entails adopting reasonable adjustment measures to ensure the inclusion of learners with disabilities in mainstream schools. In these circumstances, to be reasonable, the measures should not cause undue or disproportionate burdens or hardship or unjustified costs.

In South Africa, apart from White Paper 6 which sustains the inclusion of learners with disabilities in inclusive setting, such support is reiterated by the White Paper on Disability Rights<sup>40</sup> which also relies on reasonable accommodation to protect the dignity of persons with disabilities. In this respect, in addressing barriers to foster access, participation and inclusion for persons with disabilities, among others, the White Paper’s strategy highlights the need to focus on reasonable accommodation measures,<sup>41</sup> which comprise adjustment to ensure the accessibility of the physical environment; to information and communication; to accommodate explicit sensory requirements such as those relating to light, noise and spatial stimuli; and foster independence and mobility of persons with disabilities.

36 Art 24(2)(a) CRPD (my emphasis).

37 Art 24(2)(c) CRPD.

38 Art 24(2)(d) CRPD.

39 Art 2 CRPD.

40 White Paper on the Rights of Persons with Disabilities adopted on 9 December 2015, *Government Gazette* 39792 of 9 March 2016.

41 White Paper (n 40) para 6.1.1.6.

Having assessed what should be done to ensure the inclusion of learners with disabilities, it is necessary to examine the extent to which measures taken by South Africa foster the inclusion of learners with disabilities in general education during COVID-19. To ensure that the right to education is not interrupted, the government undertook numerous initiatives, including the provision of online resources for parents, caregivers and learners to support learning at home. These initiatives also entail the delivery of study material for all grades, on multimedia with assessments, audio lessons, video tutorials, interactive workbooks, lockdown digital school, Vodacom e-school and reading material. They also cover COVID-19 guides in various languages, with numerous links to e-education resources, school curricula and broadcast support programmes on television and radio as well numerous tips for parents.<sup>42</sup> One of the landmark programmes was the Basic Education and SABC Coronavirus television and radio curriculum support programmes for learners. In the same vein, and to its credit, the Free Stem Lockdown Digital School had developed into community television to reach more learners.<sup>43</sup>

At first glance, the government should be commended for its initiative to foster education during the time of COVID-19. However, learners with disabilities are forgotten for the following reasons: First, most initiatives rely primarily on computers, tablets and online learning portals, virtual lessons and radio or television lessons that are not often accessible to learners with disabilities.<sup>44</sup> Linked to this is the fact that virtual lessons are associated with access to the internet which is not cheap and, therefore, not available to learners with disabilities, generally associated with extreme poverty.<sup>45</sup> Although the government subsidised access to the internet through deals with network providers, internet and broadband penetration remain a challenge especially in rural areas where a low rate of media access is also a constraint to inclusive education.

Second, another challenge faced by learners with disabilities is the fact that most gadgets such as tablets, computers, mobile phones

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42 Department of Basic Education 'Online resources for parents, caregivers and learners to support learning at home', <https://www.education.gov.za/> (accessed 30 September 2020).

43 For more on this initiative, see <https://www.gov.za/Coronavirus/education> & DBE website [www.education.gov.za](http://www.education.gov.za).

44 C McClain-Nhlapo 'An inclusive response to COVID-19: Education for children with disabilities' 11 May 2020, <https://www.globalpartnership.org/blog/inclusive-response-covid-19-education-children-disabilities> (accessed 15 June 2020).

45 M Pinilla-Roncancio 'Disability and poverty: Two related conditions. A review of the literature' (2015) 63 *Revista de la Facultad de Medicina* 113; M Palmer 'Disability and poverty: A conceptual review' (2011) 21 *Journal of Disabilities Policy Studies* 210.

and online portals used to provide education are not equipped with the essential and compulsory 'accessibility features to make them usable for children with disabilities. And, even when the tools are made with the accessibility features, they require technology that is not readily available to many learners [with disabilities]'.<sup>46</sup> These challenges are also real when lessons are provided through television or radio that is not equipped with accessibility features. Explaining these challenges with regard to access to education through a virtual environment for learners with hearing impairments, for example, McClain-Nhlapo writes:<sup>47</sup>

They might not be able to hear what the lecturer is saying (audio is distorted through technology). Other challenges include absence of closed captions or subtitles, not being able to quickly check with a peer what was said, and not having manual or electronic notes immediately available to them.

Put differently, shifting teaching and learning online without providing reasonable accommodation for learners with disabilities constitutes discrimination against these learners. The reasonable accommodation of these learners would include subsidies, or the provision of computers equipped with accessibility features, subsidised access to the internet for these learners, and ensuring that all lessons on television have sign language interpreters. In doing so, all learners would thus be provided with the necessary and appropriate technology devices.

While it could be argued that the state does not have the available resources, this argument cannot hold water because basic education, which is at the centre of this article, needs to be realised immediately and is compulsory. In fact, it is disquieting to note that learners with disabilities often are at the receiving end of the justification for exclusion of a lack of resources. That is to say that if indeed there are no resources, every other learner should experience the challenge faced by the state in discharging its obligation and not only learners with disabilities. Therefore, a failure to provide reasonable accommodation for learners with disabilities amounts to declaring them 'uneducable' during the time of COVID-19. This is a violation of their right to equality provided for in section 10 of the South African Constitution as well as in the Promotion of Equality and

<sup>46</sup> McClain-Nhlapo (n 44).

<sup>47</sup> As above. Also see D Bell 'How to help students with a hearing impairment as courses move online' *The Conversation* 2 April 2020, <https://theconversation.com/how-to-help-students-with-a-hearing-impairment-as-courses-move-online-134582> (accessed 20 June 2020).

Prevention of Unfair Discrimination Act,<sup>48</sup> which compels all persons and entities to reasonably accommodate persons with disabilities.

In *Harksen v Lane*<sup>49</sup> the Constitutional Court pronounced itself on the test for unfair discrimination in stating that three questions are crucial, namely, whether the law, policy or practice on which the differentiation between people or groups of people such as the differentiation in the circular is rational and legitimate; whether the differentiation is unfair discrimination; and in the case of the differentiation being unfair discrimination, whether it can be justified under section 36 of the Constitution. The second question underlines the need to protect the human dignity of all. To this end, the Court explores the impact of the discrimination on the complainant and the social group(s) to which he or she belongs. In this exercise the following factors are significant: (a) the position of the plaintiff in society and the extent to which he or she belongs to a group that has been the victim of disadvantage or exclusion in the past; (b) the type of provision or power and the objective it seeks to achieve, including considering whether the provision or power is intended to achieve a worthy and important social goal; and (c) the extent to which the provision or power had affected the rights or interests of the plaintiff and whether it has encroached upon the fundamental human dignity of the plaintiff in a comparably severe manner.<sup>50</sup>

During COVID-19 the provision of education through digital and media schooling led to unfair discrimination against learners with disabilities who are in a fragile position; belong to a group that is generally the victim of exclusion and disadvantage; and the provision of a regulatory framework and practice of digital schooling had affected their rights or interests and violated their fundamental human dignity by depriving them of the right to education.

The violation of the right to education of learners with disabilities during the pandemic is caused by the lack of political will to foster their education. This is demonstrated by *Centre for Child Law v Minister of Basic Education*.<sup>51</sup> On 8 April 2020 the Centre for Child

48 Act 4 of 2000.

49 *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) para 53.

50 *Harksen v Lane* (n 49) paras 51-53; for further analysis of this case, see SD Kamga 'The protection of the right to employment of persons with disabilities in Africa: Lessons from Zimbabwe' (2017) 1 *Zimbabwe Rule of Law Journal* 93; C Ngwena 'Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education' (2013) 1 *African Disability Rights Yearbook* 139; R Kruger 'Equality and unfair discrimination: Refining the *Harksen* test' (2011) 128 *South African Law Journal* 479.

51 *Centre for Child Law v Minister of Basic Education*, High Court of Pretoria, Case 3123/2020.

Law engaged the DBE and the DBE's inclusive education directorate to find out what had been done to ensure the readiness of schools to welcome learners with disabilities and for the support and services available for parents or caregivers of these pupils during lockdown.<sup>52</sup> Several follow-up letters were sent to these departments, but to no avail, until 5 May 2020 where the Directorate presented an inappropriate and vague document with no specifics on what had been done to ensure the readiness of schools to welcome pupils and schools and support them while at home.<sup>53</sup> As will be demonstrated later, it needed a court order to force the DBE to adopt measures for education that are inclusive of all learners with disabilities.

### 3.2 Exclusion of learners with disabilities from special schools

According to Khumalo and Hodgson, 'special schools are primary and high schools that are equipped to deliver a specialised education programme to learners requiring access to highly intensive educational support'.<sup>54</sup> These learners with specific disabilities are placed in special schools with expertise in the accommodation of their particular disability.<sup>55</sup> The normative commitment of White Paper 6 to ensure the inclusion of learners with severe disabilities is not questionable. To ensure that none of these learners is left behind, the Department of Education adopted Guidelines to Ensure Quality Education and Support in Special Schools and Special School Resource Centres in 2007 and 2014. These Guidelines address issues related to the admission of learners, the curriculum, personnel quality and utilisation, infrastructure, accommodation, transport, resources and facility supports, to list but a few. Ultimately, the quality of support at school, assistive devices and attention, are key to the success of learners with special needs.

Moving from physical to virtual education during COVID-19 deprived learners with special needs of the most needed support that is crucial to their learning success. In this respect, it is assumed that inexperienced parents in special needs education are at the centre of their children's education in terms of supervising their learning, creating a school environment at home and also teaching substantial content.<sup>56</sup> This is an impossible mission for many parents who simply

52 *Centre for Child Law* (n 51) paras 46, 47, 48 & 49.

53 *Centre for Child Law* (n 51) paras 52, 52.1, 52.2 & 52.3.

54 S Khumalo & T Hodgson 'The right to basic education for children with disabilities: Section 27's action from national research and litigation strategies to international advocacy' (2016) *Basic Education Rights Handbook* 110.

55 As above.

56 J McKenzie et al 'The education of children with disabilities risks falling by the wayside during the pandemic' 27 May 2020, <https://www.dailymaverick.co.za/>

do not have the required expertise to be a teacher to their children with special needs, who could end up being left behind. A concerned parent explains this challenge as follows:<sup>57</sup>

We [parents] both work from home anyway, but he's usually at school. It's difficult to work with a child who needs constant attention. He's not coping very well. His frustration levels are increasing, lack of outings and being indoors is not good. Not being at school, being out of routine, not being stimulated, all these things are adding to his frustration, which increases his levels of aggression, anxiety and of late, depression (he has been crying far more).

This challenge also underscores that some learners with special needs may need extra attention including personal assistants, a variety of therapies and/or emotional support and to be kept on the school nutrition programme to be able to sustain their studies. This support is no longer provided with the shifting of education to online and media.<sup>58</sup>

The exclusion of learners with disabilities is further compounded by the fact that most study materials are locked away at school and inaccessible from home. In some cases, when teachers manage to send materials to parents, the latter often do not have the required skills to use these and to support their children efficiently. Nonetheless, there are some positive stories where learners with special needs were successfully accommodated. On a brighter note, Mckenzie *et al* illustrate the success story with the following example:<sup>59</sup>

In Cape Town, the High Spirits Skills Training Centre for the Intellectually Challenged prepared activity packs which were distributed through the food parcel distribution network. These included the paper, activity pages, colouring-in pages and other play materials. Instructions were shared in hardcopy with the activity pack, and also via the school's WhatsApp group. They are currently developing video tutorials on the organisation's Facebook page.

While this is encouraging, it unfortunately is the exception because many learners in numerous other schools are forgotten and considered 'uneducable' during COVID-19. They are left behind, because study materials are not sufficient to cater for their education which can 'range from learning difficulties to emotional, behavioural

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article/2020-05-27-the-education-of-children-with-disabilities-risks-falling-by-the-wayside-during-the-pandemic/ (accessed 28 June 2020).

57 As above.

58 McClain-Nhlapo (n 44).

59 As above.

or physical challenges affecting a child's ability to learn or socialise as well as specialised education programmes'.<sup>60</sup>

Apart from the very problematic absence of study materials, special programmes and qualified teachers at home, assistive devices such as Perkins Braille or video technology for communicating remotely in sign language often are not available at home. In addition, even if these device supporting systems were to be delivered to families, not only are they not affordable, but they are not always user-friendly for parents who may be unfamiliar with them and consequently unable to assist their children.<sup>61</sup> In the same vein, the home environment is not equipped with stimulating tools related to sights, sounds and notion embedded in the education of learners with sensory, physical and intellectual disability disabilities.<sup>62</sup>

From the foregoing, it could thus be argued that the rights of learners with special needs education have been violated during COVID-19. Learners with disabilities were unfairly discriminated against because they belong to a well-known disadvantaged group. In addition, the government's initiative for continuing education during lockdown did not consider the plight of learners with special needs, and this amounts to the violation of their dignity. Clarifying unfair discrimination and the violation of human dignity, the Court held in *Hugo*:<sup>63</sup>

The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.

In other words, the government should have been proactive in ensuring that all learners with disabilities, including those with special needs education, were catered for as far as schooling was concerned. In fact, these learners should have been given precedence in light

60 A Pedro, B Mthimunye & E Bust 'How lockdown could affect children with special needs' *The Conversation* 12 May 2020, <https://theconversation.com/how-lockdown-could-affect-south-africas-children-with-special-needs-137127> (accessed 20 June 2020).

61 McKenzie et al (n 56).

62 As above.

63 *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

of the *Grootboom* Court's prescription which requests that priority should be given to the most vulnerable.<sup>64</sup> The failure to do so leads to the claim that, by moving to virtual education, 'the government is leaving most children with disabilities behind, with no education at all'.<sup>65</sup> This argument will hold water because no reasonable accommodation measures were adopted during the pandemic to ensure that these learners also accessed education. Although they remain formally equal to other learners as prescribed by section 29 of the Constitution, nothing was done to protect their substantial equality with their counterparts without disabilities. This could have been done by specific measures to ensure the continuity of education of learners with disabilities. Marumoagae writes:<sup>66</sup>

Equality for persons with disabilities cannot stop with injunctions to refrain from invidious discrimination, but there must be a *practical acknowledgment* that persons with disabilities are not fully catered for by existing societal structures and that they have a right to participate fully in society.

Practical acknowledgment may can be interpreted to mean taking concrete action to foster the right to education of learners with disabilities. From this perspective, unfair discrimination will occur if the state fails to 'take positive steps to make sure that disadvantaged groups benefit equally from services offered to the general public'.<sup>67</sup> In the Canadian case of *Eldridge v British Columbia*<sup>68</sup> the Court stated that the prohibition of discrimination against persons with disabilities (under the Canadian Charter of Fundamental Rights) is not only a negative right but also a positive right that obliges the state to take positive actions to ensure that persons with disabilities enjoy equal rights with all other members of society.<sup>69</sup>

In sum, it could be argued that COVID-19 exposes a significant degree of discrimination against persons with disabilities. It exposes the exclusion and systemic marginalisation of learners with disabilities who have remained invisible for years. The next part focuses on lessons for the future.

64 *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC).

65 R Beere, S Khumalo & T Hodgson 'Lend children with disabilities a hand' *Mail & Guardian* 15 March 2018, <https://mg.co.za/article/2018-03-15-00-lend-children-with-disabilities-a-hand/> (accessed 21 June 2020).

66 MC Marumoagae 'Disability discrimination and the right of disabled persons to access the labour market' (2012) 15 *Potchefstroom Electronic Law Journal* 347 (my emphasis); S Day & G Brodsky 'The duty to accommodate: Who will benefit?' (1996) 75 *Canadian Bar Review* 433.

67 *Eldridge v British Columbia (Attorney-General)* [1997] 3 SCR 624 para 79.

68 As above.

69 *Eldridge* (n 67) para 79.

## 4 Lessons for the future: Addressing systemic deficits in South Africa's 'inclusive' education system

The COVID-9 pandemic has revealed the systemic marginalisation of learners with disabilities by the South African education system which excludes approximately 600 000 of these learners from schools.<sup>70</sup> To remedy the situation and in preparation for future pandemics, it is imperative to foster the implementation of inclusive education. This entails providing appropriate and reasonable accommodation commensurate with learners' needs in mainstream schools, and providing more well-resourced special schools.

### 4.1 Providing reasonable accommodation for the inclusion of learners with disabilities

Providing reasonable accommodation commensurate with learners' needs in mainstream schools entails multiple actions. First, it is imperative to collect disaggregated data by disabilities. This will enable the government to know the number of learners with disabilities, their gender and the types of disabilities. In a similar vein, it is important to know who is included in mainstream schools, or special care centres. Having this data is necessary to enable the government to plan its inclusive education actions and to be able to monitor and evaluate progress. This exercise would prepare the ground for an appropriate response in times of pandemics when it is important to know the numbers and areas of additional interventions to avoid leaving any learner behind. A failure to map out disability trends in schools during non-pandemic contexts will hinder the ability of the government to include learners with disabilities in the education system during times of crisis. Sharing this view, Singal writes that '[g]athering disaggregated data is essential for human rights from the perspective of meeting the obligations of non-discrimination and equality. Thus, the right to be counted is an essential aspect of fulfilling the goals of an inclusive society.'<sup>71</sup>

70 'Advocacy group heads to court as 600 000 disabled school kids forced to stay at home' 26 September 2019, <https://www.iol.co.za/news/advocacy-group-heads-to-court-as-600-000-disabled-school-kids-forced-to-stay-at-home-33570968> (accessed 23 June 2020).

71 N Singal 'Disability and data: Need for numbers and narratives' 1 August 2018, <http://www.washingtongroup-disability.com/disability-data-need-numbers-narratives/> (accessed 25 July 2020). For more on the need to collect data on disability to advance the inclusion of persons with disabilities, see O Abualghaib et al 'Making visible the invisible: Why disability-disaggregated data is vital to "leave no-one behind"' (2019) *Sustainability* 1.

Second, the curriculum should be designed to meet the needs of all learners in the classroom. In this respect, the universal learning design (ULD) principles should be implemented to ensure that no learner is left behind. According to Eagleton,<sup>72</sup>

[t]hese principles guide educators in finding innovative ways to make curriculum accessible and appropriate for individuals with different backgrounds, learning styles, abilities, and disabilities in various learning situations and contexts. This paradigm for teaching, learning, assessment, and curriculum development focuses on adapting the curriculum to suit the learner rather than the other way around. ULD guides teachers and curriculum developers toward creating flexible materials and methods before they are put in students' hands, rather than waiting until students arrive and trying to retrofit inflexible materials to each learner. In considering [ULD] as a new paradigm for addressing the instructional needs of students with disabilities and those at risk for learning challenges, 'disability' is viewed as a normal phenomenon of human diversity rather than as an aberration.

While the ULD principles are instrumental to securing the inclusion of learners with disabilities, the resultant curriculum should be in all accessible formats. Related workbooks and textbooks and other materials should be accessible in all formats. They should be put online with reading tools, and be popularised through radio and television and other portals at all times. This will help prepare the ground for the automatic inclusion of learners with disabilities in case of pandemics without any need to adopt *ad hoc* measures.

The effectiveness of this approach requires reallocating and targeting resources to provide internet, radio and television access to households with learners with disabilities. Not only will this assist the learners who cannot physically attend school, but it will also empower the family and caregivers in attending to the education of these learners regularly and, importantly, in times of pandemics. This leads to the third point, namely, the preparedness of parents and caregivers of learners with disabilities which is instrumental at all times. Their 'emotional resilience'<sup>73</sup> needs to be regularly fostered and their training upgraded to assist their children with disabilities at all times and in times of pandemics. Sharing this view, Buchanan calls on the government to enable or support parents or caregivers by equipping them with the necessary skills to assist with the education of their children away from schools.<sup>74</sup> In this endeavour, teachers

72 M Eagleton 'Universal design for learning' (2008) 1-2, <https://www.ebscohost.com/uploads/imported/thisTopic-dbTopic-1073.pdf> (accessed 27 July 2020).

73 J Buchanan 'Protect the rights of people with disabilities during COVID-19' 25 March 2020, <https://www.hrw.org/news/2020/03/26/protect-rights-people-disabilities-during-covid-19#> (accessed 20 June 2020).

74 As above.

should be encouraged through various incentives to be permanently in contact with parents and caregivers of learners with disabilities, to guide and assist them with the provision of home support to the learners.<sup>75</sup> Needless to say, teachers should be properly trained, skilled and equipped to become the learners' and parents' trainers. These measures should be integrated in education permanently to advance inclusive education that will not be interrupted during future pandemics.

#### 4.2 Providing more special schools for the inclusion of learners with disabilities

While normatively the country commits to provide special needs learners with special schools, on the ground these schools are insufficient as thousands of learners with severe disabilities are left at home.<sup>76</sup> This amounts to the violation of their rights to education. This was the position of the Court in *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*.<sup>77</sup> In this case the Court was unequivocal in holding that the education of learners with severe intellectual disabilities away from school but in private settings such as non-governmental organisations (NGOs) was a violation of the right to education of these learners and urged the government to remedy the situation. Yet, there are reports that approximately 11 000 school children with severe to profound intellectual disabilities who were refused admission at public schools are still accommodated in these special care centres under NGOs' roofs, in private homes, RDP houses and shacks.<sup>78</sup> The lack of funding and adequate support from the government at various levels hinders the effective inclusion of learners with disabilities in schools. This is disquieting, especially at the primary or basic education level where the enjoyment of the right is not subject to progressive realisation, but should be enjoyed immediately.

However, to its credit, the government through the Department of Social Development and the Department of Health undertook the expansion of special care centres with increased funding from

75 M Brodie et al 'Learning in the time of COVID-19: Equitable support during school closures desperately needed' *Coronavirus OP-ED* 21 April 2020, <https://www.dailymaverick.co.za/article/2020-04-21-learning-in-the-time-of-covid-19-equitable-support-during-school-closures-desperately-needed/#gsc.tab=0> (accessed 20 June 2020).

76 V Japtha 'We fail children living with disabilities' 6 March 2020, <https://mg.co.za/article/2020-03-06-we-fail-children-living-with-disabilities/> (accessed 20 June 2020).

77 *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 (5) SA 87 (WCC).

78 Japtha (n 76).

R34 million in 2011 to R80 million in 2017, including R11 million from the Western Cape Education Department, to fund outreach teams to special care centres.<sup>79</sup> This is a positive development which is in line with the remedies prescribed by the *Western Cape Forum* case. While this is a positive development, many other learners with disabilities remain on the margins of schools. Angie Motshekga, Minister of Basic Education, recognises this problem. She states that learners with severe to profound disabilities are 'at risk of compound marginalisation' and 'in every settlement in South Africa, rural, peri-urban and urban, there are children with disabilities who remain excluded from education'.<sup>80</sup> This acknowledgment by the Minister of Basic Education reinforces the call to build more special schools if inclusive education is to become a reality in ordinary times and also during pandemics.

Building these schools and ensuring the training of staff and harmonising their capacity with those of the parents and caregivers of learners with disabilities, as discussed earlier, will enhance the prospect of an effective and inclusive education generally and specifically in times of pandemics. In these schools, all necessary measures should be taken to ensure that materials, including textbooks, workbooks and others, are available in various accessible formats and made available at all times. The transformation of the education sector into an inclusive one should be systemic, thereby enabling the inclusion of learners with disabilities in the education system in times of pandemics.

*Centre for Child Law v Minister for Basic Education*,<sup>81</sup> in which the Equal Education Law Centre represented the Centre for Child Law, clearly illustrates the lack of government commitment to secure the right to inclusive education of pupils with disabilities. The Centre for Child Law engaged the DBE several times (over a period of three months) for the inclusion of learners with disabilities in the measures or directives adopted to return to school during COVID 19. The DBE demonstrated a strong resistance to adopt specific measures for the accommodation of these learners who had to return to school as well as those who had to remain at home. All its directives and amendments were unsatisfactory.<sup>82</sup> Consequently, the Centre for Child Law approached the Court with an urgent application to declare invalid a number of the latest directives published on 23 June 2020. These directives covered only the needs of learners with autism

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79 As above.

80 As above.

81 *Centre for Child Law* (n 51).

82 *Centre for Child Law* (n 51) paras 51, 57, 58, 62 & 69.

and deaf, hard of hearing, blind and partially-sighted learners, and disregarded those of learners with physical disabilities, intellectual disabilities, epilepsy and severe to profound intellectual disabilities as well as those that will have to remain at home. By agreement between the parties, the court order gave the respondent three weeks to amend its directives to include learners with physical and intellectual disabilities, epilepsy and severe to profound intellectual disabilities and to address the readiness of special school hostels, among other measures.<sup>83</sup> The draft amended directive and the DBE guidelines prepared to this effect should be made public for comments for ten days before issuing the final document after the consideration of public comments.

While this decision is hailed as a victory for learners with disabilities, the state should avoid going to that length to implement the right to inclusive education. It should rather work proactively and bear in mind that learners with disabilities are part of human diversity and should always foster their inclusion in the education. To this end, it is imperative to develop guidelines to address the plight of all learners with disabilities in normal times and during pandemics and avoid the 'one-size-fits-all approach' in the process. Failure to do so will not include learners with disabilities in the education system and fail to advance the transformation of South African society into an equalitarian one.

## 5 Conclusion

The aim of the article was to interrogate the extent to which basic education was inclusive of learners with disabilities during the COVID-19 pandemic which was characterised by online and media education. The article started with a recognition that South Africa is party to all international and regional instruments that provide for an inclusive free and compulsory primary education to be realised immediately. It also acknowledged that South Africa has adopted legal and policy as well as theoretical frameworks to ensure that no child is left behind as far as inclusive education is concerned.

Notwithstanding this normative compliance, the article found that during COVID-19 learners with disabilities in mainstream schools did not enjoy reasonable accommodation that would have been vital for their inclusion in the education system. Materials such as workbooks and exercise books were not in accessible formats for these learners;

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83 *Centre for Child Law* (n 51) paras 1.2-1.4.

numerous online platforms used were not accessible to them; and radio and television through which education was provided were not always accessible to these learners. In addition, the parents were not trained and skilled to facilitate the education of their children from home.

The article also found that learners with disabilities also were not included in special needs schools. The latter are insufficient to accommodate all learners who require these schools. Moreover, as in the case of mainstream schools, materials and resources are not in accessible formats to learners with severe disabilities. Even though there were positive developments with a budget increase to the benefit of these schools, much more needs to be done to ensure that many more needy students accessed these institutions. In sum, during the COVID-19 pandemic learners with disabilities were considered 'uneducable' as no specific measures were taken to ensure their right to equality though various platforms with their non-disabled counterparts who attended schools. It was also found that learners with disabilities were not included in the ministerial directives on returning to school during the pandemic. However, when forced to do so, the DBE included only the needs of learners with autism and deaf, hard of hearing, blind and partially-sighted learners in its amended directives and disregarded other types of disability.

Based on these findings, the article draws lessons for the future. To this end, it emphasises the need to address systemic deficits in South Africa's 'inclusive' education system. This will entail a total transformation of the system to ensure its inclusiveness in ordinary times and not just in times of crisis. For this to happen, it is vital to collect disaggregated data by disabilities. This will enable the government to know the number of learners with disabilities, the gender and the type of disabilities. Having this data will be instrumental for disability programming in the education sector. This will help with a roadmap to advance inclusive education in mainstream schools as well as special needs schools and foster the monitoring and evaluation of inclusion initiatives.

Furthermore, it is imperative to ensure that prior to any pandemic, reasonable accommodation measures are taken in mainstream schools to foster the inclusion of learners with disabilities. This should include ensuring the availability of all study materials in accessible formats, and advancing online education at all times so as to assist learners with disabilities and their parents to be able to work from home. Additionally, through affirmative action measures, households with learners with disabilities should have their internet or data and

radio subsidised by the government so as to include these learners in the education system, especially at the basic or primary level where the enjoyment of the right should be immediate and free of charge. Furthermore, it is imperative to build more special needs schools, equip them adequately and ensure that they welcome all the needy learners without exception. These measures should be taken and implemented prior to pandemics so as to ensure their operationalisation without loopholes should any crisis or pandemic occur. While the discussion focuses on South Africa, lessons learned from the pandemic apply across Africa where persons with disabilities are generally marginalised.

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## Exacerbated inequalities: Implications of COVID-19 for the socio-economic rights of women and children in South Sudan

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**Summary:** *This article critically examines measures adopted by the Revitalised Transitional Government of National Unity (TGoNU) in South Sudan to fight the COVID-19 pandemic. It analyses the implications of such measures on constitutionalism and socio-economic rights of women and children. In so doing, it reveals that policy decisions adopted by the RTGoNU exclusively focused on fighting the Coronavirus at the expense of the socio-economic rights of zol meskin (common person). In particular, the decisions lack supportive social protection packages to cushion the low-income households that depend on daily hustling, impacted by the measures adopted. This led to a disproportionate impact on women and children whose rights to livelihoods and education are more adversely affected. Such policy decisions could deepen poverty margins that already exist in South Sudanese society. As schools remain closed, with the exception of primary eight and senior four candidates,<sup>1</sup> the hope of more than 2.2 million children who are already out of the education*

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1 The Ministry of General Education and Instruction announced on 28 September during a press briefing that candidate classes will resume their studies on 5 October with certain standard operating procedures to be adhered to.

*system hangs in the balance.*<sup>2</sup> In sum, the article demonstrates that the fight against COVID-19 appears to have been won but at a cost of losing the fight against already-rampant socio-economic inequalities. This in part is due to the fact that, on the one hand, measures adopted to fight the pandemic appear to be successful at flattening the curve as revealed by the cumulative numbers of patients and deaths but, on the other, such policies have arguably exacerbated the socio-economic conditions of the poor who already live on the brink of famine as warned by the United Nations agencies in keeping with the Integrated Food Security Phase Classification reports.<sup>3</sup> The article thus recommends that the government and policy makers should consider three critical lessons for the future: (a) strengthening social welfare sector to protect vulnerable households from sudden onsets; (b) enhance disaster risk and preparedness capacities to effectively deal with pandemics in a way that protects the most vulnerable people; and (c) strengthen democratic governance and rule of law as catalysts for well-managed emergency responses.

**Key words:** COVID-19; South Sudan; exacerbated inequalities; zolmeskin; women and children

## 1 Introduction

When the World Health Organisation (WHO) announced COVID-19 as a global public health emergency, countries invariably responded. A common denominator among measures adopted include the declaration of a state of emergency, effectively limiting certain human rights and fundamental freedoms as well as restricting socio-economic activities. In the case of South Sudan, the government ordered a partial lockdown on 20 March 2020 as part of several panic measures, in particular, the closure of institutions of learning, markets, the imposition of a night curfew, the banning of social gatherings (churches, funerals, clubs and weddings) and a restriction of movement by air, sea and land – both internally and with neighbouring countries – in order to prevent the spread of COVID-19.<sup>4</sup> As of 7 August 2020, the country's cumulative caseload

2 UNICEF 'Education in South Sudan briefing note' (2020), [https://www.unicef.org/southsudan/media/5101/file/Education\\_Briefing\\_Note\\_June\\_Final.pdf](https://www.unicef.org/southsudan/media/5101/file/Education_Briefing_Note_June_Final.pdf) (accessed 19 September 2020).

3 See latest IPC reports <http://www.ipcinfo.org/ipc-country-analysis/details-map/en/c/1152422/?iso3=SSD> (accessed 20 September 2020).

4 These measures were announced in the presidential address published on 16 March 2020, [https://www.youtube.com/watch?v=Wm\\_x0scA4KI](https://www.youtube.com/watch?v=Wm_x0scA4KI) (accessed 18 August 2020).

stood at 2 470 positive patients, 47 deaths and 1 252 recoveries.<sup>5</sup> However, health experts doubt that the figures represent a true picture for South Sudan given its limited testing and surveillance capabilities.<sup>6</sup>

This notwithstanding, the measures adopted have arguably succeeded in halting the much-feared spread of the virus in the form by uncontrollable community transmission, and the enormity and burden with which the country's poor public healthcare system would not have coped. Suffice to note that although the measures adopted were later eased, they have inflicted harm in terms of loss of livelihoods of poor households and the so-called 'population at risk'.<sup>7</sup> However, there is more to that: The measures adopted have exposed democratic deficits and socio-economic inequalities affecting poor households, in general, and women and children, in particular.

To critically analyse these dynamics, this article examines the extent to which the socio-economic rights of women and children can be guaranteed and protected during public health emergencies. It evaluates measures adopted by the Revitalised Transitional Government of National Unity (RTGoNU) in relation to their implications on women's livelihoods and children's rights. This is because children's rights to education and women's livelihoods are disproportionately impacted by COVID-19 measures adopted, resulting in exacerbated inequalities on *zol meskin*.<sup>8</sup> The article focuses on women and children as they constitute the vulnerable and marginalised groups in South Sudan. Although women constitute a significant numerical majority in South Sudan,<sup>9</sup> their inclusion in governance, economic spheres and social affairs is unjustifiably limited.<sup>10</sup> Even prior to COVID-19, women and children were among the most vulnerable in South Sudan in relation to equal access to political and economic opportunities. The conflict, which sparked

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- 5 High Level Task Force's daily COVID-19 situation update (on file with author).  
 6 T Mayai 'The nature and magnitude of the COVID-19 outbreak in South Sudan' (2020) 2, [https://www.suddinstitute.org/assets/Publications/5ece18a4baed3\\_TheNatureAndMagnitudeOfTheCOVIDOutbreak\\_Full.pdf](https://www.suddinstitute.org/assets/Publications/5ece18a4baed3_TheNatureAndMagnitudeOfTheCOVIDOutbreak_Full.pdf) (accessed 30 May 2020).  
 7 These are persons living in protection of civilians sites (PoCs) managed by the UN Mission in South Sudan (UNMISS), internally-displaced persons, refugees and the elderly, including those with pre-existing health conditions.  
 8 The phrase *zol meskin* is a Juba Arabic term referring to less fortunate persons or common people. This article characterises women and children as common people in relation to their economic and political position in society.  
 9 Care International 'South Sudan gender in brief' (2020), <https://www.care.org/wp-content/uploads/2020/05/Gender20in20Brief20South20Sudan20.pdf> (accessed 25 September 2020).  
 10 Initiatives such as 35% affirmative action in governance by the Sudan Peoples' Liberation Movement (SPLM) is not always respected as witnessed in the recent formation of the Revitalised Transitional Government of National Unity where only one governor was appointed in a 10-seat gubernatorial state government.

in December 2013 and continues to-date, albeit in diminished intensity, combined with the economic collapse, have affected women and children. Women in particular suffered sexual violence and many children were forced into armed forces and groups and dozens dropped out of school.<sup>11</sup>

In revealing how COVID-19 policies impacted women and children, the article demonstrates that policy making devoid of realities for all peoples – rich and poor – risks offsetting any gains made in narrowing the gaps in inequalities and in advancing the socio-economic rights of women and children. Furthermore, the article examines legal and policy measures taken by the government of South Sudan as recommended by the COVID-19 High-Level Taskforce (HLTF) and how they exacerbate pre-existing inequalities and governance deficits, including the possibility of jeopardising the nation-building and democratisation agenda. The article engages with secondary literature, laws, policies, guidelines and civil society reports in analysing how measures adopted to fight COVID-19 exacerbate inequalities, leading to losing the fight against socio-economic inequalities in South Sudan. I suggest that whenever I use the terms ‘poor’, ‘rich’ and ‘vulnerable’ in the article, these refer to cultural, economic and political limitations faced by women and children in the enjoyment of socio-economic rights and opportunities.

The article commences with a background analysis to provide impetus to the discussions that follow (part 1). It then discusses political and legal frameworks underpinning measures adopted by the government of the Republic of South Sudan in part 2. It does this to expose pre-existing inequalities and vulnerabilities which COVID-19 measures have exacerbated as well as how such measures disproportionately impact *zol meskin* – children and women, in particular. It proceeds to analyse safeguards for ensuring compliance with the rule of law and constitutionalism and challenges experienced in ensuring compliance (part 3). Building on that, part 4 analyses how measures adopted aggravate socio-economic vulnerabilities of women and children in terms of the impact on children’s rights to education and loss of livelihoods of women who depend on commerce performed within the informal economy that had been badly impacted. In drawing on the lessons for the future (part 5) the

11 For a more detailed account of human rights violations committed during the conflict in South Sudan, see the African Union Commission’s human rights report on South Sudan, <https://www.peaceau.org/uploads/auciss.final.report.pdf> (accessed 27 September 2020). See also J Akech ‘Prosecution or reconciliation? Perspectives on the Commission for Truth, Reconciliation and Healing and the independent Hybrid Court for South Sudan’ unpublished thesis, University of Pretoria, 2018 18.

article highlights corrective measures and proposals to ensure that the meagre gains made with respect to socio-economic inequalities are not regressed by measures adopted to fight COVID-19. It highlights key policy recommendations for donors, government and civil society organisations. In the last part the article recalls major strands and key issues that may require further research.

## 2 Contextualising South Sudan's government's COVID-19 response

### 2.1 Legal and policy frameworks for emergency powers

The exercise of public emergency powers vests in the President of the Republic of South Sudan and the presidency – in light of collegial consociational power sharing introduced by the Revitalised Agreement on the Resolution of Conflict in the Republic of South Sudan (R-ARCSS).<sup>12</sup> Similarly, the Transitional Constitution 2011 (as amended) expressly empowers the President to declare a state of emergency.<sup>13</sup> However, such constitutional emergency powers may only be exercised in two instances: (a) as a general function of a president under article 101(e) where he or she may 'declare and terminate a state of emergency in accordance with the provisions of [the] Constitution and the law',<sup>14</sup> or (b) as a special constitutional power on declaration of war and public emergency only upon occurrence of stated events. The relevant provision states:<sup>15</sup>

The President upon the occurrence of an *imminent danger*, whether it is war, invasion, blockade, natural disaster or *epidemics*, as may threaten the country, or any part thereof or the safety or economy of the same, declare a state of emergency in the country, or in any part thereof, in accordance with [the] Constitution and the law.

It is important to note that the President did not declare a state of emergency, but instead he issued a Republican Order classifying COVID-19 as a public health emergency in South Sudan consequent upon which he imposed certain measures in order to prevent, manage and contain its spread.<sup>16</sup> These measures include the establishment of a High-Level Task Force committee (HLTF) to oversee efforts to

12 Art 1.9.1 R-ARCSS (providing that the Revitalised Transitional Government of National Unity (RTGoNU) is founded on the premise that there shall be collegiality in exercising certain powers among the President and his five Vices in decision making).

13 Arts 101(e), 189 & 106A(2)(c) Transitional Constitution 2011 (as amended).

14 As above.

15 Art 189(1) Transitional Constitution (my emphasis).

16 See Republican Order 8/2020.

fight the novel Coronavirus disease. Although measures adopted were not announced under a state of emergency, such is implied considering the operative implication of such measures on certain human rights and fundamental freedoms.

The Republican Order established ‘a High-Level Task Force Committee – composed of government hierarchy – to take extra precautionary measures in combating the spread of Coronavirus diseases’.<sup>17</sup> Having been empowered to take ‘extra precautionary measures’ the HLTF passed several resolutions meant to flatten the curve of the viral infection. In taking these measures, the HLTF first adopted the 16 March 2020 presidential statement on COVID-19 which imposed certain measures to fight COVID-19. Although the statement did not make reference to any legal provision, the formation of the HLTF was done pursuant to article 106A(2)(c) of the Transitional Constitutional Constitution 2011, as amended, which stipulates that ‘the President shall, in consultation with the First Vice President and the Four Vice Presidents ... exercise the powers of the nomination and appointment of the members of independent Commissions, interim and *ad hoc* Commissions and Committees’.

Aside from the Constitution, policy makers may make reference to relevant policies such as the National Social Protection Policy Framework (NSPPF) and the National Health Policy (NHP) which would aid and permit the government to effectively address social protection concerns arising from the measures adopted. The policy frameworks on social protection and health safety, therefore, are indispensable if the implementation of public health emergency measures is to be effective. Accordingly, they are instructive to policy choices during a state of emergency.

Adherence to the constitutional and policy framework before, during and after a state of emergency is paramount. So, what measures have been put in place to ensure such compliance? The next part discusses safeguards put in place by the Constitution and other mechanisms for ensuring compliance with due process of law and as a protection for rights and freedoms that may be limited or restrained under preventative public health measures.

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17 As above. The HLTF initially comprised the President, as Chairperson, deputised by First Vice-President, Dr Riek Machar, who was tasked with managing the day-to-day operations with membership from Ministers of Health, Cabinet Affairs, Defence and Veterans’ Affairs, Interior, National Security, Finance and Economic Planning, Trade and Industry, Higher Education, General Education, Transport, Governor of the Central Bank, CEO of Civil Aviation and Directors of General Intelligence Bureau and Internal Security Bureau respectively.

## 2.2 Socio-political landscape influencing COVID-19 policy choices

South Sudan is a country recovering from a self-inflicted conflict that has ravaged its economy and ruined democratic dreams of a prosperous society. The war that sparked in 2013 was paused through a peace agreement, the 2016 Agreement on the Resolution of Conflict in the Republic of South Sudan (ARCSS), which soon collapsed in 2015 and was revitalised in 2018. That Agreement establishes a broad-based government and provides parameters for building institutions and a new permanent Constitution. Underlying the fragile peace pact is the trust deficit that characterises the manner in which democratic decisions would be made. In particular, the tenuous consociational power sharing among and between political coalitions that formed the national unity government implicated decision making on COVID-19.<sup>18</sup> For instance, while the First Vice-President was designated to oversee the day-to-day operation of the HLTF, he was soon removed by the President, who was the Chairperson, in a bid to restructure and streamline the COVID-19 response mechanism. Others claim that the move was politically motivated.

The streamlining of the HLTF was in response to public criticism that the pandemic is best managed by technocrats. Although the new team was substantially enhanced with technocrats and chaired by one of the Vice-Presidents, Hussein Abdalbaagi, who oversees the service cluster, it is reportedly plagued by mismanagement of funds and infighting. Aside from capacity, alleged corruption and politicisation of the HLTF, the principal concern is the lack of consultation with the national legislature in ensuring transparent mechanisms to inform the public of measures being taken by their government. Clearly, South Sudan's COVID-19 response reveal interesting intersections between constitutionalism and peace building, thus influencing policy choices adopted to fight the Coronavirus pandemic.

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<sup>18</sup> The R-ARCSS shares power among five political coalitions: South Sudan Opposition Alliance (SSOA); Other Political Parties (OPP); Incumbent Transitional Government of National Unity (ITGNU); Sudan Peoples' Liberation Movement/Army in Opposition (SPLM/A-IO); and Former Detainees (FDs) which are further composed of smaller factions of politico-military formations.

### 3 Legal and constitutional guarantees and challenges to compliance

#### 3.1 State obligations on socio-economic rights

Socio-economic rights are guaranteed under the Transitional Constitution 2011, as amended, and applicable international law. It is worth noting that South Sudan has not ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>19</sup> However, the adoption of the ICESCR by South Sudan's Transitional Legislative Assembly obliges South Sudan not to roll back such intention demonstrated by its national legislature in adopting ICESCR. This negative obligation means that South Sudan is required to ensure that policy decisions on COVID-19 do not negate the obligation of non-regression inadvertently or otherwise. In fact, ICESCR obliges state parties to<sup>20</sup>

undertake steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights by all appropriate means, including particularly the adoption of *legislative measures*.

As stated above, non-ratification does not absolve South Sudan from obligations arising out of a treaty adopted by its national legislature but awaiting presidential assent and deposition of the instrument of ratification with the United Nations (UN). It is argued that the parliamentary adoption of ICESCR is sufficient to require positive policy actions that promote its spirit and object. In fact, although non-justiciable, the Transitional Constitution stipulates, under economic objectives, that economic policies should 'eradicate poverty, address wealth disparities and promote equitable access to income and national wealth'.<sup>21</sup> Clearly, policy decisions on COVID-19 ought to have been inspired by the need to achieve this constitutional policy directive. In terms of the applicability of international human rights instruments, the Transitional Constitution stipulates that '[a]ll rights enshrined in international human rights treaties, covenants and instruments ratified or acceded to by South Sudan are to be

<sup>19</sup> OHCHR 'Status of ratification' (2020), <https://indicators.ohchr.org/> (accessed 16 September 2020). See also UNMISS Press release 'UNMISS welcomes ratification of international human rights covenants in South Sudan' (2019), [https://unmiss.unmissions.org/sites/default/files/unmiss\\_welcomes\\_ratification\\_of\\_international\\_human\\_rights\\_covenants\\_in\\_south\\_sudan.pdf](https://unmiss.unmissions.org/sites/default/files/unmiss_welcomes_ratification_of_international_human_rights_covenants_in_south_sudan.pdf) (accessed 16 September 2020).

<sup>20</sup> Art 2(1) ICESCR (my emphasis).

<sup>21</sup> Art 37(1) Transitional Constitution (n 13).

considered an integral part of the [country's] Bill of Rights'.<sup>22</sup> I now turn to examine the extent to which these legal and constitutional guarantees have been complied or not complied with.

### 3.2 Safeguards for compliance with the Constitution and the rule of law

The Transitional Constitution puts in place several safeguards that must be followed before, during and after the declaration of a state of emergency to ensure compliance with the rule of law. First, public emergency powers impacting on human rights and fundamental freedoms must be derived from the Constitution and the law as stipulated under articles 101(e) and 189(1). The exercise of such emergency powers may only be triggered upon the occurrence of an 'imminent danger' which must be an identifiable threat to national security or public health safety. The delineation of events that must trigger the declaration of a state of emergency is to ensure that such power is not abused.

Second, once the state of emergency is declared, the Constitution commands that the declaration be 'submitted to the national legislature within 15 days'<sup>23</sup> for parliamentary oversight. This directive is to give legislators an opportunity to scrutinise the validity of the state of emergency and the government's plans on how to mitigate its impact on the enjoyment of rights. As an oversight arm of government, the national legislature must approve legislative and policy measures impacting on fundamental rights and freedoms as well as peoples' livelihoods.

The third safeguard is that the Constitution prohibits the derogation of rights and freedoms unless in accordance with the law. It enjoins the courts and the national Human Rights Commission to monitor and protect human rights abuses during a public emergency.<sup>24</sup> This means that anyone whose right has been infringed can either approach the courts or lodge a complaint with the human rights watchdog to investigate such claims. Inherent in the requirement for an oversight role by the legislature, the courts and the Human Rights Commission are to ensure that measures adopted is proportionate to the legitimate objective of managing the public health emergency. This is in recognition of the fact that the executive branch of

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22 Art 9(3) Transitional Constitution.

23 Arts 189(2) & 101(e) Transitional Constitution.

24 Art 9(10) Transitional Constitution.

government tends to hide behind states of emergency to abuse human rights and roll back democratic reforms.

However, this role is complementary to the oversight function of the national legislature in ensuring that public decisions respect the Constitution and comply with the rule of law. Other safeguards lie in international law applicable to South Sudan. For instance, both the Committee on Economic, Social and Cultural Rights (ESCR Committee) which monitors compliance with ICESCR, and the African Commission on Human and Peoples' Rights (African Commission) which monitors compliance with the African Charter on Human and Peoples' Rights (African Charter) issued guidance to member states to ensure that the measures adopted to fight COVID-19 respect human rights.<sup>25</sup> Despite these constitutional and international safeguards, the manner in which measures were adopted and enforced reveals challenges with compliance with the Constitution and the rule of law.

### 3.3 Challenges experienced in compliance with the rule of law

Preventative public health measures adopted have exposed both legal and policy implications to socio-economic rights and fundamental freedoms. First, despite the constitutional command requiring the President to seek legislative debate, deliberation and endorsement after the lapse of 15 days, the national legislature did not debate any public health emergency adopted by the executive branch of government.<sup>26</sup> This left the legislature in darkness as regards the nature and impact of a public health emergency. The government claims that it is acting in the public interest to flatten the curve of the spread of COVID-19. In the absence of legislative oversight, the measures adopted did not undergo democratic scrutiny and approval despite their far-reaching impact on democracy, generally, and on the lives of ordinary people, in particular.

It is argued that the national legislature should have been engaged to debate and approve measures to fight COVID-19 owing to the impact of the measures on socio-economic rights and constitutionalism. Seen from that perspective, the oversight function of the national legislature cannot be muted even in times of emergency as it is a constitutional command that it be consulted

<sup>25</sup> See the statement of the ESCR Committee on the Coronavirus disease and economic social and cultural rights, E/Ct12/2020/1 6 April 2020 and press statement by the African Commission on Human and Peoples' Rights, <https://www.sachpr.org/pressrelease/detailiid=483> (accessed 6 August 2020).

<sup>26</sup> Arts189(2) & 101(e) Transitional Constitution.

whenever a public emergency is triggered. Such consultation would be a trust-building measure among peace partners and an assurance to the peoples of South Sudan that institutions are beginning to be rebuilt. Evidently, COVID-19 not only is a threat to the country's crippling public health system, but also to the fragile peace and weak governance system.

Similarly, the COVID-19 response has been highly securitised, in particular the enforcement of the curfew, border control and the enforcement of compliance for testing and contact tracing. This is evident not only by the presence of security forces on the borders and streets, but also the representation of national security services, the Ministry of Interior and the defence forces in the HLTF – the national body that directs COVID-19 policies. In the initial stages of the declaration of the measures, the government established the HLTF with a huge presence of security personnel, leading others to appeal to the government to end securitising the fight against COVID-19.<sup>27</sup> In that period, 'instances of beating, arbitrary arrest and detention including extortion of money were reported'.<sup>28</sup> Although the enforcement of emergency laws expectedly ousts certain rights, it is important to state that the Constitution prohibits the derogation of rights and freedoms enshrined in the Bill of Rights and enjoins the 'Supreme Court and other competent courts including Human Rights Commission to monitor compliance in accordance with the Constitution and the law'.<sup>29</sup> Having considered challenges to the rule of law and constitutionalism, what follows is a detailed analysis of the impact of Coronavirus measures on the livelihoods and democratic rights of women and children.

#### **4 Exacerbated inequalities: Impacted socio-economic rights**

The COVID-19 measures imposed by the government of the Republic of South Sudan negatively impacted and continue to affect small-scale women entrepreneurs and children. In specific terms, they have impacted their socio-economic rights and right to education, respectively. This category of people had been made vulnerable by a vortex of plagues – 'conflict, continuing political instability, weak economy and chronic under-resourcing of public

27 J Akech 'COVID-19 response: Implications on peacebuilding and constitutionalism in South Sudan' (2020), <https://ancl-radc.org.za/node/644> (accessed 4 July 2020).

28 As above.

29 Art 9(10) Transitional Constitution.

health institutions'.<sup>30</sup> This also is at the backdrop of an 'economic slowdown – all in the face of widespread threat of hunger, especially as the COVID-19 problem arrived on the heels of the locust attacks'.<sup>31</sup> These factors arguably heightened pre-existing vulnerabilities and inequalities among South Sudanese peoples of which women and children risk being left further behind in the hierarchy of society's economic and political set-up.<sup>32</sup> The measures have impacted women and vulnerable people in several ways; robbed them of income from their economic activities, rendered poor people jobless and exposed them to health risks as they attempt to look for food by all other means – which most probably are unsafe. The next parts discuss the socio-economic rights of women and children that are being impacted by the COVID-19 measures.

#### 4.1 Loss of women's livelihoods

The COVID-19 measures adopted – restrictions on the movement of people, goods and services as well as the absence of an economic package for small-scale businesses (roadside and open-air tea stalls, food sale, hawking and agriculture) – impacted women entrepreneurs most of whom operate in the informal economies. This situation deprived women of much-needed financial capital and livelihoods for their families. The loss of livelihoods by women could further worsen pre-existing vulnerabilities women already face, as the late John Garang once said, that 'women are amongst the marginalised of the marginalised'.<sup>33</sup> Even worse, women continue to bear the brunt of the conflict and its worsening effects on the economy, security and livelihoods. Admittedly, one can hardly guess what COVID-19 has done to women: shattered their hopes and pushed them to the brink of devastation. This image is captured by one Lilian, a South Sudanese woman entrepreneur:<sup>34</sup>

COVID-19 is like a death sentence to us vulnerable women who depend on farming to feed our children. At a time when we hope to

30 J Akech 'The 7 plagues devastating South Sudan's health system' (2020), <https://www.savethechildren.org.uk/blogs/2020/7-plagues-devastating-south-sudan-health-system> (accessed 5 July 2020). See also A Mayai 'War and schooling in South Sudan 2013-2016' (2020) *Journal on Education in Emergencies*.

31 As above.

32 N Tiitmamer & A Awolich 'The COVID-19 pandemic vulnerability factors in South Sudan' (2020) 9, [https://www.suddinstitute.org/assets/Publications/5ec35cdc23465\\_TheCOVIDPandemicVulnerabilityFactorsInSouthSudan\\_Full.pdf](https://www.suddinstitute.org/assets/Publications/5ec35cdc23465_TheCOVIDPandemicVulnerabilityFactorsInSouthSudan_Full.pdf) (accessed 7 July 2020).

33 Quoted from oral speech of the late Dr John Garang, the then leader of the Sudan Peoples' Liberation Movement/Army (SPLM/A).

34 See <https://www.wvi.org/stories/coronavirus-health-crisis/covid-19-death-sentence-women-south-sudan-after-years-conflict-it> (accessed 6 August 2020).

give our children the best life after several years of conflict, COVID-19 takes away our good plans. Why?

A report by the University of Juba in collaboration with the United Nations Development Programme (UNDP) reveal the devastating socio-economic impact of COVID-19 on the formal and informal economy with women being the hardest hit. The report reveal that most women-led 'households are under significant strain due to loss of income'.<sup>35</sup> Similarly, a report by UN Women in South Sudan declares that 'small business owners in South Sudan bear the brunt of COVID-19 as livelihoods shrink'.<sup>36</sup> It is important to note that the easing of Coronavirus measures is a *de facto* authorisation for businesses to open. However, adaptation to the market after a sudden shock will be difficult for most women whose businesses are largely in the informal sector. Owing to the already worsening humanitarian and economic situation – soaring inflation and acute food security levels<sup>37</sup> – the RTGoNU should have activated the national social protection policies to provide for grants to women as social welfare packages for loss of income, including financial assistance to their struggling businesses.

Women in the farming sector are also badly affected because the government imposed certain restrictions such as social distancing and limitation on movement so that farmers who rely on farm workers were unable to get the labour they needed. As one woman farmer narrates, 'with lockdowns, mobilising farm labour has been difficult, yet, the large acreage of land we cultivate need people for planting'.<sup>38</sup> Other than the loss of livelihoods, women's democratic rights have also been impacted. For instance, the 15-member HLTF reveals women's underrepresentation over male dominance. Yet, this is the body that makes policies on COVID-19 in South Sudan. Accordingly, COVID-19 has also exposed democratic deficits and inequalities where women and gender inequalities are heightened, and their civic voices trumped.<sup>39</sup>

35 University of Juba 'Gender and socio-economic impact assessments of COVID-19 pandemic in Juba municipality, South Sudan' (2020) 40-41.

36 UN Women 'Small business owners in South Sudan bear the brunt of COVID-19 as livelihoods shrink' (2020), <https://www.unwomen.org/en/news/stories/2020/7/feature-south-sudan-small-businesses-face-covid-19> (accessed 7 August 2020).

37 IPC reports <https://reliefweb.int/report/south-sudan/south-sudan-integrated-food-security-phase-classification-snapshot-january-july-0> (accessed 25 September 2020).

38 UN Women (n 36).

39 F Bringi 'The impact of COVID-19 on women and girls in South Sudan' (2020), <https://www.csrif-southsudan.org/blog/the-impact-of-covid-19-on-women-and-girls-in-south-sudan/> (accessed 5 August 2020).

## 4.2 Children's rights to access education and social protection

Although the clinical impact of COVID-19 on children's health remains negligible, rights agencies warn that 'they risk being among its biggest victims'<sup>40</sup> as the crisis unfolds. However, children's well-being, rights to education, leisure and freedom of movement remain severely impacted with schools remaining closed and play prohibited even for out-of-school children.<sup>41</sup> Due to high poverty levels among poor households in urban areas, the upsurge of children living and working on the streets is disturbing. With lockdown measures denying most families the essential income they need, more children are now on the streets doing hawking business to feed themselves and their families. This phenomenon is likely to impact on children's rights to education when schools reopen as they will have become used to other activities rather than learning. Despite the adoption of a social protection policy by the government, 'access to safety net remains clearly stated in the policies but unsatisfactorily absent due to budgetary underfunding'.<sup>42</sup> Due to the COVID-19 measures, an estimated '1,9 million children (43% girls) will have lost learning opportunities with 35 000 teachers and volunteers at risk of losing their jobs'.<sup>43</sup> This is in addition to the 2,2 million children already out of school,<sup>44</sup> out of 6 million schoolgoing children across South Sudan.<sup>45</sup>

To minimise the impact of school closures, the government and development partners are pushing for innovative approaches to continue learning amidst the Coronavirus pandemic. Some of the measures piloted by development partners and the MoGEI include distance learning through radio, online and home-based learning, but serious challenges abound. First, this approach presupposes that children will have access to these gadgets and learning platforms

40 UN 'The impact of COVID-19 on children' (2020) 2, [https://unsdg.un.org/sites/default/files/2020-04/160420\\_Covid\\_Children\\_Policy\\_Brief.pdf](https://unsdg.un.org/sites/default/files/2020-04/160420_Covid_Children_Policy_Brief.pdf) (accessed 4 July 2020).

41 J Madut 'The impact of COVID-19 school closedowns in East Africa' (2020), <https://www.nation.co.ke/kenya/blogs-opinion/blogs/dot9/madut/the-impact-of-covid-19-school-closedowns-in-east-africa-1919258> (accessed 14 August 2020).

42 African Child Policy Forum (ACPF) 'Baseline assessment for the implementation of the East Africa Community Child Policy in the Republic of South Sudan' (2020) 44.

43 World Vision '1,9 million South Sudanese children despair over closure of schools due to COVID-19; mothers worried of the future' (2020), <https://reliefweb.int/report/south-sudan/19-million-south-sudanese-children-despair-over-closure-schools-due-covid-19> (accessed 16 July 2020).

44 Ministry of General Education and Instruction et al 'Global initiative on out-of-school children' (2018) 12, <http://uis.unesco.org/sites/default/files/documents/global-initiative-out-of-school-children-south-sudan-country-study.pdf> (accessed 16 July 2020).

45 UNICEF (n 2).

and that they are able to effectively use them with limited or no supervision. Overall, these alternative methods of learning are ineffective and non-inclusive given that a vast majority of children live in rural areas where the infrastructure is poor or non-existent.

Second, children with disabilities and those in hard-to-reach places are more likely to be excluded from the education programme if they cannot access these means and platforms. Children with disabilities and marginalised children who were already unable to access education could be further left behind. For these reasons, the Ministry of General Education and Instruction (MoGEI) and its partners who have innovated this idea are cautious to officially declare this programme although it is already being implemented. If officially adopted as a policy decision on continuing education during the COVID-19 pandemic, it could push more children out of the education system as it is likely to legitimise the academic calendar for those children who would have access to these learning platforms. Furthermore, the emphasis under Sustainable Development Goal 4 (SDG 4) to ensure that no child is left behind by 2030 means that any policy that excludes them is counterproductive to that aim.<sup>46</sup>

In a recent consultative meeting with children from across South Sudan organised by Save the Children and the MoGEI, children expressed a number of concerns.<sup>47</sup> First, they are not being informed on when the school might re-open, and the indefinite closure means that children who depended on a day meal at school can no longer benefit from this arrangement. Second, the capitation grant girls used to receive from Girls Education South Sudan is no longer available as such payment can only be made to children in schools. Third and last, girls have expressed concerns of rising sexual violence, generally, and child marriage, in particular, due to their being at home and out of school. These concerns have all arisen because schools have remained shut due to COVID-19. The Deputy Minister of the MoGEI, for instance, reported that an estimated 50 school girls were impregnated in Eastern Equatoria and the number could be higher as no assessment has been conducted.<sup>48</sup>

While attending the webinar, the Minister acknowledged the lack of a clear plan on the part of his Ministry and the government whether or not schools were to open, but acknowledged that coordination with other stakeholders, such as the Ministry of Gender, Child and Social

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46 See generally SDG 4 <https://sdgs.un.org/goals/goal4> (accessed 18 September 2020).

47 The webinar was held in July 2020. The story is cited from memory.

48 As above.

Welfare (MGCSW), international non-governmental organisations (NGOs), UN agencies and civil society actors to tackle concerns raised by children was paramount. In addressing issues raised by children, Save the Children and the United Nations Children's Fund (UNICEF), among other humanitarian and development actors, have been advocating for safe re-opening of schools which the government recently endorsed.<sup>49</sup> It however directed respective ministries to work with partners to put in place necessary measures to protect children and teachers against COVID-19. This is in recognition of the fact that 'schools are not the drivers of the pandemic'<sup>50</sup> given the lack of evidence that children are actually susceptible to the Coronavirus. The actors lay claim to this call due to 'overwhelming evidence on the negative impact of schools' closures on children's wellbeing'.<sup>51</sup> In particular, incidences of sexual violence against girls, the risk of child marriage and the potential for regression in academic skills by children if they stay out of school for long periods could potentially create another pandemic for South Sudan.<sup>52</sup> However, they warned that decisions to re-open schools must be guided by the best interests of the child as well as their safety and wellbeing.

## 5 Lessons for the future

If life's lessons are hard to forget, the lessons learnt from the COVID-19 response in South Sudan are the hardest to escape the memories of women and children who continue to bear the brunt of the ripple effects of the COVID-19 pandemic. Lessons learnt span from panic response mechanisms to democratic deficits that are influencing South Sudan's response to the COVID-19 pandemic. This article suggests key takeaways to inform the policy choices for the South Sudanese policy makers to mitigate their implications for the poor and most marginalised.

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- 49 Eye Radio 'Cabinet okays reopening of schools' (2020), <https://eyeradio.org/cabinet-okays-reopening-of-schools/> (accessed 19 September 2020). See also Save the Children 'Save the Children Commends Government's Decision to Reopen Schools in South Sudan' (2020) <https://reliefweb.int/report/south-sudan/save-children-commends-government-s-decision-reopen-schools-south-sudan> (accessed 17 September 2020).
- 50 J Ludvigsson 'Children are unlikely to be the main drivers of the COVID-19 pandemic – A systematic review' (2020) *Acta Paediatrica*.
- 51 UNICEF's back to school advocacy plan (on file with author). See also UNESCO and UNICEF press release calling on the government of South Sudan to reopen schools, <https://www.unicef.org/southsudan/press-releases/time-has-come-reopen-schools-south-sudan> (accessed 22 July 2020).
- 52 L Crawford et al 'Back to school? Tracking COVID cases as schools reopen' (2020), <https://www.cgdev.org/blog/back-school-tracking-covid-cases-schools-reopen> (accessed 19 July 2020).

### **5.1 The fight against COVID-19 could trigger another pandemic**

If the adage 'there can be no excuse for putting out a fire to start another' is in any way true, one finds abundant evidence in South Sudan's COVID-19 response framework which reveals two policy contradictions: a relative success in halting widespread community transmission, but at the cost of hurtful socio-economic policy choices. For the former, the country's cumulative deaths are fewer taking into account its ill-equipped public health system. However, many of the efforts in averting what would have been the world's worst and most uncontrollable community transmission is attributed to generous financial and technical support from international actors: WHO, the Centre for Disease Control (CDC), international NGOs, the World Bank, the US government and other well-wishers. As the analysis in part 4 reveals, this is a false win as it has come at a cost of deepening socio-economic inequalities. As regards the latter, measures adopted have added fuel to the fire by exacerbating inequalities for poor households and depriving women of their livelihoods and children of their rights to education. The question arises as to what policy considerations South Sudan should have taken, given her precarious situation – acute humanitarian crises, economic collapse, civil war and a poor healthcare system.

South Sudan's fight against COVID-19 may have made some gains but such a win is a false victory as it could trigger another pandemic in the form of widespread poverty among women as well as the possibility of a generational loss to education, as argued in part 4. It thus is contended that while measures adopted to fight COVID-19 may have been successful, this could trigger another pandemic in the form of deepening socio-economic inequalities.

It is important to note that vulnerable people in South Sudan were already struggling to make ends meet through small-scale informal commerce and other engagements. With lockdown and the restrictions on movement of goods and services, families living on a daily income face the threat of starvation, risking a further fall into abject poverty. Despite this, the government did not initiate programmes to protect the most vulnerable from the impact of the COVID-19 measures, even if it was palpable that such measures would have a negative impact on low-income households. In such cases, the government should have been guided by its social protection policies in taking decisions on lockdowns as well as how

to support the most vulnerable.<sup>53</sup> The country's social protection policies provide 'a range of social protection programmes for the most vulnerable'<sup>54</sup> through a committed one per cent of the national budget to finance implementation. However, nothing substantial has so far been done in the implementation of social protection to help the poor, as a consequence of which the policy choices adopted by the government of South Sudan to shut down informal businesses negatively impacted the most marginalised and least fortunate in society. In particular, women who depend on the sale of fruit, used clothes, cosmetics and food stuffs for subsistence risk being pushed to the brink of starvation and further below poverty line.

As a landlocked country, South Sudan's economy depends on imports from neighbouring countries, mainly Uganda, Sudan and Kenya, but with the restriction on the movement of goods and services following the border closure, the country's commodity prices skyrocketed, and small-scale businesses are stressed amidst the lack of government intervention to stabilise the economy and support poor households with financial assistance to cover the sudden disruptions in their livelihoods. This has impacted the livelihoods of poor households and has interrupted small and informal enterprises operated by women. Coupled with the economic decline, the prices of 'basic commodities have since risen by at least 30%, with a 50kg bag of maize flour in Konyokonyo market selling at about 50% more than usual'.<sup>55</sup> The hiked commodity prices would affect the least fortunate families since they would not be able to afford basic food items and would therefore be threatened by starvation. Moreover, the measures led to small-scale informal businesses shutting down or operating improperly, while supermarkets – owned by the middle class – were allowed to operate. The argument in favour of this selective policy is that supermarkets are well organised and can reasonably implement COVID-19 safety measures, such as hand sanitising and social distancing, whereas the informal businesses, such as tea stalls and other open-air businesses, would not effectively adhere preventive measures.

Owing to the poor state of development, analysts warned that 'many people are at risk of dying from hunger than Coronavirus

53 The NSPPF defines social protection as 'a set of private and public mechanisms that ensure individuals' and households' access to essential goods and services to protect them from adverse effects of shocks and stresses, while building their resilience and capacity to effectively manage any future hazardous occurrences'.

54 ACPF (n 42) 44.

55 A Mayai et al 'The economic effects of the COVID-19 pandemic in South Sudan' (2020) 4, [https://www.suddinstitute.org/assets/Publications/5ea90d311d87b\\_TheEconomicEffectsOfTheCOVIDPandemicIn\\_Full.p](https://www.suddinstitute.org/assets/Publications/5ea90d311d87b_TheEconomicEffectsOfTheCOVIDPandemicIn_Full.p) (accessed 8 July 2020).

infection if total lockdowns were imposed without economic cushion<sup>56</sup> to the poor and vulnerable households. In particular, out of the staggering 82 per cent of South Sudanese living in poverty, women account for a majority already 'occupying the lowest ranks of social and political hierarchy' in society.<sup>57</sup> With the negative impact of the COVID-19 measures affecting their livelihoods, the situation could only worsen for poor rural and urban women.<sup>58</sup> In a recent analysis of inequalities and social stratification in Africa, ObEng-odoom warns of a 'rising inequality and social stratification risk' as a result of the COVID-19 pandemic, and that in some countries it was already pre-existing but 'hidden by a thick debris of shock and panic both in terms of access to and control of income and wealth'.<sup>59</sup> This is true for South Sudan where COVID-19 acts as adding fuel to the fire, because the country's economy was already in tatters, typified by a soaring inflation of more than 300 per cent,<sup>60</sup> the absence of local production and a protracted conflict. This is coupled with the stark estimate of '63 per cent of the population living below the national poverty line of which 70 per cent are under 30 years of age and around 85 per cent engage in subsistence agriculture'.<sup>61</sup> This article warns that if nothing is done, inequalities could become endemic considering the ever-widening gap between the rich and the poor.<sup>62</sup> The analysis in part 4 details the deepening socio-economic inequalities.

## 5.2 Strengthened social welfare sector can protect the less fortunate

In adopting policy decisions, the Constitution encourages policy makers to ensure that policy decisions promote 'eradication of poverty, attainment of development goals, guaranteeing the equitable distribution of wealth, redressing imbalances of income, and achieving a decent standard of life for the people of South Sudan'.<sup>63</sup> It is important to note that the COVID-19 measures adopted by the

56 Tiitmamer & Awolich (n 32) 9.

57 As above.

58 U Pape & A Finn 'How conflict and economic crises exacerbate poverty in South Sudan' (2019), <https://blogs.worldbank.org/african/how-conflict-and-economic-crises-exacerbate-poverty-in-south-sudan> (accessed 11 July 2020).

59 F ObEng-odoom 'COVID-19, inequality, and social stratification in Africa' (2020) 12 *African Review of Economics and Finance* 4.

60 C Ballantine et al 'South Sudan: The economic and social impact of violence against women and girls' (2017) 7, <https://www.whatworks.co.za/documents/publications/167-south-sudan-working-paper-final/file> (accessed 14 July 2020).

61 UNICEF 'South Sudan social protection overview' (2019), <https://www.unicef.org/southsudan/sites/unicef.org.southsudan/files/2019-12/UNICEF-South-Sudan-Social-Protection-Briefing-Note-Dec-2019.pdf> (accessed 16 July 2020).

62 ObEng-odoom (n 59) 4.

63 Art 37(1) Transitional Constitution.

government fell below this threshold as they were taken without 'any social protection plans to ensure money in people's hands so that they could feed their families and look after loved ones'.<sup>64</sup> This is why they were soon relaxed by the government in acknowledgment of the fact that the country's weak economic and dire humanitarian situation could not cope with a complete shutdown.

In the intermediate phase, there is a need to turn around an economic collapse and rebuild families distressed by the economic decline in order to reduce the impact of the COVID-19 measures on middle-income families and informal business owners. This can be realised by ensuring significant public investment in social services to ensure that vulnerable people have a sufficient buffer in times of crises. In what he calls 'wrong economic medicine', ObEng-odoom argues that monetary, fiscal and health policies must be radically reconstructed to ensure that the poor are not further left behind and that the narrative of recovery is inclusive of all voices.<sup>65</sup> To effectively support poor households, the government needs to undertake several measures, including the provision of face masks and micro-finances to small businesses, install handwashing stalls to allow the continuation of women's businesses. These policy interventions must prioritise small start-ups (vegetable stalls, tea places, the sale of second-hand clothes and goods stores/stalls) owned and operated by women and poor people.<sup>66</sup>

### 5.3 Disaster risk preparedness can help contextualise pandemic response

Even though almost every country – rich and poor, new and old – was caught off guard by the novel Coronavirus, South Sudan arguably is at the bottom of the unpreparedness ranking. Emergency preparedness is a key ingredient of any successful emergency response. As noted, the country's public health system was already weak or non-functional, to say the least, and struggling to cope with the effects of conflict when COVID-19 was first registered in South Sudan. Even testing equipment, isolation and treatment facilities, personal protective equipment (PPEs) and oxygen masks or ventilators could only be provided with donor funding. Because of this, most people were already not going to hospital in South Sudan. It would therefore follow that responses to COVID-19 needed to envisage the fact that most people would have to be treated at

64 Akech (n 30).

65 ObEng-odoom (n 59) 17.

66 Mayai et al (n 55) 4.

home. Recognising the panic attitude associated with the measures imposed, the government must ensure that disaster risk reduction plans are in place with sufficient technical experts. In considering measures to be taken, small-scale businesses should be exempt from closure, and where such is inevitable, micro-finance should be provided to jump-start their shattered ventures. It thus is evident that managing similar or worse pandemics requires strategic far-sighted preparedness and plans.

#### 5.4 The rule of law and constitutionalism cannot wait

When a pandemic encounters efforts aimed at consolidating peace and stability, constitutionalism takes a back seat. This is evident in the way COVID-19 measures were adopted by the South Sudanese government. There was neither legislative scrutiny nor social protection measures to buffer women's loss of livelihoods and reduce the impact of COVID-19 on children. However, political governance in South Sudan was already undermined by the conflict characterised by the absence of constitutionalism and democracy. As observed elsewhere,<sup>67</sup> the fragile transitional government was already handicapped by a lack of resources and a trust deficit among political forces comprising the RTGoNU. This has led to critical decisions on the effective management of COVID-19 being delayed, not taken or taken in a non-inclusive way.

A lack of consultation with relevant institutions of government in the declaration of major policy decisions undercuts efforts to build democracy and peace building in South Sudan. This disturbing tendency was emphasised by the outgoing US ambassador to South Sudan who cautioned:<sup>68</sup>

The aspirations of the South Sudanese people for a country at peace, for development and for a democratic society should not be delayed or derailed by COVID19. The key to success is strong political will from a reform-minded leadership engaged with an active and unfettered civil society. No virus can stop that kind of peace.

Accordingly, the consolidation of peace and socio-economic gains is paramount as part of the emergency response, more especially for countries in transition. The intersection between effective COVID-19 management and constitutionalism is palpable. Democratic oversight processes should not be ignored even under the pressure of a pandemic as these processes are catalysts for a well-managed

<sup>67</sup> See generally Akech (n 27).

<sup>68</sup> <https://ss.usembassy.gov/ambassador-hushek-july-fourth-greeting/> (accessed 8 July 2020).

pandemic. It may be observed that democratic governance and the rule of law shape the fight against the Coronavirus when government adopts participatory governance resulting in inclusive policies that do not further alienate the poor and leave them at the edge of poverty and further away from prosperity and equality.

## 6 Conclusion

This article discusses measures adopted by the government of South Sudan and their implications for the socio-economic and democratic rights of children and women – the *masaskin*.<sup>69</sup> The analysis reveals that while measures adopted forestalled the much-feared uncontrollable community transmission of the disease, South Sudan still risks entering into another pandemic: a deepening lack of socio-economic rights among women and children. This is a result of insufficient social protection policies to cushion poor families who lost income due to COVID-19. Similarly, the prolonged school closure jeopardises children’s rights to education and could result in a generation lost to the pandemic. It has been shown that women’s small-scale businesses and children’s rights to education are negatively affected in comparison to the other groups of vulnerable people in South Sudanese society. The restrictions on the movement of goods and services and the ban on informal businesses, which was deemed to be incapable of effectively implementing COVID-19 measures, led to the closure and eventual collapse of small-scale businesses. These businesses will not be able to recover properly without financial assistance from the government. The livelihoods of those business owners will be negatively impacted unless they access funding to support their sudden loss of income. In addition to this, the school closure has led to increased sexual violence, child marriage and a risk of more children being likely to abandon school once they reopen.

In sum, the article argues that the consequences of the COVID-19 measures on livelihoods (food shortages and income loss) are likely to cause much more damage than the disease itself. As it now appears from the above COVID-19 cumulative figures, it may be argued that the disease did not affect most people as it reportedly endangers old people and persons with certain pre-existing conditions. To ensure greater preparedness in the future, the article suggests four critical lessons as key to be learnt from the COVID response: First, there is the risk that the way in which South Sudan has dealt with COVID-19 may

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<sup>69</sup> Plural word of *meskin* or common person.

start another pandemic in the form of deepening social inequalities; women's loss of income and livelihoods is a recipe for a rise in poverty and the prolonged closure of schools risks a generation lost. Second, there is a need to strengthen the social welfare sector to protect vulnerable households from sudden onsets. Third, the disaster risk and preparedness capacity should be strengthened to effectively deal with pandemics in a way that protects the *zol meskin*; and, fourth, democratic governance and the rule of law are catalysts for a well-managed response and should therefore always be prioritised.

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# When guns govern public health: Examining the implications of the militarised COVID-19 pandemic response for democratisation and human rights in Uganda

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**Summary:** *The article is premised on the hypothesis that the Uganda Peoples' Defence Force (UPDF) and the attendant auxiliary forces are not an ideal force for domestic deployment in contending with public health pandemics such as COVID-19. The UPDF has been the main architectural tool that has been deployed by the National Resistance Movement party, a former guerilla movement, to perpetuate militarisation in the country for the past 30 years. The conduct, power, authority and prominent position accorded to the UPDF in the management of COVID-19 and the enforcement of the prevention measures laid bare this reality. Thus, unlike in other jurisdictions where the militaries were deployed because of their superior capability to adapt and provide extra and immediate professional services to support the civilian authorities, in Uganda this deployment was different. It was informed by the long-held and widely-documented belief by the President of Uganda, Museveni, that the UPDF, which developed from his personal guerrilla army of the National Resistance Army (NRA), only holds a legitimate vision for the country*

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*and is far more reliable. The COVID-19 pandemic, therefore, was an opportunity to continue the deliberate build-up and normalisation of the infiltration of the military in what have hitherto been spheres of operation for the civil and public servants. Thus, a critical question arises as to whether the primary motivation factor for the UPDF deployment was political, to accentuate the presidency of Museveni in power through militarisation. The question is also whether any positive harvests from the deployment of the military in the fight against COVID-19 were unintended consequences and, if they did materialise, how they were used to further glorify the centrality of the military in dealing with societal crises, further entrenching militarism. The article concludes with some recommendations emphasising the need for accountability – more so, parliamentary oversight in the deployment of the military in such situations to counter a breach of rights and freedoms. Additionally, this would check the current trend of the executive having the exclusive power to deploy the military, making it susceptible to hijacking and eventual politicisation and militarisation.*

**Key words:** *militarisation; Uganda Peoples Defence Forces; COVID-19; democratisation*

## 1 Introduction

As the scourge of the COVID-19 pandemic ravaged different parts of the world, it caught nations unaware and unprepared. To counter its spread, many nations across the world, including more prominently in African countries, in addition to the public health civilian institutions, enlisted the support of their respective military forces in an unprecedented militarisation move. There is compelling evidence across the world that there can be ‘transformative’ militarisation which contributes positively to the development of the country.<sup>1</sup> This is precisely why some countries often turn to the military in situations of crisis and emergencies. Arguably, no country can effectively plan a perfect emergency plan for the very reason that it comes unannounced. The majority of countries, more so in Africa, cannot effectively mobilise their often tattered and inefficient civilian health institutions to combat these often fast-spreading health pandemics such as COVID-19. The long legalistic operating bureaucratic nature of the civilian institutions also often is a stumbling block to quick

<sup>1</sup> K Mani “‘The soldier is here to defend you.’ Latin America’s militarised response to COVID-19’ *World Politics Review* 21 April 2020, <https://www.worldpoliticsreview.com/articles/28700/from-peru-to-venezuela-military-forces-take-the-lead-in-coronavirus-responses> (accessed 24 July 2020).

interventions in emergencies. Therefore, it is not surprising and certainly not illegal to have countries all over the world turning to their military forces to harness their efficiency and swiftness in managing such emergencies. By their training and structural setup based on a strict hierarchical command and control characterised by unquestionable obedience to orders by subordinates, the execution of tasks often is meticulous and expedient delivering almost instant results.<sup>2</sup>

Further, the singling out of the military as the ideal institution to confront such emergencies is attributed to its overly-emphasised values that define the military identity. These include 'loyalty, honour, conformity, and obedience' that are increasingly projected as superior to civilian values and 'desirable for civilians and as panacea to particular kinds of social problems'.<sup>3</sup> Consequently, the military is projected as the institution deserving of an 'ambivalent status' almost tending to cultic in nature, wherein every other civilian entity must be subordinate; after all, they are not as organised as the military.<sup>4</sup>

Having a standing effective military with the ability to offer human resource in such emergencies is both a great milestone but also a call for concern. The latter is premised on the way in which these military institutions are hijacked by the ruling political class to consolidate their often authoritarian rule prevalent before the outbreak of such pandemics, as has been witnessed in Myanmar, Thailand, Indonesia and the Philippines.<sup>5</sup> In addition, there is the contested manner – often militant – dubbed 'martial law-like lockdown' in which these institutions work by approaching pandemics as an 'insurgency to quash – not a crisis that requires long-term health reforms'.<sup>6</sup> These modes of work often restructure the constitutionally-guaranteed power relations in the country through toppling and subordinating of civilian authority to the military in deliberate 'claw back on civilian power'.<sup>7</sup> More fundamentally is the way in which such pandemics are weaponised to further militarise society and general governance with grave ramifications for the progression of the rule of law, human

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2 As above.

3 P Higate et al 'Militarisation, stigma, and resistance: Negotiating military reservist identity in the civilian workplace' (2019) *Critical Military Studies* 5, <http://eprints.lse.ac.uk/100347/> (accessed 22 July 2020).

4 As above.

5 N Chandran 'The pandemic has given armies in Southeast Asia a boost' *FP News* (Washington) 15 June 2020, <https://foreignpolicy.com/2020/06/15/coronavirus-pandemic-army-military-southeast-asia-boost-indonesia-philippines-jokowi-duterte-authoritarianism/> (accessed 20 September 2020).

6 As above.

7 Higate et al (n 3).

rights and constitutionalism.<sup>8</sup> Using Uganda and its COVID-19 containment framework, managed by the military, as a case study, the article investigates this understudied phenomenon of militarised emergency response.

The article is divided into four parts, and probes how the COVID-19 pandemic was weaponised in Uganda to accentuate the militarisation agenda of the ruling party, the National Resistance Movement (NRM). Part 1 is the conceptualisation of the notion of militarisation and how, in practice, it was adapted to the public health emergency response, its trends and patterns and the motivating factors behind its deployment. In parts 2 and 3 the article further examines the impact of the militarised COVID-19 response on the rule of law and human rights in Uganda respectively. In part 4, without necessarily denouncing the use of the military in such situations, the article examines what is acceptable military response and under what circumstances should it be involved by way of recommendations.

## 2 Conceptualisation, trends and patterns of militarisation of the COVID-19 emergency response

Militarisation has been defined as

a step-by-step process by which a person or a thing gradually comes to be controlled by the military or comes to depend for its well-being on militaristic ideas. The more militarisation transforms an individual or a society, the more that individual or society comes to imagine military needs and militaristic presumptions to be not only valuable but also normal.<sup>9</sup>

Adelman further expounds on this, drawing in comparatively militarism. She argues:<sup>10</sup>

Militarism blurs the boundaries between what can be defined as military and what can be viewed as part of civilian life. Militarism demands that an entire society become permeated with and built according to military values and priorities ... the concept of militarisation draws attention to the simultaneously material and discursive nature of military dominance.

8 J Smith & N Cheeseman 'Authoritarians are exploiting the Coronavirus. Democracies must not follow suit' *FP News* (Washington) 28 April 2020, <https://foreignpolicy.com/2020/04/28/authoritarians-exploiting-coronavirus-undermine-civil-liberties-democracies/> (accessed 20 September 2020).

9 C Enloe *Maneuvers: The international politics of militarising women's lives* (2000) 3.

10 M Adelman 'The military, militarism, and the militarisation of domestic violence' 9 September 2003 Arizona State University 23-24.

Adelman concludes that 'in a militarised society, one is always oriented toward war'.<sup>11</sup> Uganda is not any different from this kind of society. To an innocent onlooker, the deployment of the military to contain COVID-19 in Uganda may have appeared as a necessary action and in sync with the trend that was witnessed worldwide, including in the United Kingdom, Belgium, France, Spain, Hungary, Germany, Sweden and Italy, in Europe, and Tanzania, Kenya, Uganda, South Africa and Nigeria.<sup>12</sup> A criticism of this, therefore, may have come off as lamentationist and dismissed as the usual rubble-rousing of human rights activists bent on failing, unfairly, genuine efforts of a concerned government saving its citizens from the scourge. This is plausible if one chooses to concentrate only on the period of COVID-19. However, further historical scrutiny manifests evidence of a deliberate agenda, facilitated by a permissive legal framework and an increasingly benevolent authoritarian executive towards reliance on militarism/militarisation to consolidate power in Uganda.

The use of the military might and its signature violence in Uganda to achieve and maintain political power dates back to the most immediate years of independence in 1962.<sup>13</sup> As Asiimwe rightly notes, since 1966 Uganda's political landscape has been 'characterised by unconstitutional governance; strangulation of civil institutions of governance; totalitarianism, state repression and violation of human rights' with the military as the central player.<sup>14</sup> Militarisation sustained the brutal regimes of President Milton Obote (1966-1971); President Idi Amin, who ruled by decree with the military as the source and guarantor of his power from 1971 to 1979; and a number of military governments between 1980 and 1986 when the guerilla movement of the National Resistance Army (NRA) took over power.<sup>15</sup> Upon the takeover of government in 1986 by the NRA, Mr Yoweri Museveni preached hope for the battered country through his momentous speech:<sup>16</sup>

11 As above.

12 J Kazibwe et al 'Using military health systems in the response to COVID-19' Centre for Global Development 15 June 2020, <https://www.cgdev.org/blog/using-military-health-systems-response-covid-19> ; D Olewe 'Coronavirus in Africa: Whipping, shooting and snooping' *The BBC* (London) 8 April 2020, <https://www.bbc.com/news/world-africa-52214740> (accessed 20 September 2020).

13 S Namwase 'Uganda's army and violence: How COVID-19 is offering hints of change' *The Conversation* (Parkville) 13 May 2020, <https://theconversation.com/ugandas-army-and-violence-how-covid-19-is-offering-hints-of-change-138331> (accessed 20 July 2020).

14 GB Asiimwe 'Of fundamental change and no change: Pitfalls of constitutionalism and political transformation in Uganda, 1995-2005' (2014) 39 *Africa Development* 21; Council for the Development of Social Science Research in Africa 24.

15 Asiimwe (n 14) 24; S Lindemann 'Exclusionary elite bargains and civil war onset: The case of Uganda' (2010) 2 *Crisis States Working Papers Series 2-4*.

16 Asiimwe (n 14) 24; Lindemann (n 15) 31.

No one should think that what is happening today is a mere change of guard: it is a fundamental change in the politics of our country. In Africa, we have seen so many changes that change, as such, is nothing short of mere turmoil. We have had one group getting rid of another one, only for it to turn out to be worse than the group it displaced. Please do not count us in that group of people.

Political commentators at the time applauded this as a ‘watershed in the political architecture of Uganda’,<sup>17</sup> but not for long, as manifestations of ‘continuities with the past, some of which were in different forms and magnitude’ since emerged.<sup>18</sup> Key to these emerging old trends is the reliance on the military to consolidate political power to the detriment of the fledgling constitutionalism in the country.<sup>19</sup> To date, the NRA/military ideological orientation reigns supreme clothed in civilian tendencies including cosmetic elections to create what some scholars insist is a ‘benevolent dictatorship’ maintained by the coercive force of the military.<sup>20</sup> As a result, as Namwase opines, the military’s use of excessive force against perceived enemies has always been ‘pervasive and entrenched ... [and] this has been magnified during the COVID-19 crisis’ which has witnessed strengthened militarisation.<sup>21</sup>

It is not surprising, therefore, that the Uganda Peoples’ Defence Force (UPDF) and its attendant auxiliary forces are firmly under government control aided by ‘propaganda, neo-patrimonial practices and ethnicity’ as the principal traits of the civil-military relationship.<sup>22</sup> The militarism and militarisation continue to take a stronghold in Uganda’s political, economic, social and cultural life spheres, albeit at varying degrees of permeation and acceptability and/or resistance by the populace. The following is a brief synthesis of a litany of efforts by the executive geared towards militarisation.

### 3 Manifestations of militarisation in Uganda

Evidence of the government of Uganda’s militarisation agenda can be deciphered from its foreign policy and domestic ‘rebirthing’ of the public sector. One such manifest action was the proliferation of the Ugandan military contingents in various parts of sub-Saharan Africa mostly projected as a pacifying force, deployed exclusively

17 As above.

18 As above.

19 As above; also see J Okuku *Ethnicity, state power and the democratisation process in Uganda* (2002) 22.

20 J Oloka-Onyango ‘Uganda’s “benevolent” dictatorship’ (1998) 2, <https://ssrn.com/abstract=3621118> (accessed 22 July 2020).

21 Namwase (n 13).

22 L Heiberg *Civil-military relations in Uganda: A cultural approach* (2010) 57.

by President Museveni amidst protests from Parliament. This was witnessed in the Democratic Republic of the Congo (DRC) and Central African Republic in pursuit of the Lord's Resistance Army (LRA);<sup>23</sup> also in South Sudan allegedly to protect Ugandans who were there at the height of the civil war, and in Somalia as part of the African Union Mission to Somalia (AMISOM), and in Guinea Bissau controversially as a mercenary force at the beckon of the President of Bissau who was facing resistance from the populace.<sup>24</sup>

Domestically, perhaps no institution has suffered the dominance of the military ideology over its own more than the Ugandan police force, which is also central to this COVID-19 pandemic in its cardinal role of enforcing law and order. Between 2001 and 2017 President Museveni consistently appointed senior military personnel as inspectors-general of police (IGP): Major-General Katumba Wamala (2001-2005), later replaced by General Kale Kayihura (2005-2017).<sup>25</sup> Career police officers called out on his reign as having 'damaged the professional capacity of the force in ways which will have lasting repercussions in Uganda. His militaristic policing grossly and negatively impacted on the criminal justice system of the country.'<sup>26</sup>

General Kayihura was replaced by a veteran career police officer, Okoth Ochola, deputised by a serving military general, Major General Sabiiti Muzeeyi, who was the former commander of the military police under the UPDF.<sup>27</sup> Political analysts maintained that, in reality, power in the police was concentrated in the military deputy more than the career policeman (IGP).<sup>28</sup> In July 2019 President Museveni deployed four more senior military personnel into the police, placing them in the most strategic four positions of the institution: the Chief Joint Staff (CJS) Assistant Inspector-General of Police (AIGP); Brigadier Godfrey Golooba; AIGP Brigadier Jack Bakasumba; Colonel Jesse

23 R Mugabe 'UPDF on the spot over DR Congo mission' *The New Vision* (Kampala) 30 December 2017, <https://www.newvision.co.ug/news/1468255/updf-spot-dr-congo-mission> (accessed 20 September 2020).

24 E Biryabarema 'Uganda says will withdraw troops hunting rebels in Central African Republic' Reuters 10 June 2016, <https://www.reuters.com/article/us-uganda-rebels/uganda-says-will-withdraw-troops-hunting-rebels-in-central-african-republic-idUSKCN0YW1HE> (accessed 20 July 2020); RR Atkinson 'From Uganda to the Congo and beyond: Pursuing the Lord's Resistance Army' (2009) *International Peace Institute* 275.

25 J Kamoga 'More military men don police uniform as Uganda polls loom' *The East African* (Nairobi) 14 July 2019, <https://www.theeastafrican.co.ke/tea/news/east-africa/more-military-men-don-police-uniform-as-uganda-polls-loom-1422504> (accessed 20 July 2020).

26 H Karugaba 'Stop using soldiers to fight internal crime' *The Daily Monitor* (Kampala) 23 July 2019, <https://www.monitor.co.ug/OpEd/Commentary/Stop-using-soldiers-fight-internal-crime/689364-5206640-x4o9hy/index.html> (accessed 20 July 2020).

27 Kamoga (n 25).

28 As above.

Kamunanwire; and Colonel Chris Damulira.<sup>29</sup> To many this was a 'systematic takeover, a fusion of the police and the military that they say stems from a historic discomfort with the Police that President Museveni has expressed since 1986, when he took over the country's leadership'.<sup>30</sup>

Beyond the militarisation of the police, the President systematically extended the dominance of the military into other strategic sectors of the government, especially in relation to service delivery. This was often implemented riding on the highly-hyped reputation of the UPDF as a professional army, a tag that finds comfort in a comparative analysis with the rogue and violent past militaries of Uganda.<sup>31</sup> Military doctors were deployed to cover the duties of striking doctors in government hospitals in November 2017.<sup>32</sup> The military was heavily deployed across the country to 'transform' the heavily-funded Operation Wealth Creation project (OWC) in preference to the highly-technical National Agricultural Advisory Services (NAADS) under the Ministry of Agriculture.<sup>33</sup>

In the same vein, the Directorate of Immigration at the Ministry of Internal Affairs too was effectively under military governance by 2013 under the leadership of the General Aronda Nyakairima, formerly the Chief of Defence Forces under the UPDF who introduced compulsory military training to civilian staff.<sup>34</sup> In December 2018 the President appointed more military personnel in this ministry in strategic positions of Director of Immigration and Citizenship, Commissioner of Immigration and Commissioner of Citizenship and Passports.<sup>35</sup> In 2017 the military took over the fisheries department under the

29 'Museveni names four new police AIGPs from UPDF' *The Independent* (Kampala) 2 July 2019, <https://www.independent.co.ug/museveni-names-four-new-police-aigps-from-updf/> (accessed 23 September 2020).

30 Kamoga (n 25). Part of this militarisation of the police is traced to Mr Museveni's disdain for the police in the 2001 general presidential elections when many of the poll results conducted in the police barracks were for his opposing candidate, retired Colonel Dr Kizza Besigye. Mr Museveni then lamented that he could still lose even if he were to 'stood against a cow' at a police barracks.

31 Namwase (n 13).

32 C Kasujja 'UPDF deploys military doctors at public hospital' *The New Vision* (Kampala) 16 November 2017, <https://www.newvision.co.ug/news/1465832/updf-deploys-military-doctors-public-hospital> (accessed 13 July 2020).

33 F Musisi 'Museveni: Why I entrusted Naads programme with army' *The Daily Monitor* (Kampala) 16 June 2014, <https://www.monitor.co.ug/News/National/Museveni--Why-I-entrusted--Naads-programme-with-army/688334-2349720-1guvia/index.html> (accessed 13 July 2020).

34 C'Obore 'Aronda takes immigration officers for army training' *The Daily Monitor* (Kampala) 19 October 2013, <https://www.monitor.co.ug/News/National/Aronda-takes-Immigration-officers-for-army-training/688334-2038242-6dtkc6/index.html> (accessed 13 July 2020).

35 M Gyagenda 'Museveni nominates senior army officer to immigration amid heightened illegal dealings' *Soft Power News* (Kampala) 22 December 2018, <https://www.softpower.ug/museveni-nominates-senior-army-officers-to-immigration-amid-heightened-illegal-dealings/> (accessed 12 July 2020).

Ministry of Agriculture, Animal Industry and Fisheries, supposedly to crack down on what President Museveni called ‘illegal fishing’ and the depletion of the fish stocks in the water bodies.<sup>36</sup> This take-over, creation and deployment of the Uganda Peoples’ Defence forces (UPDF) Fisheries Protection Unit has since been marred by extreme human rights violations against the fishing community in the various water bodies of Uganda, including Lake Albert, Lake Victoria, Lake Edward, Lake George and Lake Kyoga.<sup>37</sup> Similarly, despite having formal, constitutionally-established anti-graft institutions such as the Inspector General of Government (IGG), the President created an ad hoc anti-corruption unit headed by serving military personnel within the state house.<sup>38</sup>

The militarisation permeated Ugandan society to the extent that it often was invoked in sarcasm. A case in point was at the height of the African championships, held in Egypt, when the Uganda Cranes – the national soccer team – threatened to strike due to no remuneration. Social media was awash with Ugandans joking of how the President should ‘send soldiers’ to play in place of professionals.<sup>39</sup> A joke it may be, but drawn from the reality surrounding them – the scourge of militarisation.

#### 4 Legislative framework for military deployment in the COVID-19 response

The first choice of deployment of the military was justified through reliance on various legal provisions both within the Constitution and the subsidiary laws. Of course, some of these provisions, although

36 P Mudliar ‘Fire on the water: Militarisation of fisheries management on Lake Victoria’ *Secure Fisheries* 19 April 2018, <https://securefisheries.org/news/militarization-fisheries-lake-victoria> (accessed 20 September 2020).

37 ‘UPDF fisheries protection unit to be deployed on Lake Albert’ *The Independent* (Kampala) 18 June 2020, <https://www.independent.co.ug/updf-fisheries-protection-unit-to-be-deployed-on-lake-albert> (accessed 20 September 2020); ‘Parliament halts UPDF fisheries operations’ *The Daily Monitor* (Kampala) 19 December 2019, <https://www.monitor.co.ug/uganda/news/national/parliament-halts-updf-fisheries-operations-1865750> (accessed 20 September 2020); A Otto ‘Cabinet to investigate UPDF fisheries protection unit’ *Uganda Radio Network* (Kampala) 28 January 2020, <https://ugandaradionetwork.net/story/cabinet-to-investigate-updf-fisheries-protection-unit> (accessed 20 September 2020).

38 S Nabwiiso ‘State house anti-corruption unit vows to end corruption in local governments’ *EABW* (Kampala) 27 January 2020, <https://www.busiweek.com/state-house-anti-corruption-unit-vows-to-end-corruption-in-local-governments/> (accessed 20 September 2020); Uganda Media Centre ‘Achievements by the state house anti-corruption unit since inception’ (Kampala) 28 April 2020, <https://www.mediacentre.go.ug/media/achievements-state-house-anti-corruption-unit-inception> (accessed 20 September 2020).

39 J Bahingwire ‘Uganda government accused of militarising the public service’ *The Independent* (Kampala) 19 April 2018, <https://www.independent.co.ug/uganda-govt-accused-of-militarizing-the-public-service/> (accessed 21 July 2020).

rightly cited, were interpreted narrowly to fit into the grand scheme of militarisation and unquestionable state authority as the last line of defence against the pandemic. In this part we examine the legislative framework used by the Ugandan government in combating the pandemic and how permissive it was of militarisation, thus negatively impacting on the protection and promotion of human rights.

To start with, Objective 23 of the Constitution of Uganda of 1995 provides that 'the State shall institute effective machinery for dealing with any hazard or disaster arising out of natural calamities or any situation resulting in general displacement of people or disruption of their normal life' as, arguably, COVID-19 had done.<sup>40</sup> It should be noted that the Constitution does not conceptualise 'effective machinery', a term that, arguably, is susceptible to permissive interpretation by the government to justify the deployment of the military as part of such machinery.

The UPDF is established under article 208 of the Constitution of the Republic of Uganda to be 'non-partisan, national in character, patriotic, professional, disciplined, productive and *subordinate to the civilian authority* as established under this Constitution'.<sup>41</sup> The institution is subordinated to civilian authority at all levels in the country, at least on paper, a departure from Uganda's violent history when the military reigned supreme over civilian authority. However, perhaps more critical in accentuating militarisation in the Constitution is article 209 which provides for the functions of the UPDF. Among these function are the preservation and defence of the sovereignty and territorial integrity of Uganda, which essentially places the mandate of the UPDF outside the domestic realm of Uganda. Second, the UPDF is called upon to cooperate with the civilian authority in emergency situations and in cases of natural disasters. The other is 'to foster harmony and understanding between the defence forces and civilians' and, lastly, 'to engage in productive activities for the development of Uganda'.<sup>42</sup> Opportunistically used to cause deployment, the same provisions unfortunately were not followed in practice as the UPDF eventually took over and sidelined the civilian authorities, as shown later in the article. The government relied largely on the foregoing functions, arguing that the deployment of the UPDF was constitutional in as far as it was cooperating with the Ministry of Health to deal with the emergency

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40 Constitution of the Republic of Uganda 1995 (as set out under Objective 23).

41 Art 208(2) Constitution of the Republic of Uganda.

42 Arts 209(a)-(d) Constitution of the Republic of Uganda.

situation of COVID-19. The spokesperson of the UPDF at the time averred:<sup>43</sup>

UPDF had to rise to the occasion during the campaign against COVID-19, we could not afford disappointing Ugandans, we had to fulfill our Constitutional obligation. Article 209 speaks out on the functions of the Defence Forces and one them is to cooperate with the civilian authority in emergency situations and also in case of disasters. There is no doubt that COVID-19 situation is an emergency because it has been serious and indeed it is serious, it was unexpected, it is very dangerous and required immediate action.

In the same vein, article 212 of the Constitution establishes the Ugandan police force directing that it 'shall be nationalistic, patriotic, professional, disciplined, competent and productive; and its members shall be citizens of Uganda of good character'. Its functions include '(a) to protect life and property; (b) to preserve law and order; (c) to prevent and detect crime; and (d) to cooperate with the civilian authority and other security organs established under this Constitution and with the population generally'.<sup>44</sup> The most immediate preceding function was opportunistically relied on to bring in the military as a means of the police to cooperate with 'other security organs'. Indeed, the narrative went that the UPDF was only supporting the police; yet, as shown above, the police had already been subordinated to the military through the elaborate process of militarisation explained earlier. The spokesperson of the UPDF, Brigadier-General Richard Karemiro, averred:<sup>45</sup>

UPDF has played a very supportive role to the Police alongside other friendly security forces without excluding our brothers and sisters-the LDUs. We always conduct joint operations in support of each other and that is why the country is peaceful with few incidents of crime. The joint security forces have spent hundreds of hours on check points, border patrols, enforcement of curfew, which measures have saved our people and the country from the pandemic.

The other central law was the Public Health Act, chapter 281 under the laws of Uganda which empowered the Minister of Health to undertake necessary measures to combat the spread of an infectious disease in the country. Under this law, a number of statutory instruments were published to legitimise and ratify the presidential directives that had been announced haphazardly with no force of law. These instruments included Public Health (Notification of

43 AA Kungu 'Interview: UPDF speaks out on role in COVID-19 fight, attacks by civilians and conduct of Idus' *Soft Power News* (Kampala) 6 June 2020, <https://www.softpower.ug/files/interview-updf-speaks-out-on-role-in-covid-19-fight-attacks-by-civilians-and-conduct-of-Idus/> (accessed 20 September 2020).

44 Arts 212 (a)-(d) Constitution of the Republic of Uganda 1995 (emphasis added).  
45 Kungu (n 43).

COVID-19) Order, SI No 45/2020; Public Health (Prevention of COVID-19) (Requirements and Conditions of Entry into Uganda) Order, SI No 46/2020; Public Health (Control of COVID-19) Order, SI No 52/2020; and Public Health (Prohibition of Entry into Uganda) Order, SI No 53/2020. Almost all of these were consistently amended as the situation demanded.

Of equal importance was the need to enlist unfettered citizenry participation in situations of pandemics. Under the Penal Code (CAP 120), a person who performs any negligent act, which is and which he or she knows or has reason to believe to be likely to spread the infection of any disease dangerous to life, commits an offence and is liable to imprisonment of seven years. The law invoked mandatory obligations that were supposed to be performed by the citizens in cooperation with government measures.

From the above legal provisions were crafted a litany of guidelines and measures adopted by the government to prevent the further spread of the Coronavirus. These measures, announced on 25 March 2020 by the President, included a ban on public transport and open markets that did not sell foodstuffs. Other bans included saloons, bars, schools and institutions of higher learning, bars and cinema halls, prayers in churches and mosques and open-air prayers, hotels, non-urgent court hearings, and

marriage ceremonies, wedding parties, vigils and funerals, banned except where the people gathered are not more than 10, public meetings including political rallies, conferences and cultural related meetings, indoor and outdoor concerts and sports events, trading in live animals at places designated for this purpose by a local authority, group exercising including group jogging in public places, highways, roads and other public spaces.<sup>46</sup>

The measures also stipulated mandatory quarantine of 14 days for any returning Ugandan from what the government had categorised as high-risk countries.<sup>47</sup> Further measures were announced on 30 March 2020 which extended the ban to all privately-owned vehicles, the institution of a dusk-to-dawn curfew, the closure of all shopping

46 The Public Health (Control of COVID-19) (Amendment) Rules, 2020 (under secs 11 & 27 of the Public Health Act, Cap 281).

47 The Public Health (Prevention of COVID-19) (Requirements and Conditions of Entry into Uganda) Order, which required persons arriving in Uganda to among others undergo isolation and quarantine for 14 days or other period as directed by the medical officer, depending on their countries of departure and transit. Other regulations included the Public Health (Prohibition of Entry into Uganda) Order, which prohibits entry into Uganda by any person with effect from Monday 23 March 2020. This order was set to expire on 23 April 2020, except if and when extended by the Minister.

malls and arcades and non-food shops for a period of 14 days pending revision.<sup>48</sup> It is for purposes of the enforcement of these guidelines and regulations that the security agencies, led by the military, were deployed.

Another equally permissive legal policy framework was the National Policy for Disaster Preparedness and Management of 2010. It provided for the Ministry of Defence – more so the UPDF as one of the central stakeholder institutions that is relied on – to ‘ensure timely provision of support in numbers of human resources, equipment and logistics whenever massive disasters occur, that is beyond the capacities of the regular emergency institutions’.<sup>49</sup> It was noted:<sup>50</sup>

The security forces are standby organised and well-equipped institutions located strategically across the country. They can be called upon at short notice to give a full range of support (rescue, transport and recovery) during emergencies. The security agencies are a major source of equipment, well organised personnel and other logistics for emergency management.

The same policy, however, warns and places limitations on the capabilities of security forces.

The security forces, however, are not well placed for vulnerability assessments, risk mapping, public awareness sensitisation and education, mitigation, preparedness and contingency planning which are better performed by the civilian technical institutions.<sup>51</sup>

In relying on the UPDF as a partner, the policy provides various guidelines that are supposed to be followed. Among them is the principle that ‘the armed forces shall not take over leadership from the civilian authority when called upon to give support’.<sup>52</sup> Clearly, this guideline only remained on paper.

Uganda did not declare a state of emergency in the country despite the elaborate provisions in article 110 of the Constitution which guarantee the President the latitude of making this declaration for a period lasting not more than 90 days.<sup>53</sup> It is very difficult not to

48 The Public Health (Control of COVID-19) Rules, 2020; the Public Health (Control of COVID-19) (No 2) (Amendment) Rules, 2020; the Public Health (Control of COVID-19) (No 2) Rules, 2020; the Public Health (Prohibition of Entry into Uganda) (Amendment) Order, 2020; Public Health (Prevention of COVID-19) (Requirements and Conditions of Entry into Uganda) Order, 2020.

49 Directorate of Relief, Disaster Preparedness and Refugees office ‘National Policy for Disaster Preparedness and Management’ October 2010 56-57.

50 As above.

51 As above.

52 As above.

53 Art 110 Constitution of the Republic of Uganda 1995.

read political expediency into this government's decision. The reason perhaps is to be found in the need to circumvent the expansive accountability and human rights framework that the Constitution establishes should the executive declare a state of emergency. The first layer of accountability and oversight in such a situation is incarnate in the Uganda Human Rights Commission. The Constitution grants the Uganda Human Rights Commission power to review the case of a person who is restricted or detained in accordance with the enforcement of the state of emergency.<sup>54</sup> The aim of this mandate is to ensure that there is no abuse of rights and freedoms during such a state of emergency. The Commission has the power to 'order the release of that person, or uphold the grounds of the restriction or detention'.<sup>55</sup>

The second layer is Parliament upon which the Constitution bestows powers to receive and scrutinise the reports of the responsible minister detailing the number of the people who have been detained and his actions on the reports of the Uganda Human Rights Commission.<sup>56</sup> Parliament also reserves the power to extend the period of the declared state of emergency should it deem it necessary. It can also revoke the declaration in addition to having veto power over the first instance declaration by the President.<sup>57</sup> The epitomisation of this parliamentary power and oversight over the presidency is the directive by the Constitution for the President to 'submit to Parliament at such intervals as Parliament may prescribe, regular reports on actions taken by or on behalf of the President for the purposes of the emergency'.<sup>58</sup>

Clearly, declaring a state of emergency would have brought about a different – a progressive and human rights-sensitive – direction. Kabumba captures the essence of this path as follows:;<sup>59</sup>

[It establishes] a clear and transparent legal basis for effective state action in responding to Covid-19; while at the same time ensuring that (i) such a response is delicately balanced with the protection of human rights; and (ii) the response is institutional rather than individualised. To be clear, while the guidance and leadership of the President in the current crisis is necessary and welcome, the Constitution did not envisage that he would be the sole or dominant actor in this regard ... all factors considered, both the state and citizens would be better

54 Art 48 Constitution of the Republic of Uganda 1995.

55 As above.

56 Art 49 Constitution of the Republic of Uganda 1995.

57 Art 110 Constitution of the Republic of Uganda 1995.

58 Art 110(6) Constitution of the Republic of Uganda 1995.

59 B Kabumba 'The 1995 Constitution and COVID-19' *Law Africa* April 2020 8, <https://lawafrica.com/wp-content/uploads/2020/04/The-1995-Constitution-and-Covid-19-by-Dr.-Busingye-Kabumba.pdf> (accessed 12 July 2020).

served by the transparency and legal certainty that would be provided by the declaration of a state of emergency. At the very least it would ensure institutional checks and balances in determining the appropriate response to the crisis.

In the end, the President was faced with a choice between militarisation and constitutionalism. The President opted for the former with limited oversight and certainly more powers within his ambit to control the COVID-19 response mechanisms.

## 5 Manifestations of militarisation in the COVID-19 response

### 5.1 'War' narratives, militarised terms and analogies

The first tier of this militarisation took the course of shaping the narrative in militarised terms or analogies. These phrases included 'waging a war against an invisible enemy'; 'we will defeat it'; 'enemy', and 'patriotic duty' as used both in Uganda and by other governments across the world.<sup>60</sup> This narrative, characterised by instilling a 'COVID-19 fear psychosis' in the masses, became a recruitment framework of the public by the government, in the process stifling any critical views of the measures employed to contend with COVID-19.<sup>61</sup> Stringent measures of restricting rights and freedoms and the deployment of violence by the state in their enforcement became normalised without criticism by the already-recruited citizenry. The application of the war metaphors and narratives that were picked on by the media without scrutiny were not meant to simply stop at words. Rather, they were used to aid the framing of a 'problem as a threat – an enemy to defeat – and to zoom into particular aspects of the threat at the cost of many others means to already think violently'.<sup>62</sup>

60 R Acheson 'COVID-19: Militarise or organise?' Women's International League for Peace and Freedom 20 March 2020, <https://www.wilpf.org/covid-19-militarise-or-organise/> (accessed 24 July 2020).

61 D Rajasingham-Senanayake 'Time to end the COVID-19 fear psychosis and militarised curfews' *In-Depth News* (Colombo) 22 April 2020, <https://www.indepthnews.net/index.php/opinion/3512-time-to-end-the-covid-19-fear-psychosis-militarized-curfews> (accessed 20 July 2020). Though Rajasingham-Senanayake used 'COVID-19 fear psychosis' in relation to Sri-Lanka, the same analogy obtains in Uganda.

62 C Laucht & ST Jackson 'Soldiering a pandemic: The threat of militarised rhetoric in addressing COVID-19' 24 April 2020, <http://www.historyandpolicy.org/opinion-articles/articles/soldiering-a-pandemic-the-threat-of-militarized-rhetoric-in-addressing-covid-19> (accessed 20 July 2020).

Viewed from a wider perspective, militarisation connotes aspects of violence. Thus, some scholars maintain that this methodology of militarising the COVID-19 response measures eventually gave way to and indeed bred 'a violent way of thinking that relies on drawing borders and lines of distinction between self and other'.<sup>63</sup>

The 'other' here figures in different ways: as the subaltern whose suffering is neglected and who becomes disposable in comparison to the ... healthy and wealthy; as the 'other' who her/himself becomes understood as the threat, the poor, the migrant, the 'unhygienic'; as the opinionated 'other' who promotes views that challenge the proclaimed necessity that all think and act uniformly against the enemy as an absolute priority'.<sup>64</sup>

It is this narrative of 'waging a war' against the Coronavirus that was the most 'deceptively alluring analogy for mobilising private and public resources to meet a present danger'.<sup>65</sup>

Indeed, in Uganda this militarised response was clad in secrecy, war tones, a lack of accountability, all pointing to the creation of a new citizen, whose patriotism could only manifest in his or her conformist, unquestioning 'values' towards the government. Laucht and Jackson aptly summarise this mind indoctrination that was witnessed in Uganda during COVID-19:<sup>66</sup>

To think violently then also means to invest in the idea that there is only one truth which dictates what uniform action must look like; that the state knows what is best for society and all others are not only wrong but are dangerously wrong ... The 'self' created through these violent ways of thinking is not a democratic body ... Individual agency is confined to passivity: stay home and save lives. In state we trust.

In that line, the decision making was recentralised into the hands of the President and a few of his appointees in the National Joint Task Force on COVID-19, of which the composition is explained later in this article. There was no room for any criticism of the way in which the Task Force performed its work, especially from the citizens further reconstructing the power relations in the decision-making framework of society. Contrary to the constitutional provisions that subject military authority and power to civilian authority, militarised COVID-19 response structures and measures uplifted the military above the civilian institutions. The fear and uncertainty that engulfed the public arising out of COVID-19 provided the perfect cover upon

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63 As above.

64 Laucht & Jackson (n 62).

65 As above.

66 Laucht & Jackson (n 62 above)

which the militarisation quest was built and sustained.<sup>67</sup> Resultantly, there was minimal or no challenge to the authoritarian regulations that were enacted devoid of the requisite declaration of a state of emergency. However, even as the public in a 'multi-partisan backing for most of the edicts aimed at stemming the spread of the virus', joined the state and embraced militarisation to allegedly counter the spread of COVID-19, the pressing fear, perhaps unspoken, was whether the now permeated and strengthened militarisation would be rolled back in the post-COVID-19 pandemic era.<sup>68</sup>

## 6 Overrun of the civilian public health institutions by the military

Whereas Uganda has an ideal public health governance institutional framework running from the central government through to the local government at the district level, the military deployed in the National Emergency Coordination and Operations Centre (NECOC) overrun and sidelined the decision-making power under this ideal structure. NECOC was created under the office of the Prime Minister – Directorate of Relief, Disaster Preparedness and Refugees mandated to 'coordination, support and facilitation in order not to duplicate or take over emergency mandates of existing institutions of government, the private sector, NGOs and Uganda Red Cross Society'.<sup>69</sup> Thereby, by design the NECOC was led by a National Incident Commander (NIC) who at all times must be a seconded senior officer from either the UPDF or the Ugandan police force. This centre was directly linked to the Uganda Police Operations Centre, all district police stations (District Emergency Coordination and Operations Centres) and to the UPDF on a 24-hour basis. This centre was mandated to have 'seconded junior officers from Uganda Police and UPDF to operate communication links the Uganda Police Force and the UPDF systems'.<sup>70</sup> The seconded communications officers were required 'for purposes of managing and keeping separate the confidentiality of information on the military and police communications systems'.<sup>71</sup>

67 I Dolan 'Here in Uganda we have never faced a situation like COVID before' *Relief Web* 2 April 2020, <https://reliefweb.int/report/uganda/here-uganda-we-have-never-faced-situation-covid> (accessed 14 September 2020).

68 I Anguyo 'Unmasking political COVID-19 face coverings in Uganda' *London School of Economics and Political Science* August 2020, <https://blogs.lse.ac.uk/africaatlse/2020/08/04/unmasking-political-covid19-face-mask-coverings-uganda-health/> (accessed 14 September 2020).

69 Directorate of Relief, Disaster Preparedness and Refugees Office (n 49) 35.

70 As above.

71 As above.

Despite criticism of the overly militant structure in charge of the COVID-19 prevention measures, the Uganda Human Rights Commission supported this deployment. It argued that the security fraternity of Uganda led by the UPDF 'possess a national command network with experience emergency response and disciplined manpower who can be deployed at relatively short notice to help supplement civilian frontline services during national emergency situations'.<sup>72</sup> However, as the policy permissively and conveniently provided, the entire emergency response mechanism was placed under the superintendence of the military while sidelining and subordinating the civilian health system leadership at the periphery.

### 6.1 Military dominance over the Ugandan police force in the enforcement of COVID-19 preventive measures

What was witnessed in Uganda was the extended roles and power that were accorded to the UPDF, playing undoubtedly the most prominent role in the internal security and COVID-19 response structuring of the country. In March 2020 the Ugandan government through the highly-powerful National Security Council established the Inter-Agency Security Joint Task Force (IAJTF).<sup>73</sup> This task force operated at both the national and regional levels with the mandate of supporting the Ministry of Health (MOH) in combating the COVID-19 epidemic.<sup>74</sup> The IAJTF was comprised of officers from the UPDF, the Uganda Police Force (UPF), Uganda Prison Services (UPS), and the National Joint Intelligence Committee, Immigrations and Customs Directorates under the Ministry of Internal Affairs.<sup>75</sup> Other member government entities included the National Water and Sewerage Corporation, UMEME and Kampala City Council Authority and Uganda Revenue Authority. In furtherance of military dominance, the IAJTF was led by the UPDF Deputy Chief of Defence Forces under the directorship of Lieutenant-General Wilson Mbasu Mbadi, a former aide to President Museveni.<sup>76</sup> In relation to its day-

72 P Achan Okiria 'Legal framework on COVID-19 and implications on enforcement' 23 April 2020, <https://www.jlos.go.ug/index.php/com-rsform-manage-directory-submissions/services-and-information/press-and-media/latest-news/item/754-legal-framework-on-covid-19-and-implications-on-enforcement> (accessed 21 July 2020). Ms Achan is a commissioner with the Uganda Human Rights Commission.

73 S Masaba 'Security teams hunt for COVID-19 carriers' *The New Vision* (Kampala) 27 March 2020, <https://www.newvision.co.ug/news/1517135/security-teams-hunt-covid-19-carriers> (accessed 14 September 2020).

74 W Kamusiime 'Inter-agency task force formed to combat COVID 19' *UPF News* (Kampala) 25 March 2020, <https://www.upf.go.ug/inter-agency-task-force-formed-to-combat-covid-19/> (accessed 14 September 2020).

75 As above.

76 'UPDF to lead national security council inter-agency task force in response to COVID-19' *Soft Power* (Kampala) 26 March 2020, <https://www.softpower.ug/>

to-day operations, the IAJTF was led by the Chief of Staff Land Forces, Major-General Leopold Kyanda, with its headquarters at the Uganda Police Force Joint Operation Centre in Naguru, a suburb of Kampala City Capital.<sup>77</sup>

The IAJTF structure was replicated at the regional level in decentralised Uganda, comprising the districts.<sup>78</sup> At the district level the resident district commissioners (RDCs) – who are presidential appointees and also chair the district security committees across the country – were put in charge of the structure. At the time the majority of these RDCs were military personnel either retired, reservists or in active duty. The district police commanders (DPCs), who ideally should have been in command of operational teams at the regional and district levels, were subordinated to the RDCs.

Among its many assignments communicated to the public, the IAJTF was tasked with coordinating any direct support from the member agencies to the MOH.<sup>79</sup> The security forces, more especially from the UPDF and UPF, also provided human resources of over 240 medical personnel in support of the efforts by the MOH in various health centres around the country.<sup>80</sup> It also monitored and enforced compliance with the COVID-19 preventive measures that were periodically issued by the President.<sup>81</sup> The military was also deployed to watch over quarantine centres that were spread all over the country holding suspected COVID 19 patients under isolation.<sup>82</sup>

More fundamentally and in striking support by the public, the IAJTF was also responsible for monitoring the security situation in the country to forestall potential opportunistic crime due to the lockdown and also to oversee and provide security to allow continuous delivery of vital services to the public. The public was provided with toll-free communication lines to contact the police and the UPDF regarding 'vital security related information and non-compliance cases'.<sup>83</sup> The IAJTF would also offer extra evacuation services to the MOH in situations of emergencies of identified COVID-19 suspected cases to the nearest gazetted quarantine/isolation centres run by the MOH. It also hunted down suspected COVID-19 carriers on the run from

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files/updf-to-lead-national-security-council-inter-agency-task-force-against-covid-19/ (accessed 14 September 2020); Achan (n 72 above).

77 Masaba (n 73).

78 Achan (n 72).

79 As above.

80 Masaba (n 73).

81 As above.

82 As above.

83 Kamusiime (n 74)

quarantine centres.<sup>84</sup> The IAJTF also provided security to the over 100 hubs working as testing centres for the various samples picked from suspected carriers from the quarantines and communities across the country. In the same vein, the UPDF and the attendant military auxiliary forces of the local defence units (LDUs) played a leading role in the enforcement of the phased movement curfew that was imposed throughout the country as between 06:30 and 19:00.<sup>85</sup> A combination of the heavily-armed UPDF, LDU and UPF personnel manned numerous road blocks on various roads entering and exiting the capital city, Kampala.<sup>86</sup> Joined by the UPS, they were also at the forefront almost exclusively in delivering the door-to-door food relief package to over one million vulnerable people in the Kampala and Wakiso districts.<sup>87</sup>

The UPDF's operations further involved undertaking countrywide border area inspections, especially after it had emerged that Uganda's COVID-19 cases were mainly imported.<sup>88</sup> These inspections aimed at assessing the level of compliance with the COVID-19 prevention measures by the border communities, immigration officers and customs officers operating at the border points.<sup>89</sup> These were border areas with Tanzania, Kenya, the DRC and South Sudan.<sup>90</sup> The IAJTF leadership used the inspections to also liaise with and supervise the regional task forces based in the various parts of the country to enhance the coordination between the headquarters of the Joint Task Force based in Kampala and the regional teams.<sup>91</sup> Other modes

84 Masaba (n 73)

85 S Yiga 'COVID-19: LDU, Police, resume night operations' 14 August 2020, *The New Vision* (Kampala) <https://www.newvision.co.ug/news/1524756/covid-19-ldu-police-resume-night-operations> (accessed 19 September 2020).

86 'COVID-19: How Ugandans died at the hands of security agents' *The Daily Monitor* (Kampala) 8 August 2020, <https://www.monitor.co.ug/uganda/news/national/covid-19-how-ugandans-died-at-the-hands-of-security-agents-1916380> (accessed 20 September 2020); URN 'Ugandan security have killed 6 while enforcing COVID guidelines' *The Weekly Observer* (Kampala) 4 June 2020, <https://observer.ug/news/headlines/65127-ugandan-security-have-killed-6-while-enforcing-covid-guidelines> (accessed 18 September 2020).

87 'Uganda distributes emergency Coronavirus food supplies' *The International News* 5 April 2020, <https://www.thenews.com.pk/print/639797-uganda-distributes-emergency-coronavirus-food-supplies> (accessed 18 September 2020). For the politics behind this food relief package, see I Anguyo 'The politics of food relief in Uganda's COVID-19 era' London School of Economics and Political Science 1 July 2020, <https://blogs.lse.ac.uk/africaatlse/2020/07/01/politics-food-relief-aid-uganda-covid19/> (accessed 20 September 2020).

88 N Mandela 'Security Task Force inspects problem spots on Uganda's borders' *PML Daily* (Kampala) 31 May 2020, <https://www.pmldaily.com/news/2020/05/security-task-force-inspects-problem-spots-on-ugandas-borders.html> (accessed 18 September 2020).

89 K Kazibwe 'COVID-9: Joint security task force inspects country's border points' *NilePost* (Kampala) 1 June 2020, <https://nilepost.co.ug/2020/06/01/covid-9joint-security-task-force-inspects-countrys-border-points/> (accessed 19 September 2020).

90 Mandela (n 88).

91 Kazibwe (n 89).

of enforcing compliance included impounding motor vehicles and motorcycles, especially in the Kampala metropolitan area, found without the duly-authorized government essential services provider stickers.<sup>92</sup> The operations also focused on curbing the abuse of stickers by motorists who were undertaking non-essential movements and businesses contrary to that for which the stickers had been issued.<sup>93</sup>

All known Ugandan hospitals that were hosting COVID-19 patients as quarantine centres had observable military deployments attached to them at their various entry and exit points, the majority of which were observed by the author. However, even as these guns were deployed to govern the health centres, continued cries of a lack of personal protective equipment (PPE) such as gloves, masks (especially the recommended N95 category), goggles, face shields, gowns and aprons, and the promised monthly risk allowance, from the medical practitioners permeated through the largely opaque framework under which COVID-19 was being contained in the country.<sup>94</sup> In the eastern part of the country, for example, in the Soroti district, the medical workers executed a strike and refused to return to work until such time as the PPEs, as provided for under the Occupational Health and Safety policy and guidelines, were provided to all staff of Princess Diana Health Centre IV.<sup>95</sup> The Uganda Nurses and Midwives Union and the Uganda Medical Association (UMA) would later decry the continued stock-outs of these PPEs despite the large budget for logistics in the COVID-19 prevention/containment national budget.<sup>96</sup>

It therefore is interesting to note that it is this same militarisation employed to combat the spread of the virus that was and remains responsible for the current situation most states across the world face, including Uganda. The inconceivable amount of money, approximately \$2 trillion per year globally, that is allotted to security and defence budget votes globally as against the meagre resources directed towards the betterment of the public health infrastructure

92 T Malaba 'COVID-19 - Security arrest 83, impound 167 vehicles over non-compliance' *The Daily Monitor* (Kampala) 1 April 2020.

93 'COVID-19 lockdown: Vehicles with forged stickers impounded' *The Daily Monitor* (Kampala) 19 April 2020, <https://www.monitor.co.ug/News/National/Covid-19-lockdown-vehicles-forged-stickers-impounded/688334-5528542-115d6qlz/index.html> (accessed 16 July 2020).

94 E Biryabarema 'Uganda health workers say they lack vital equipment to fight COVID-19' *The Reuters* 3 June 2020, <https://www.reuters.com/article/us-health-coronavirus-uganda/uganda-health-workers-say-they-lack-vital-equipment-to-fight-covid-19-idUSKBN23A218> (accessed 24 June 2020).

95 I Mufumba 'Inadequate protective gear frustrating COVID-19 fight' *The Daily Monitor* (Kampala) 23 May 2020, <https://www.monitor.co.ug/SpecialReports/Inadequate-protective-gear-frustrating-Covid-19-fight/688342-5560988-2356u2z/index.html> (accessed 24 June 2020).

96 As above.

and general medical/health care research was coming back to haunt the world.<sup>97</sup>

Using the above structure, the military had effectively taken over the entire response mechanism in the domestic crisis, whose first call of preference by constitutional mandate would have been the Ugandan police force. Thus, if the law had been followed, any summons of the UPDF to join the UPF for support would have been initiated by the UPF leadership and the UPDF-deployed officers would have worked supervised by and superintended over by the UPF in a clear transparent and accountable chain of command. In such a setup, even in situations of a breach of human rights during the deployment, as discussed below, the UPF would have had the sole responsibility for accountability.

## 6.2 Human rights violations and the elusive quest for accountability in the militarised COVID-19 response

The majority of the documented human rights violations during the COVID-19 pandemic in Uganda revolved around clashes between desperate people and security agencies in the enforcement of compliance with the curfew measures. The lockdown affected the poor and further exacerbated their vulnerability in the country, and plunged them further in an economic predicament with no daily earnings, being devoid of a social security protection plan that characterises Uganda's informal sector.<sup>98</sup> From the outset it was manifest that there would be resistance to the restrictions on movement as the poor sought to survive, besieged by starvation, on the one hand, and COVID-19, on the other.

Indeed, those in support of the forceful mode of enforcement of the lockdown measures maintained, quite persuasively, that Uganda could not manage a full-blown outbreak due to the fragility of the healthcare system, thus having put all its efforts in prevention even if it meant force to prevail upon the masses. This was and remains a legitimate argument, considering the many problems that confront the country, including 'limited resources, fragile health systems, existing disease burden, urban density, conflict, and record levels of population displacement'.<sup>99</sup> However, the cost in relation to human

97 Acheson (n 60).

98 F Musisi 'COVID-19 lockdown exposes Uganda's poverty, inequality' *The Daily Monitor* (Kampala) 28 April 2020, <https://www.monitor.co.ug/uganda/special-reports/covid-19-lockdown-exposes-uganda-s-poverty-inequality-1887226> (accessed 12 September 2020).

99 Africa Centre for Strategic Studies 'African adaptations to the COVID-19 response' 15 April 2020, <https://africacenter.org/spotlight/african-adaptations->

rights of this enforcement led by the military continued to reverberate with dire consequences, including a violation of the right to life.

### 6.2.1 *The extra-judicial killings, torture, degrading and inhumane treatment*

By 24 July 2020 Uganda had only reported one death from COVID-19, a shocking contradiction to an alleged 12 deaths or killings resulting from the violence and brutality meted out by the UPDF-led security agencies involving the Ugandan police force and the Local Defence Unit (LDU) personnel enforcing the government's lockdown measures.<sup>100</sup> For some it was instant death (extra-judicial killings) while some died as a result of bullet wounds and injuries arising from brutal gun butt beatings on sensitive parts of the body. One such case involved was reported in Eastern Uganda, in Budhumbuli, Jinja town, Jinja district where Evelyn Namulondo was shot in the stomach by security personnel at around 05:00.<sup>101</sup> She operated a food stall that necessitated her travelling in the early morning to get merchandise by using a motorcycle.<sup>102</sup> She was accused of moving before the dawn-to-dusk curfew. Three days later in hospital she died from the bullet wounds.<sup>103</sup> Still in Eastern Uganda, in Jinja district, Charles Sanga, a businessman, also succumbed to wounds occasioned by clobbering by soldiers and policemen on the accusation of defying the President's lockdown orders.<sup>104</sup> Most 'offences' were as minor as riding motorcycles, running an open shop, walking after the 19:00 decreed curfew time and carrying passengers on motorcycles. Explanatory pleas by detained people often fell on deaf ears due to the 'take-no-explanation' mode of enforcement reflective of extreme militancy.

Further accounts by victims' families and survivors reveal the impact of this militant response to COVID-19. A prominent account that invoked a national outcry involved the extra-judicial killing of a cleric of a church in Uganda, one Nsimenta Benon, a lay reader of Kogere Church of Uganda operating in Western Uganda in Kasese district, who was killed on 26 June 2020 in Hima village. He was shot in front of his wife, riding on a motorcycle along Karungibati

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to-the-covid-19-response/ (accessed 19 July 2020).

100 Uganda Radio Network 'Ugandan security have killed 6 while enforcing COVID guidelines' *The Weekly Observer* (Kampala) 4 June 2020, <https://observer.ug/news/headlines/65127-ugandan-security-have-killed-6-while-enforcing-covid-guidelines> (accessed 7 September 2020).

101 As above.

102 As above.

103 As above.

104 As above.

on the Hima-Kasese road in Western Uganda. The deceased had written authorisation from the local leadership to ride the banned motorcycle used during the lockdown. His wife, Allen Musimenta, narrated the ordeal as follows:<sup>105</sup>

The soldiers who stopped us didn't even take a minute to ask questions. One of them crossed the road, raised his gun and shot my husband in the neck ... We did our family projects together, talked through everything. We made plans for our children's future. How I am supposed to pay for their education by working our small farm?

Another football coach, Nelly Julius Kalema, nursing head injuries from an altercation with the security agencies asked, 'How many of us must die or be maimed before the security forces change their methods?'<sup>106</sup> One relative of the deceased lamented to BBC: 'I am extremely angry. They beat him, but even the top hospital in the country could not give him proper medical care. My brother died in my arms.'<sup>107</sup>

Another extra-judicial killing occurred in Budaka district in Eastern Uganda on 18 April when Wilber Kawono, a resident of Budaka district, was shot by police on 18 April for allegedly carrying a passenger on his motorcycle against the presidential directives.<sup>108</sup> Margret Nanyunja, aged 80, of Wakiso district bordering Kampala city, died after beatings inflicted on her by the LDU personnel on 10 April at around 01:00 when she protested their entry into her house without a search warrant.<sup>109</sup> The group was allegedly pursuing her grandson who they claimed had breached COVID-19 curfew orders.<sup>110</sup> Another victim was Vincent Serungi, a resident of Wakiso town council, shot dead on 31 March 2020 by security personnel, allegedly for riding a motorcycle against the President's COVID-19 directives.

The brutality, militant order-obey kind of lifestyle exhibited by the military at check points was also criticised as having denied many patients with chronic illnesses, such as cancer and kidney failure

105 BBC 'Uganda – Where security forces may be more deadly than Coronavirus' BBC (London) 23 July 2020, <https://www.bbc.com/news/world-africa-53450850> (accessed 18 July 2020). Her narrative is also corroborated by the *Daily Monitor*. 'They didn't ask him anything. They just stopped him and one of them came close and just fired a bullet into his neck. After seeing that he was down, he stepped back' *The Daily Monitor* (Kampala) 26 June 2020, <https://www.monitor.co.ug/News/National/Widow-of-killed-lay-reader-disputes-army-s-version-of-events/688334-5583486-x2xlet/index.html> (accessed 18 July 2020).

106 As above.

107 BBC (n 105).

108 Uganda Radio Network (n 100 above).

109 As above.

110 As above.

which merit recurrent hospital check-ups, visits even when they had the relevant travel documents to the requisite health centres for treatment. Deaths that resulted from this type of militant rigidity, devoid of reason and reasonable empathy, will never be known.

In Mityana district, outside Kampala, soldiers beat up people for delaying closing up their shops and bars.<sup>111</sup> On 26 March 2020 in Mukono district, two construction workers were shot allegedly for riding a motorcycle after 19:00.<sup>112</sup> On 28 March 2020 police and the military in Bududa, in the east of the country, opened fire against a group of people allegedly engaging in drinking of a local brew in a group, injuring one severely.<sup>113</sup> In the same district, the police beat up motorcyclists allegedly for carrying more than two passengers.<sup>114</sup> The police maintained that it was enforcing COVID-19 guidelines against public gatherings.<sup>115</sup> The most publicised action occurred on 26 March 2020, when members of the LDU auxiliary force under the UPDF unleashed terror using electric wires and sticks to beat motorcycle riders, female vendors selling fruit and vegetables on the streets, which was their source of income in downtown Kampala city.<sup>116</sup>

### 6.2.2 Extortion by military personnel

There were also widespread allegations and complaints by the public of extortion by the military from people who had been arrested for allegedly defying the curfew directives.<sup>117</sup> Officers manning road blocks demanded bribes to let cars pass after the 19:00 curfew commencement, including allowing those that had no essential

111 Human Rights Watch (HRW) 'Uganda: Respect rights in COVID-19 response' 26 March 2020, <https://www.hrw.org/news/2020/04/02/uganda-respect-rights-covid-19-response#> (accessed 18 July 2020).

112 'COVID-19: Two shot for defying presidential directives' *The Daily Monitor* (Kampala) 27 March 2020, <https://www.monitor.co.ug/uganda/news/national/covid-19-two-shot-for-defying-presidential-directives-1882628> (accessed 9 September 2020).

113 B Oketch et al 'Security on the spot over curfew brutality' *The Daily Monitor* (Kampala) 9 April 2020, <https://www.monitor.co.ug/uganda/news/national/security-on-the-spot-over-curfew-brutality-1884624> (accessed 20 September 2020).

114 'Bududa: Boda boda cyclists protest police brutality' *The Nile Post* (Kampala) 30 June 2020, <https://nilepost.co.ug/2020/06/30/bududa-boda-boda-cyclists-protest-police-brutality/> (accessed 10 September 2020).

115 Human Rights Watch (n 111).

116 'Battered vendors narrate ordeal' *The Daily Monitor* (Kampala) 30 March 2020, <https://www.monitor.co.ug/News/National/Battered-vendors-narrate-ordeal/688334-5508806-bnggnx/index.html> (accessed 18 September 2020).

117 A-N Ssemugabi & P Twinamukye 'COVID-19 lockdown: Dark deeds that curfew nights cover' *The Monitor* (Kampala) 10 May 2020, <https://www.monitor.co.ug/uganda/news/national/covid-19-lockdown-dark-deeds-that-curfew-nights-cover-1888974> (accessed 20 September 2020).

service provider stickers.<sup>118</sup> Another aspect of the corruption was directed towards pedestrians who would be threatened with detention at road blocks for not possessing and wearing their face masks.<sup>119</sup> The military officers and LDUs in charge of these road blocks would collude with mask vendors, allow them to be situated near the road blocks to sell masks to the members of the community who would be threatened with detention in exchange for a commission.<sup>120</sup> The bribe fee extorted was between US \$20 and \$65 for the persons or the impounded motorcycles and motor cars to be released.<sup>121</sup>

### 6.2.3 Denial of right to vocation through public market closures

The security Joint Task Force (JATF) was also accused of arbitrary closing down some markets risking famine and access to cheap foodstuffs by the urban poor. They also threatened to close and take over the management of many more markets across the capital of Kampala.<sup>122</sup> They alleged that the market dwellers were not complying with the directives of physical/social distancing (four meters), sanitising hands and masking the face.<sup>123</sup> Even if this were true, the first option of closure speaks to the militancy in enforcement leaving the people no opportunity to correct their mistakes by putting up the necessary stipulated measures of COVID-19 prevention. It took a public outcry for the markets to be re-opened.

### 6.2.4 Media rights violations

Journalists also suffered at the hands of the security in the enforcement of the COVID-19 preventive measures despite the media fraternity being classified by the President as essential service providers and, thus, not subject to the curfew restrictions.<sup>124</sup> Many suffered beatings

118 B Abaho 'LDUs another form of insecurity' *PML* (Kampala) 7 July 2020, <https://www.pmldaily.com/oped/2020/07/brighten-abaho-ldus-another-form-of-insecurity.html> (accessed 20 September 2020).

119 Editorial 'Police, LDUs shouldn't use COVID-19 to extort Ugandans' *The Weekly Observer* (Kampala) 8 July 2020, <https://observer.ug/viewpoint/65578-police-ldus-shouldn-t-use-covid-19-to-extort-ugandans> (accessed 20 September 2020).

120 CR Naggayi 'Mask vendors ejected from police check points' *Uganda Radio Network* (Kampala) 26 May 2020, <https://ugandaradionetwork.net/story/mask-vendors-ejected-from-police-check-points> (accessed 17 September 2020).

121 Ssemugabi & Twinamukye (n 117).

122 K Joseph 'Security task force to close markets for defying COVID-19 Guidelines' *Uganda Times* (Kampala) 2 April 2020, <https://ugandatimes.ug/security-task-force-to-close-markets-for-defying-covid-19-guidelines/> (accessed 19 July 2020).

123 As above.

124 'COVID-19: Media condemns latest assault of journalists' *The Daily Monitor* (Kampala) 5 April 2020, <https://www.monitor.co.ug/uganda/news/national/covid-19-media-condemns-latest-assault-of-journalists-1883966> (accessed 20 September 2020).

and arbitrary detentions as they did their work, documenting social life during the lockdown, including scrutinising the conduct of the security agencies in enforcing the curfew lockdown restrictions.<sup>125</sup> Accounts of cuts on bodies arising from stick and rubber-insulated electric wire-administered beatings by the military, leading some to undergo hospitalisation, emerged since the imposition of the lockdown curfew by the President on 18-19 March 2020.<sup>126</sup> Others had their tools of the trade (cameras) confiscated and were ordered to delete the footage therein by the security agencies on patrol led by the UPDF officers, LDUs and police officers.<sup>127</sup> It emerged that the targeted journalists were those who were covering stories depicting the overt brutality, bribery and extortion, among other violations, and abuses of power exhibited by the security agencies in the name of the enforcement of lockdown measures.<sup>128</sup> Between March and the end of April, a local media rights defence organisation, Human Rights Network for Journalists (HRNJ), had recorded 12 cases involving violations of rights and freedoms of journalists while in all these cases the accountability of the perpetrators remained elusive.<sup>129</sup> These cases were reported by journalists operating in various parts of the country, including Northern Uganda in the districts of Kitgum, Apac, the western district of Ntungamo, Gulu and central Uganda, in Masaka and Mukono.<sup>130</sup>

It should be noted that at the centre of these human rights violations was the brutality of the LDUs. The LDU, an auxiliary force under the UPDF, was mainly composed of youths, who were poorly trained for a short period, were poorly paid, sleeping in filthy tents, but equipped with guns.<sup>131</sup> The militant mode of training them, being an auxiliary force that is less on situation de-escalation, crowd control and more on force, coupled with feelings of inferiority due to poor remuneration and living conditions, created a cocktail of explosive individuals with lethal weapons at their disposal.<sup>132</sup> In

125 CPJ 'Ugandan security personnel enforcing COVID-19 measures assault journalists' 22 April 2020, <https://cpj.org/2020/04/ugandan-security-personnel-enforcing-covid-19-meas/> (accessed 19 July 2020).

126 A Gitta 'Ugandan journalists "assaulted by security forces" amid Coronavirus lockdowns' *DW* (Berlin) 24 April 2020, <https://www.dw.com/en/ugandan-journalists-assaulted-by-security-forces-amid-coronavirus-lockdowns/a-53235644> (accessed 16 September 2020).

127 As above.

128 As above.

129 As above.

130 S Hayden "'I realised my body was burning": Police brutality in Uganda lockdown' *The Guardian* (London) 28 May 2020, <https://www.theguardian.com/global-development/2020/may/28/i-realised-my-body-was-burning-police-brutality-in-uganda-lockdown> (accessed 16 September 2020).

131 *BBC* (n 105).

132 URN 'LDUs complete refresher training, restricted to night operations' *The Weekly Observer* (Kampala) 11 August 2020, <https://observer.ug/news/>

joint operations such as the enforcement of COVID-19 prevention measures, this militarised response dictated the dominance and 'favour of military doctrine' over that of the civilian police.<sup>133</sup>

As a result, this bred an 'imbalance of power between the police and the army' and contributed to the obscuration and blurring of the 'chains of responsibility and accountability', creating a disastrous recipe of the flourishing of human rights violations with impunity.<sup>134</sup> The military and the entire JATF were emboldened by the fact that they were operating under presidential directive or command and authority, which equally heightened tensions between them and local authorities as the JATF sought to assert military dominance. Whereas the JATF was set up as a support structure to the civilian authorities, in some cases it dominated over and subordinated the rightful civilian authorities under them. A case in focus is the distribution of relief, livelihood packages of posho, rice, sugar and powdered milk to the urban poor in the densely-populated districts of Kampala and Wakiso.<sup>135</sup> This exercise was directed by the military assisted by the police, Ugandan prisons services officers with the civilian structure of the local government officials relegated to the periphery only present for legitimacy purposes during the distribution exercises.<sup>136</sup>

Basic human rights and freedoms that were supposed to inform and be at the centre of every government response mechanism to the COVID-19 pandemic could not have been achieved in a largely-militarised response that inherently abhors rights and freedoms. In the end, this militancy approach served to only alienate the masses from cooperating with the authorities. The Africa Centre for Strategic Studies notes the centrality of trust and humane treatment of the masses as some of the fundamental lessons to be learnt from the past pandemics that have hit Africa. It opined:<sup>137</sup>

Effective pandemic responses depend on high levels of trust between the government, health professionals and scientists, the public, and private sector. This takes many forms. Respect for human rights in the

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headlines/66066-ldus-complete-refresher-training-restricted-to-night-operations (accessed 19 September 2020).

133 Namwase (n 13).

134 As above.

135 K Kazibwe 'Lockdown: Government starts relief food distribution to vulnerable people in Kampala' *Nile Post* 4 April 2020, <https://nilepost.co.ug/2020/04/04/lockdown-government-starts-relief-food-distribution-to-vulnerable-people-in-kampala/> (accessed 19 September 2020).

136 SP Tumwine 'Gov't donates food to the vulnerable' *The New Vision* (Kampala) 5 April 2020, <https://www.newvision.co.ug/news/1517534/gov-donates-food-vulnerable> (accessed 19 September 2020).

137 Africa Centre for Strategic Studies 'African adaptations to the COVID-19 response' 15 April 2020, <https://africacenter.org/spotlight/african-adaptations-to-the-covid-19-response/> (accessed 19 July 2020).

course of the response is key if popular support is to be maintained for what will need to be a sustained period of cooperation. Experience shows that heavy-handed responses to enforce stay-at-home orders depletes public trust and triggers defiance. This defeats the purpose of these efforts to limit mobility in the first place ... Trust is also indispensable to elicit the behavior change on which Africa depends to confront this crisis.

The numerous cases of police brutality forced many commentators on the African continent to conclude that the security forces were more dangerous than COVID-19 in countries such as Nigeria, South Africa, Uganda and Kenya.<sup>138</sup> At the time of writing this article, the Ugandan government was considering a new study by scientists at Makerere University College of Natural Sciences which made recommendations that the government should not lift the lockdown until October 2020 in an effort to curb the spread of the Coronavirus, since the health system was unable to support the large numbers of infections.<sup>139</sup> In essence, the lockdown was likely to continue with the military at the helm of the enforcement of compliance as the government sought to counter a predicted deadly second wave. Therefore, a repetition of the violations arising from the militarisation examined in the foregoing discussion could not be ruled out. During all this brutal conduct by the military and militarised police, civil society organisations in Uganda did not have an opportunity to systematically monitor these violations, unlike in other jurisdictions such as in South Africa, which relied on its independent police investigation directorate to monitor police excesses.<sup>140</sup> In addition, the lockdown measures also meant that civil society organisations had limited movement opportunities to go out among victims of these violations for documentation purposes. The majority went unaccounted, hence the thriving of militant impunity.

138 Olewe (n 12).

139 T Abet & S Otago 'Scientists recommend govt to extend COVID-19 lockdown' *The Daily Monitor* (Kampala) 17 June 2020, <https://www.monitor.co.ug/News/National/Study-recommends-govt-extend-Covid-19-lockdown/688334-5578144-106en1qz/index.html> (accessed 19 July 2020).

140 Olewe (n 12); K Trippe 'Pandemic policing: South Africa's most vulnerable face a sharp increase in police-related brutality' *Atlantic Council* 24 June 2020, <https://www.atlanticcouncil.org/blogs/africasource/pandemic-policing-south-africas-most-vulnerable-face-a-sharp-increase-in-police-related-brutality/> (accessed 16 September 2020); K Harrisberg 'South Africans go online to document police brutality' *Thomson Reuters Foundation News* (Johannesburg) 3 August 2020, <https://news.trust.org/item/20200803153908-65o21/> (accessed 17 September 2020).

### 6.2.5 *The elusive accountability for human rights violations*

The violations that characterised the enforcement conduct led to parliamentary intervention. The matter was raised under the agenda of National Importance in Parliament by a Manjia County MP, John Baptist Nambeshe, on the floor of Parliament.<sup>141</sup> The Speaker of Parliament, Rebecca Kadaga, would later call on the government to counter this conduct by prevailing on the security and bringing to accountability the perpetrators of these violations.<sup>142</sup> This was never pursued as violations continued.

The Uganda Human Rights Commission noted, rather half-heartedly with no follow-up action:<sup>143</sup>

There have been some allegations of human rights violation and aggravated torture of several women and some men who were being accused of flouting curfew orders and the ban on public spaces. However, the leadership of both the UPDF and UPF have come out clearly and strongly condemned the outrageous and gross acts of misconduct by the officers, who instead of protecting the constitutional and civil rights of the victims, violated it with the excessive use of force. Such cases have been taken seriously and the concerned officers have been arrested and charged in the court martial.

It rather opted to sound a caution on how 'it is important that the citizens to maintain cooperation with security forces and avoid attacking the security forces and defying the directives on COVID-19', even without establishing what the cause was of the citizenry's resistance to the security agencies.<sup>144</sup> Accountability was even made more difficult given the fact that the newly-recruited and deployed officers of the LDUs had no identity tags on their uniforms as is the case with police officers and the UDFP.<sup>145</sup> As such, the individual pursuit of accountability became almost impossible due to the comradery protectionism by fellow security officers. This protectionism and lack of accountability only emboldened the impunity being bred.

For their part, the UPDF exhibited vigilance in watering down these violations as isolated and individual failings rather than a

141 'Security might kill more Ugandans than COVID-19, warns MPs' *The Independent* (Kampala) 2 July 2020.

142 As above.

143 Achan (n 72).

144 As above.

145 JA Lule 'UPDF to issue name tags for LDUs' *The New Vision* (Kampala) 13 July 2020, <https://www.newvision.co.ug/news/1522504/updf-issue-tags-ldus> (accessed 15 September 2020).

representation of the institution.<sup>146</sup> Appearing sincere and concerned, the UPDF spokesperson was consistent in apologies through press statements of the violations, especially by the LDUs, always promising accountability for the individual officers involved in such impunity.<sup>147</sup> One such apology was issued on 30 March by the Army Chief of Defence Forces, David Muhoozi, made publicly to three vulnerable female street vendors of fruit, namely, Hadijah Aloyo, Christine Awori and Safia Achaya, who were attacked and beaten by the LDU.<sup>148</sup> The CDF noted that the UPDF was to hold the officers individually accountable and that a new commander of the LDU in metropolitan Kampala was to be appointed.<sup>149</sup> At the time of writing this also had not materialised.

However, in other cases public trials were conducted in the military courts of officers accused of perpetrating these violations against the civilian population. In particular, in the killing of the cleric on 29 June 2020, the Mountain Division Court Martial at Karusandara in Kasese District chaired by Colonel Felix Nyero charged the four officers implicated, Abraham Lokwap, Joel Atim, Talent Akampurira and Jackson Nyero, with murder, to which they pleaded guilty.<sup>150</sup> The alleged perpetrators were attached to the sixth Mountain Brigade Battalion based in Hima in Kasese district.<sup>151</sup> Private Abraham Lokwap was sentenced to 35 years' imprisonment for the murder; Lieutenant Talent Akampurira was sentenced to 12 months' imprisonment for commanding the unauthorised patrol, while the other two were acquitted.<sup>152</sup> However, this came after much public pressure as the army first denied the shooting, claiming that the victim had succumbed to a stray bullet, a version vehemently rejected by his widow.<sup>153</sup>

146 As above.

147 'UPDF recalls LDUs for fresh training' *The Daily Monitor* (Kampala) 16 July 2020, <https://www.monitor.co.ug/uganda/news/national/updf-recalls-ldus-for-fresh-training-1900200> (accessed 10 September 2020).

148 C Ahabwe 'COVID-19 crisis: Army chief apologises to city lady vendors clobbered by LDUs in Coronavirus crackdown, vows tough action against culpable soldiers' *PML* (Kampala) 31 March 2020, <https://www.pmldaily.com/news/2020/03/army-chief-apologises-to-women-brutalised-by-ldus-vows-tough-action-against-culpable-soldiers.html> (accessed 10 September 2020).

149 As above.

150 P Nansubuga 'Four UPDF soldiers charged with murder of Benon Nsimenta' *The Independent* (Kampala) 30 June 2020, <https://www.independent.co.ug/court-charges-four-updf-officers-with-murder-of-benon-nsimenta/> (accessed 19 July 2020).

151 E Ninsiima & F Basiime 'Four UPDF soldiers charged for killing Benon Nsimenta' *The Daily Monitor* (Kampala) 30 June 2020, <https://www.monitor.co.ug/News/National/Four-UPDF-soldiers-plead-guilty-murder-Kasese-lay-reader/688334-5585272-igjmrnz/index.html> (accessed 18 July 2020).

152 As above.

153 Uganda Radio Network 'Widow of killed lay reader disputes army's version of events' *The Daily Monitor* (Kampala) 26 June 2020, <https://www.monitor.co.ug/news/national/widow-of-killed-lay-reader-disputes-armys-version-of-events/>

On a positive note, at the highest level of political and military leadership the President, Yoweri Museveni, in a televised national speech on the update of COVID-19 preventive measures castigated the brutality of the security agencies, especially the LDU, after the rampant public outcry over their militant conduct in enforcing the lockdown measures.<sup>154</sup> He would later direct that the anti-corruption unit under the state house probe this conduct.<sup>155</sup> This, however, was criticised as a half-hearted, 'short-term intervention' and not independent considering that it was an *ad hoc* unit headed by an army officer of a lower rank of lieutenant colonel, yet the entire combined security apparatus now under scrutiny was being commandeered by a major-general.<sup>156</sup> Namwase argues that this *ad hoc* accountability mechanism raised 'concerns around independence and accountability [since it is] a role based on a presidential appointment ... [with no] legal framework defining its mandate, powers, privileges, limitations and relationship with the civilian population'.<sup>157</sup>

At the time of writing the army had withdrawn all LDU personnel from deployment across the country for re-training with a particular focus on respect, protection and promotion of human rights and freedoms.<sup>158</sup> Indeed, due to the public outcry, as discussed above, there had been two military trials that ended in a conviction of LDU and UPDF personnel for murder with sentences ranging between 20 and 35 years' imprisonment. However, these trials do not restore the lives taken, but they could have been avoided if only there was no glorification of militarisation as a means of combating the COVID-19 pandemic.

## 7 Conclusion and recommendations

The article has attempted to show the increasing militarisation of public health in Uganda, further leading to the digression of democratic values, the rule of law and human rights. There is a permissive legal framework that is manipulated to heighten this

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co.ug/News/National/Widow-of-killed-lay-reader-disputes-army-s-version-of-events/688334-5583486-x2xlet/index.html (accessed 18 July 2020).

154 J Ssebwami 'Stop beating people! Museveni warns LDU's, security personnel they will face it rough for manhandling citizens' *PML* (Kampala) 8 April 2020, <https://www.pmldaily.com/news/2020/04/stop-beating-people-museveni-warns-ldus-security-personnel-they-will-face-it-rough-for-manhandling-citizens.html> (accessed 10 September 2020).

155 As above.

156 Namwase (n 13).

157 As above.

158 'UPDF conducting refresher course for LDUs' *The Independent* (Kampala) 21 July 2020, <https://www.independent.co.ug/updf-conducting-refresher-course-for-ldus/> (accessed 10 September 2020).

agenda. Unfortunately, it has also emerged that not only is there limited and weak civilian oversight of the military but also of militarism as an ideology. As such, the COVID-19 pandemic was used to further strengthen this reality and use it to limit other civil and political rights, especially as the country prepared for the 2021 general presidential and parliamentary elections.

What then is the way forward? To curb the hijacking of such emergencies as conduits to further strengthening militarisation in Uganda, there is a need to build strong parliamentary oversight over the military deployments in such national emergencies. To achieve this, there is a need for the provision of clear rules of engagement for the military in such domestic operations where the exclusive and primary mandate is that of the Ugandan police force. These regulations, possibly emerging by way of an amendment to the parent law of the UPDF Act, should provide the need for parliamentary approval before such deployments take place, should prescribe the period of the deployment, under whose chain and command it will be, and aspects surrounding accountability in case of a violation of citizenry rights. More importantly, the law should re-establish and protect the position of the police as the primary and leading agency in dealing with domestic crises and/or law and order-related issues with close collaboration, first, with the civilian authority and, second, with the military at the prompting officially of the police authorities. Generally, the Ugandan community should commence a public debate on de-militarisation, a genuine country-wide preparation for a transition from the liberation movement of the NRM which is militaristic owing to its creation roots to a fully-fledged democratic atmosphere that respects civilian authority and subordinates the military under it.

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# AFRICAN HUMAN RIGHTS LAW JOURNAL

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## Editorial introduction to special focus: The African Children's Charter at 30: Reflections on its past and future contribution to the rights of children in Africa

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This special focus on children in this edition of the *African Human Rights Law Journal* celebrates 30 years since the adoption of the African Charter on the Rights and Welfare of the Child (African Children's Charter) in 1990. As part of the commemoration of this momentous milestone, a number of initiatives have been undertaken by various stakeholders to reflect on progress made towards achieving the standards set out in the African Children's Charter. The research undertaken in this issue is one such contribution.

As the regional standard on the rights of children, the African Children's Charter no doubt has contributed to the significant changes in the current context of children in the region. Specifically, the Children's Charter has provided a uniquely African voice to child rights standards in the region, triggering the development of normative and policy frameworks, and midwifing a fledgling community of child rights practice across the continent. There is no doubt that the Charter has contributed immensely to the establishment of an accountability framework on the rights of children on the continent, provided a basis for rallying engagement

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with policy and key stakeholders, fed a growing academic and jurisprudential discourse on the rights of children in an African context, and provided the visibility of children and their particular circumstances in the region.

The special focus on children's rights is a collection of articles that emanated from a call for papers for a symposium titled 'Symposium on the 30th anniversary of the adoption of the African Children's Charter: Visualising the African child in 2050' that was planned for July 2020. The symposium, however, was cancelled due to COVID-19 pandemic restrictions. The articles in the issue provide scholarly critique and analysis of the contributions of the African Children's Charter in moulding the current and future context of children in Africa through informing practice, transforming child rights discourse, and nudging new developments in child rights frontiers. The articles depart from three main points of view: documenting progress in respect of some selected provisions; revisiting the relevance of some of its provisions in light of lessons learned from their implementation; and acknowledging and analysing some emerging issues that may not have been contemplated by the Children's Charter at the time of its adoption. The COVID-19 pandemic also provided a particularly unique backdrop against which to evaluate the meaningfulness of the protections and standards established under the African Children's Charter.

The articles featured in the current edition are the first of two planned editions in commemoration of the 30 years of the Children's Charter. The second series of articles will appear in the first edition of the *AHRLJ* in 2021.

The current issue contains four articles on children's rights. The first article in the section provides a critical reflection on the evolution of child protection norms and practice as guided by the Charter. Given the centrality of child protection and safeguarding in child rights formulation and practice, it is a critical contribution to the discourse on children's rights. The second article advocates an approach to children's participation in medical decision-making processes guided by the rationality of the best interests' principle, a child's evolving capacity and a child's age. The next article, dealing with childhood sexuality, provides a timely contribution to an issue that remains topical yet hardly meaningfully explored in relation to the rights of children, especially in Africa. The fourth article interrogates the interaction of article 30 of the African Children's Charter with the best interests of children in prison with their mothers. This reflection is important in light of the high credit that it is accorded as one of the unique provisions of the Children's Charter, and as the subject of

the very first General Comment of the African Committee of Experts on the Rights and Welfare of the Child.

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## Child protection, safeguarding and the role of the African Charter on the Rights and Welfare of the Child: Looking back and looking ahead

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**Summary:** *With 30 years since the adoption of the African Charter on the Rights and Welfare of the Child, this article discusses how the Charter has contributed to understanding and addressing children's rights to protection. Looking back, the article examines the impetus for the Charter in the context of an emerging field of child protection on the continent. Next, the article charts the paradigm shift in the child protection sector that occurred after the adoption of the Charter and the gradual development of African jurisprudence on child protection and safeguarding. This analysis is based on a comprehensive review of Concluding Observations and Recommendations by the African Committee of Experts on the Rights and Welfare of the Child and relevant*

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documents, including *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*. Looking ahead, the article posits future directions for child protection and safeguarding, including addressing new risks and harms enabled by digital technology. In conclusion, the article underscores the importance of the Children's Committee in articulating African perspectives and catalysing state party action to realise children's rights to protection in accordance with the Charter. Through the state party reporting process and with reference to *General Comment 5* and forthcoming guidance, the Committee can continue meaningful dialogue with state parties to address persistent and new challenges to child protection taking a systemic approach.

**Key words:** *Africa; children's rights; child protection; child safeguarding; African Charter on the Rights and Welfare of the Child; African Committee of Experts on the Rights and Welfare of the Child*

## 1 Introduction

'Child protection' is generally defined as the protection of children from all forms of violence, abuse, exploitation and neglect, as well as the various measures for responding to harm.<sup>1</sup> The term is broad, encompassing abuse and exploitation that occurs in all settings both within and outside the child's home and in the digital environment. It includes areas that are not necessarily violations of children's rights but that may heighten children's risk of harm, such as children on the streets or in conflict with the law.<sup>2</sup> In contrast to child protection efforts that work to prevent and respond to all forms of violence against children in all contexts, 'child safeguarding' focuses on the realm of organisational responsibility. The term is becoming more commonly understood with reference to the organisational 'duty of care' and the responsibility to 'do no harm'.<sup>3</sup> There has been greater

1 See Myers and Bourdillon's critique of the usefulness of 'child protection' as a category for policy and programmes: W Myers & M Bourdillon 'Introduction: Development, children, and protection' (2012) 22 *Development in Practice* 437-442, <http://www.tandfonline.com/doi/abs/10.1080/09614524.2012.672962> (accessed 21 May 2020).

2 K Landgren 'Protection: The United Nations Children's Fund experience' in M O'Flaherty (ed) *The human rights field operation: Law, theory and practice* (2007) 184.

3 The origins of safeguarding in the context of aid can be traced back to the 2002 West African 'sex-for-food' scandal: United Nations High Commissioner for Refugees and Save the Children UK 'Sexual violence and exploitation: The experience of refugee children in Liberia, Guinea and Sierra Leone' (2002), <https://www.parliament.uk/documents/commons-committees/international-development/2002-Report-of-sexual-exploitation-and-abuse-Save%20the%20Children.pdf> (accessed 15 February 2020).

scrutiny of safeguarding following the 2018 'Oxfam scandal'<sup>4</sup> and several inquiries into institutional child abuse in the 'global North'.<sup>5</sup> While it is possible to conceptually differentiate 'child safeguarding' and 'child protection', they are highly interdependent in practice – especially in countries where the child protection system is not well-resourced or functioning. Considering the various state and non-state organisations delivering services for children in Africa, child safeguarding measures are essential to support the realisation of children's rights to protection.

Thirty years since the adoption of the African Charter on the Rights and Welfare of the Child (African Children's Charter),<sup>6</sup> it is timely to reflect on how the Charter has contributed to understanding and addressing children's rights to protection. This article aims to undertake this endeavour – looking back and looking ahead. The article is divided into three parts. The first is retrospective and examines the impetus for the African Children's Charter in the context of an emerging field of child protection on the continent. The second part charts the paradigm shift in the child protection sector that occurred after the adoption of the African Children's Charter and the gradual development of African jurisprudence on the Charter and child protection and safeguarding obligations. This is based on a comprehensive review of Concluding Observations and Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and an analysis of 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 (General Comment 5)<sup>7</sup> and other regional measures aimed at introducing safeguarding

4 For further discussion of safeguarding in humanitarian and development activities, see A Kaviani Johnson & J Sloth-Nielsen 'Safeguarding children in the developing world: Beyond intra-organisational policy and self-regulation' (2020) 9 *Social Sciences* 19.

5 Eg, Royal Commission of Inquiry into Abuse in Care (New Zealand); Royal Commission into Institutional Responses to Child Sexual Abuse (Australia); Independent Inquiry into Child Sexual Abuse in England and Wales; The Pontifical Commission for the Protection of Minors (Vatican); De Winter Commission about violence towards minors in the Dutch child protection system (The Netherlands).

6 African member states of the Organisation of African Unity 'African Charter on the Rights and Welfare of the Child' OAU Doc CAB/LEG/24.9/49, [https://www.un.org/en/africa/osaa/pdf/au/afr\\_charter\\_rights\\_welfare\\_child\\_africa\\_1990.pdf](https://www.un.org/en/africa/osaa/pdf/au/afr_charter_rights_welfare_child_africa_1990.pdf) (accessed 21 May 2020).

7 African Committee of Experts on the Rights and Welfare of the Child 'General Comment No 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"', <https://www.acerwc.africa/wp-content/uploads/2019/09/ACERWC%20General%20Comment%20on%20General%20Measures%20of%20Implementation%20African%20Children's%20Charter.pdf> (accessed 16 February 2020).

principles. The third part of the article posits future directions for child protection and safeguarding on the continent, including addressing new risks and harms enabled by digital technology. In conclusion, the article underscores the importance of the African Children's Committee in articulating African perspectives and catalysing state party action to realise children's rights to protection in accordance with the Children's Charter. With General Comment 5, the African Children's Committee has clearly set out its position on child protection systems, including safeguarding measures. Through the state party reporting process and with reference to General Comment 5 and forthcoming guidance, the African Children's Committee can continue meaningful dialogue with state parties to address persistent and new challenges to child protection taking a systemic approach.

## 2 Looking back – The impetus for the African Children's Charter

### 2.1 Child protection and the adoption of the African Children's Charter

Although the origins of the African Children's Charter are known in broad terms, the *travaux préparatoires* and other documentation no longer exist.<sup>8</sup> What is known is that the impetus for the treaty originated from a conference held in Nairobi in 1988, a year before the finalisation of the United Nations (UN) Convention on the Rights of the Child (CRC). Only three African states had participated for the bulk of the decade-long drafting process of the CRC. By the time it reached the final stage, nine African countries were involved. Viljoen records that the African initiative to draft a regional treaty was born partly out of frustration with the UN process.<sup>9</sup> The failures of the UN drafting process are regarded as three-fold: Africans

8 Having worked on aspects related to the Charter for two decades, and fielded queries from numerous researchers over the years seeking access to any form of background documentation from this pre-digital era, Sloth-Nielsen can readily confirm that no such documentation can be found.

9 F Viljoen 'Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *Comparative and International Law Journal of Southern Africa* 199, [https://journals.co.za/content/cilsa/31/2/AJA00104051\\_309](https://journals.co.za/content/cilsa/31/2/AJA00104051_309) (accessed 16 February 2020). See also F Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to child law in South Africa* (2009) 214. See also BD Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 230 *South African Public Law* 1 and sources cited at fn 22.

were underrepresented during the drafting process;<sup>10</sup> potentially divisive and emotive issues were omitted during consensus building between states from diverse backgrounds; and the aim of reaching a compromise meant that specific provisions on aspects peculiar to Africa were ignored. Concern for children's rights in the African human rights systems was not novel. In 1979 the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) had adopted a Declaration on the Rights and Welfare of the African Child at its 16th ordinary session in Monrovia, Liberia. The Declaration recognised the need to take all appropriate measures to promote and protect the rights and welfare of the African child.<sup>11</sup>

In 1988 the African Network for the Prevention and Protection Against Child Abuse and Neglect (ANPPCAN) and the United Nations Children's Fund (UNICEF) hosted a conference on 'Children in situations of armed conflicts in Africa'. One of the conference objectives was to consider whether there were gaps in CRC that needed to be filled with a regional-specific treaty. Some of the peculiarities of the African situation omitted from CRC were identified.<sup>12</sup> In collaboration with the two organisations that had organised the workshop, the OAU set up a working group of African experts, chaired by Lee Muthoga, to develop a draft charter. The draft followed the usual route of scrutiny by the Secretary-General and consideration by the Council of Ministers. There was some debate<sup>13</sup>

10 Only Algeria, Morocco, Senegal and, to some extent, Egypt participated meaningfully.

11 A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the gauntlet' (2002) 10 *International Journal of Children's Rights* 179, [https://brill.com/view/journals/chil/10/2/article-p179\\_4.xml](https://brill.com/view/journals/chil/10/2/article-p179_4.xml) (accessed 9 June 2020).

12 These were identified as follows: The situation of children living under apartheid was not addressed; disadvantages influencing the female child were not sufficiently considered; practices that are prevalent in African society, such as female genital mutilation and circumcision, were not explicitly mentioned; problems of internal displacement arising from internal conflicts did not receive attention; socio-economic conditions, such as illiteracy and low levels of sanitary conditions, posed specific problems in Africa; the African conception of the community's responsibilities and duties had been neglected; in Africa the use of children as soldiers and a compulsory minimum age for military service is of great importance; the position of children in prison and that of expectant mothers had not been given attention; and CRC negates the role of the family (also in its extended sense) in the upbringing of the child and in matters of adoption and fostering. See L Muthoga 'Introducing the African Charter on the Rights and Welfare of the African Child and the Convention on the Rights of the Child' (1992), paper delivered at the International Conference on the Rights of the Child, Community Law Centre, University of the Western Cape.

13 The delegate from Sudan commented on the vagueness of the African Children's Charter and its similarity to CRC, while the delegate from Senegal stated that the Preamble was unsatisfactory and that the text should more adequately reflect the social and economic conditions in Africa. The representative from Nigeria mentioned that the rights of 'illegitimate children' were not covered by the draft Charter. The representative of Swaziland wanted parents' rights to be mentioned, and that of Botswana wanted the draft rewritten to be

at the Assembly of Heads of State and Government, but the African Children's Charter was adopted without dissension on 11 July 1990. The treaty entered into force in 1999 upon receipt of the requisite minimum number of ratifications by member states. The monitoring body provided for in the Children's Charter was established in 2002.

Many substantive articles of the African Children's Charter are geared towards child protection. The most pertinent is article 16 (protection of the child against abuse and torture),<sup>14</sup> but many other articles revolve around specific child protection themes. These include prohibition on child marriage;<sup>15</sup> on harmful cultural practices detrimental to the welfare, dignity, normal growth and development of the child;<sup>16</sup> protection against involvement in armed conflict;<sup>17</sup> a prohibition on begging;<sup>18</sup> protection against sexual exploitation;<sup>19</sup> and protection against all forms of economic exploitation (in an article titled 'child labour').<sup>20</sup> A cursory examination of the provisions of article 16 suggests that at the time of its adoption it was almost entirely aspirational. While some countries had child protection laws, these neither provided any detail on investigation, reporting, monitoring, follow-up, and so forth, nor was there in practice any form of specialisation in the child protection services. This will be discussed further in part 3.

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comprehensible to children. The representatives of Uganda, Lesotho, Tunisia and Ethiopia had comments about the need for an implementation strategy. See P Veerman *The rights of the child and the changing image of childhood* (1991) 279.

- 14 Article 16 provides: '1. State parties to the present Charter shall take specific legislative, administrative, social and educational measures designed to protect the child from all forms of torture, inhuman and degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse whilst in the care of the child. 2. Protective measures under this article include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention, and for identification, reporting, referral, investigation, treatment and follow-up of all instances of child abuse and neglect.' The reference to the phrase 'whilst in the care of the child' is an unfortunate typographical error which should have read something to the effect that it occurred while in the care of parents and other persons caring for the child (cf art 19(1) CRC). The reference in the heading to 'torture' appears to indicate that this article is a (partial) amalgam of arts 37 and 19 of CRC. Sub-article (2) is close in wording to art 19(2) CRC, but absent are the provisions for judicial involvement, as appropriate, as a conceivable response to reports of child abuse and neglect.

15 Art 21(2).

16 Art 21(1).

17 Art 22(2).

18 Art 29(1).

19 Art 27.

20 Art 15.

## 2.2 Child protection: Policy and programming in the 1990s

The 'discovery' of child abuse and neglect in the home is of relatively recent provenance, stemming from the seminal 1962 publication by Kempe et al, *The battered child syndrome*.<sup>21</sup> The initial research was largely epidemiological, resulting in *ad hoc* social and legal responses. Reporting requirements for professionals such as doctors and teachers were already in place in the 'North' from the 1980s. However, writing in 2002 Lachman et al express the view that

[w]hile progress may have been made in North America, Australasia, and Western Europe, the position of children in the countries of Asia, South America, Eastern Europe, and Africa remains tenuous. The concept of child protection is often a distant dream, and the very structures<sup>22</sup> of society negate the attempts to alleviate the position children find themselves in.<sup>23</sup>

Lachman et al observe that the literature in Africa was largely limited to documentation of the incidence and prevalence of different types of child abuse. Unlike high-income countries, research had not yet moved to programme evaluation, risk assessment and intervention. They suggested that this was due to the scale of child abuse, the lack of resources to undertake research, and the limited number of trained researchers in the region. Lalor, citing Ennew et al, claimed that academic and grey literature on child sexual abuse in Africa consisted of 'an almost total vacuum'.<sup>24</sup> Clinical<sup>25</sup> and survey research findings published during the 1980s and early 1990s were almost exclusively undertaken in South Africa.<sup>26</sup> Some commentators were of the view that child sexual abuse did not occur in the region due to the close-knit communal living structures of 'pre-modern' African culture. Where it did occur, it was purportedly linked to labour migration and changing family and social structures. This view is disputed by Lalor.

21 <https://www.kempe.org/about/history/> (accessed 20 May 2020).

22 Including poverty and resource scarcity, HIV/AIDS (although this mostly post-dates the adoption of the African Children's Charter), conflict and war, gender discrimination and patriarchy, and so forth.

23 P Lachman et al 'Challenges facing child protection I. Overview – Lessons from the "South"' (2002) 31 *Child Abuse* 589. Writing a decade earlier, Lachman correctly notes that not all instances of child abuse can be attributed to structural or societal factors. P Lachman 'Child protection in Africa: The road ahead' (1996) 20 *Child Abuse and Neglect* 543 544.

24 K Lalor 'Child sexual abuse in sub-Saharan Africa: A literature review' (2004) 28 *Child Abuse and Neglect* 439 441, <https://linkinghub.elsevier.com/retrieve/pii/S0145213404000547> (accessed 15 March 2020).

25 Undertaken at hospitals where sexually-abused children had been presented for treatment.

26 The 'initial "discovery" of child sexual abuse in the United States in the 1970s was followed by a similar "discovery" in South Africa 15-20 years later (references omitted). Outside of South Africa, it is only in the last five years that other countries in sub-Saharan Africa have begun to address the problem of child sexual abuse in their practice and professional literature (references omitted)'; Lalor (n 24) 456.

He attributes the 'discovery' of child sexual abuse to the previous lack of knowledge among child protection professionals and society in general, and the lack of child protection structures to detect, record and treat victims of child abuse.<sup>27</sup>

It is not surprising that systemic responses to child abuse in the region were absent due to a failure to situate child abuse and neglect in any coherent societal context. The 'tertiary interventions' that did occur aimed at removing children from allegedly harmful situations after the situation had reached the point where removal was the only safe option.<sup>28</sup> Given the chronic underdevelopment of governmental social workers and auxiliary systems, most interventions were driven by charities and church groups. This continues as child protection systems in Africa depend heavily on non-governmental and faith-based organisations to deliver the preponderance of services to respond to child abuse and neglect. It may therefore be concluded that child protection, outside of specific interventions with targeted groups,<sup>29</sup> was barely a discipline at the time of the adoption of the African Children's Charter. The next part will chart major developments that occurred in the years after the African Children's Charter entered into force.

### 3 Shifts in the child protection landscape and the emerging jurisprudence of the African Children's Committee

#### 3.1 A 'systems' approach to child protection

By the time of the new millennium, a conceptual framework for a 'systems' approach to child protection was starting to take shape. Developed by international agencies such as UNICEF, Save the Children, and the UN High Commissioner for Refugees (UNHCR), it represented a paradigm shift in the sector. Writing in 2005, Landgren highlighted that child protection approaches to date had focused largely on legislative reform and curative responses instead of the underlying systems that failed to protect children. She argued that

<sup>27</sup> Lalor (n 24) 451.

<sup>28</sup> Human Sciences Research Council 'South Africa Country Report on the Situation on Prevention of Child Maltreatment Study' Final report submitted to the Prevention of Violence, Department of Violence and Injury Prevention and Disability, Non-communicable Diseases and Mental Health (Geneva: World Health Organisation 2009) v.

<sup>29</sup> Children recruited as child soldiers, female genital mutilation (FGM) and child labour are three of the most prominent, although evidence hereof is rather anecdotal.

these approaches, such as small-scale projects providing care and rehabilitation for 'street children', orphans and victims of trafficking and sexual exploitation, even if significantly scaled up, would be 'unlikely to make a dent in the incidence of abuse'.<sup>30</sup> While such 'issues-based' efforts had produced benefits, Wulczyn et al remarked that it resulted in a fragmented and inefficient response, which left 'pockets of unmet need'.<sup>31</sup> Issues-based efforts did not account for the realities of children's lives and the multiple and overlapping forms of abuse and exploitation that children faced.<sup>32</sup> The systems approach was put forward to address these limitations and to take a systemic approach to systemic issues.<sup>33</sup> Krueger et al observe that this paradigm shift brought the child protection discourse closer to the comprehensive public sector reform that had occurred in the health and education sectors.<sup>34</sup>

Landgren elaborated a 'Protective Environment Framework'<sup>35</sup> with eight broad and interconnected elements that could strengthen children's protection and reduce their vulnerability to risks. The eight elements constituted government commitment and capacity; legislation and enforcement; culture and customs; open discussion; children's life skills, knowledge, and participation; the capacity of families and communities; essential services; and monitoring, reporting and oversight.<sup>36</sup> These elements were reshaped in UNICEF's

30 K Landgren 'The protective environment: Development support for child protection' (2005) 27 *Human Rights Quarterly* 214-222, [http://muse.jhu.edu/content/crossref/journals/human\\_rights\\_quarterly/v027/27.1landgren.html](http://muse.jhu.edu/content/crossref/journals/human_rights_quarterly/v027/27.1landgren.html) (accessed 21 May 2020).

31 F Wulczyn et al 'Adopting a systems approach to child protection: Key concepts and considerations' UNICEF 2010 1, [https://www.unicef.org/protection/files/Adapting\\_Systems\\_Child\\_Protection\\_Jan\\_2010.pdf](https://www.unicef.org/protection/files/Adapting_Systems_Child_Protection_Jan_2010.pdf) (accessed 14 May 2020).

32 MG Wessells 'Bottom-up approaches to strengthening child protection systems: Placing children, families, and communities at the center' (2015) 43 *Child Abuse and Neglect* 8-9, <https://linkinghub.elsevier.com/retrieve/pii/S0145213415001246> (accessed 18 January 2020).

33 Wessells (n 32) 9.

34 A Krueger, G Thompson & V Crispin 'Learning from child protection systems mapping and analysis in West Africa: Research and policy implications' (2014) 5 *Global Policy* 47-48, <http://doi.wiley.com/10.1111/1758-5899.12047> (accessed 10 May 2020). See also Myers and Bourdillon's critique that attempts to organise child protection as a public service, such as health and education, have produced unsatisfactory experiences globally. They suggest that there 'appears to be something inherently relational and situational about the protection of children that resists universalisation and standardisation, which is one reason for growing interest in placing more activity related to protection within the context of community'. W Myers & M Bourdillon 'Concluding reflections: How might we really protect children?' (2012) 22 *Development in Practice* 613-616, <http://www.tandfonline.com/doi/abs/10.1080/09614524.2012.673558> (accessed 22 May 2020).

35 The Protective Environment Framework was first set out in the 2002 UNICEF Operational Guidance Note; UNICEF 'UNICEF Child Protection Strategy, E/ICEF/2008/5/Rev.1,' [https://www.unicef.org/protection/CP\\_Strategy\\_English\(1\).pdf](https://www.unicef.org/protection/CP_Strategy_English(1).pdf) (accessed 23 May 2020).

36 Landgren (n 30) 227-242.

2008 Child Protection Strategy adopting two main approaches, namely, strengthening child protection systems and supporting social change for improved protection.<sup>37</sup> Subsequently, there were various efforts to map and assess national child protection systems around the world. In Africa this was particularly important to ensure that African perspectives and the prominent role of communities were integrated into the dialogue on national child protection systems.<sup>38</sup>

By the next decade there was a growing body of research and practice on the strengthening of child protection systems in the region. In 2013 a Joint Interagency Group representing the African Child Policy Forum, the ANPPCAN and others<sup>39</sup> issued a 'call to action' for sub-Saharan Africa.<sup>40</sup> The call to action presented elements necessary for an effective child protection system, namely, appropriate policies, legislation and regulations; well-defined structures and functions and adequate capacities; supportive social norms; effective promotion, prevention and response actions; high-quality evidence and data for decision making; and efficient fiscal management and sufficient resource allocation.<sup>41</sup> Five years later the African Children's Committee articulated its approach to child protection systems strengthening in 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. The next part traces the gradual development of African

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- 37 UNICEF (n 35). See also Save the Children Sweden 'Why effective national child protection systems are needed: Save the Children's key recommendations in response to the UN Secretary General's study on violence against children' 2006, <https://resourcecentre.savethechildren.net/node/2754/pdf/2754.pdf> (accessed 24 May 2020); Save the Children UK 'A "rough guide" to child protection systems' 2009, <https://resourcecentre.savethechildren.net/node/5103/pdf/5103.pdf> (accessed 24 May 2020).
- 38 Child Frontiers Ltd 'Mapping and assessing child protection systems in West and Central Africa: A five-country analysis paper' Plan International, Save the Children International, UNICEF 2011) iii, [http://www.socialserviceworkforce.org/system/files/resource/files/Mapping%20and%20Assessing%20CP\\_Systems\\_5\\_Countries\\_Analysis\\_Paper\\_FINAL.pdf](http://www.socialserviceworkforce.org/system/files/resource/files/Mapping%20and%20Assessing%20CP_Systems_5_Countries_Analysis_Paper_FINAL.pdf) (accessed 14 May 2020). Eg, Maestral International 'Child protection systems: Mapping and assessing Eastern and Southern Africa' (2011), <https://resourcecentre.savethechildren.net/library/child-protection-systems-mapping-and-assessing-eastern-and-southern-africa> (accessed 14 May 2020); African Network on Prevention and Protection against Child Abuse and Neglect 'Desk review and analysis of literature on child protection systems in the Eastern Africa region (Ethiopia, Kenya, Rwanda, South Sudan, Sudan, Tanzania and Uganda)' Save the Children Sweden 2012, <https://resourcecentre.savethechildren.net/sites/default/files/documents/7032.pdf> (accessed 10 May 2020).
- 39 Environnement et Développement du Tiers-monde; International Social Service; Mouvement Africain des Enfants et Jeunes Travailleurs; Plan International; Regional Inter-Agency Task Team on Children and AIDS; Regional Psychosocial Support Initiative; Save the Children; SOS Children's Villages International; Terre des hommes; UNICEF; and World Vision International.
- 40 Joint Inter-Agency Group 'Strengthening child protection systems in sub-Saharan Africa: A call to action' (2013).
- 41 Joint Inter-Agency Group (n 40) 7.

jurisprudence on child protection up until the issuance of General Comment 5.

### 3.2 Emerging African Children's Committee jurisprudence on child protection

Child protection featured on the agenda of the African Children's Committee from its inception.<sup>42</sup> However, it took some years before the Children's Committee could play its role in substantively promoting and protecting children's rights. The initial term of office of the Children's Committee was largely spent drafting Rules of Procedure and reporting guidelines for state parties. State parties did not provide reports to the African Children's Committee until 2005<sup>43</sup> and the Children's Committee finally held its first pre-session for consideration of state party reports in 2008.<sup>44</sup> In 2009 the African Children's Committee issued its first Concluding Observations and Recommendations for Egypt and Nigeria.<sup>45</sup> The documents were brief and lacked sufficient detail. For example, the Children's Committee recommended to Egypt to adopt 'very severe' criminal penalties for child sexual exploitation and 'mechanisms' for victim support. Despite the limitations of these initial recommendations, the advantages of a regionally-specific child rights treaty were immediately apparent. Members of the African Children's Committee were 'sufficiently familiar with local exigencies to be able to engage immediately and with authority on African issues'.<sup>46</sup>

42 During its inaugural meeting at the AU headquarters in Addis Ababa, Ethiopia, in 2002, the African Children's Committee collectively highlighted issues requiring priority attention, the majority of which concerned child protection, namely, children in armed conflicts; child labour; child trafficking; the sexual abuse and exploitation of children; orphans affected and infected by HIV; children's rights to education; the formulation of a National Plan for Children; and resource mobilisation: A Lloyd 'The first meeting of the African Committee of Experts on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 324.

43 BD Mezmur 'The African Committee of Experts on the Rights and Welfare of the Child: An update' (2006) 6 *African Human Rights Law Journal* 561. Pursuant to art 43 of the African Children's Charter, state party reports are to be submitted 'within two years of the entry into force of the Charter for the State Party concerned; and thereafter, every three years'.

44 BD Mezmur & J Sloth-Nielsen 'An ice-breaker: State party reports and the 11th session of the African Committee of Experts on the Rights and Welfare of the Child' (2008) 8 *African Human Rights Law Journal* 21.

45 Both Egypt and Nigeria's Concluding Observations and Recommendations are undated, but Sloth-Nielsen and Mezmur highlight that they were issued shortly before the 14th session in November 2009, a full year after they had been debated; J Sloth-Nielsen & BD Mezmur 'Like running on a treadmill? The 14th and 15th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2010) 10 *African Human Rights Law Journal* 545.

46 J Sloth-Nielsen & BD Mezmur 'Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child' (2009) 9 *African Human Rights Law Journal* 345.

Over time the length of Concluding Observations increased and more concrete recommendations for state parties to realise children's rights to protection emerged.<sup>47</sup> The following analysis of Concluding Observations and Recommendations until 2018<sup>48</sup> is grouped by major and recurring themes relating to child protection that arose from the comprehensive review.<sup>49</sup> Although beyond the scope of this article, it should also be noted that the communications procedure pursuant to article 44 of the African Children's Charter has also significantly influenced issues of child protection.<sup>50</sup> Many of the General Comments of the African Children's Committee also elaborate on child protection themes.<sup>51</sup>

### 3.2.1 Policy, legislation and enforcement

Legislation and policy frameworks for child protection feature prominently in the African Children's Committee's recommendations. Harmonising the age of the child in various laws (including customary and religious laws) in line with article 2 of the African Children's Charter appears in all recommendations to date. This relates to the minimum age of marriage, employment, criminal responsibility, sexual consent and recruitment in armed forces. Many state parties are urged to introduce laws to ban corporal punishment in all

47 To date, the Concluding Observations and Recommendations on Senegal's periodic report are the longest at 20 pages (July 2019). The average number of pages is 12. The review undertaken for this article revealed a lack of consistency in length and format.

48 During the period up to and including 2017, the African Children's Committee had issued Concluding Observations and Recommendations for 32 countries, namely, Egypt, Nigeria, Burkina Faso, Mali, Tanzania, Kenya, Uganda, Rwanda, Togo, Senegal, Niger, Sudan, Liberia, Ethiopia, Guinea, Kenya, Mozambique, Madagascar, Namibia, Zimbabwe, Rwanda, Lesotho, Algeria, Gabon, Ghana, Cameroon, Eritrea, Côte d'Ivoire, Chad, Comoros, Angola and Sierra Leone. All recommendations were obtained from the website of the Children's Committee, <https://www.acerwc.africa/reporting-table/>, except for Kenya's which was not available. Most recommendations are undated but mention the African Children's Committee Session in which the state party report was considered.

49 These categories are not exclusive and there is overlap between them. Civil rights and freedoms, including birth registration, are not included in this analysis.

50 Covering issues of name and nationality, protection against child abuse and torture, and the recruitment of children in armed conflict; UNICEF 'Review of progress in the advancement of child rights in Africa: Reflecting on the past and future challenges and opportunities' (2020) 24-25, [https://www.unicef.org/evaldatabase/files/Review\\_of\\_child\\_rights\\_in\\_Africa.pdf](https://www.unicef.org/evaldatabase/files/Review_of_child_rights_in_Africa.pdf) (accessed 24 May 2020).

51 See General Comment on art 30 of the African Children's Charter on 'children of incarcerated and imprisoned parents and primary caregivers' (2013); General Comment on art 6 on the 'right to birth registration, name and nationality' (2014); General Comment on art 31 on 'the responsibilities of the child' (2017); Joint General Comment of the African Commission on Human and Peoples' Rights and the African Children's Committee on ending child marriage (2017).

settings.<sup>52</sup> This recurring theme is not surprising given the normative function of the African Children's Committee.

Beyond normative frameworks, the African Children's Committee recommends the enforcement of legislation including the investigation and prosecution of various forms of child abuse and exploitation. By 2014 there was mention of some countries with specialised sections in the police (such as Liberia, Ethiopia and Kenya) indicating progress since the time of drafting of the African Children's Charter where any form of specialisation in the services was rare. State parties are recommended to continue various efforts to ensure that perpetrators 'are not met with impunity'.<sup>53</sup> The African Children's Committee also draws attention to holding both formal and informal private sector actors accountable for economic exploitation – specifically in the form of child labour.<sup>54</sup>

### 3.2.2 *Adequate capacities and sufficient resource allocation*

The African Children's Committee pays progressively more attention to ensuring adequate capacities and sufficient resource allocation over the years. The 2014 recommendations for Liberia are notable as the first explicit discussion of the various elements of the system that need to be in place for children's protection and the capability of the state to deliver the system. The Children's Committee observes that implementation of the law is constrained as the 'structure devised by the law is not compatible with the available human resources available for social welfare', recommending that Liberia adopt a 'coherent policy framework to meet the welfare needs of children'.<sup>55</sup> This realistic assessment by the African Children's Committee does not appear to be reiterated in any other recommendations.

### 3.2.3 *Supportive social norms*

Fostering supportive social norms is part of building and strengthening a country's child protection system. It is important to recognise that

52 Eg, Concluding Observations and Recommendations for Sudan; Liberia; Mozambique; Madagascar; Namibia para 25; Zimbabwe para 26; Rwanda para 19; Lesotho para 27; Gabon para 26; Eritrea para 10; Côte d'Ivoire para 23; Chad para 24; Comoros para 18; Angola para 26.

53 Eg, Concluding Observations and Recommendations for Liberia (to investigate cases and bring perpetrators before justice); Ethiopia (to continue to build the capacity of specialised police units so that perpetrators are not met with impunity); Kenya (to continue actions towards a child-friendly justice system).

54 Eg, Concluding Observations and Recommendations for Liberia, Ethiopia, Guinea, Kenya, Madagascar, Comoros.

55 Concluding Observations and Recommendations for Liberia 4.

social and cultural norms may either be protective of children or enhance their vulnerability to abuse and exploitation. The African Children's Committee frequently draws attention to community attitudes and practices that enable or tolerate various forms of child abuse and exploitation. Examples are the practice of parents of forcing their pregnant daughters to marry perpetrators of sexual abuse,<sup>56</sup> the treatment of domestic violence as a 'family affair' which prevents it from being reported to authorities,<sup>57</sup> and the stigmatisation of those who report sexual abuse by family members.<sup>58</sup> The African Children's Committee's recommendations to address these attitudes and harmful practices focus on awareness raising and sensitisation for a 'change of mentality'.<sup>59</sup> They encourage the involvement of schools and traditional and religious leaders at the grassroots level.<sup>60</sup> Since 2017 the African Children's Committee has encouraged state parties to implement the AU campaign on ending child marriage.<sup>61</sup>

The African Children's Committee frequently recommends widespread awareness raising to address child labour.<sup>62</sup> They recommend dedicated sensitisation for community leaders and religious teachers to address the *Alamajiri* system.<sup>63</sup> Since 2016 the African Children's Committee has provided guidance beyond simply raising awareness and discusses how barriers to change can be overcome through community-level interventions. This is particularly important and addresses critiques of the 'disconnect' between formal national child protection systems and the realities of communities in Africa.<sup>64</sup> In its recommendations for Sierra Leone, for example, the African Children's Committee recommends developing a strategy for addressing social norms and behaviour that 'underpin vulnerability

56 Eg, Concluding Observations and Recommendations for Uganda, Guinea and Kenya.

57 Eg, Concluding Observations and Recommendations for Liberia and Lesotho.

58 Concluding Observations and Recommendations for Madagascar.

59 Concluding Observations and Recommendations for Uganda para 7.

60 Eg, Concluding Observations and Recommendations for Uganda, Rwanda, Guinea, Namibia, Zimbabwe, Lesotho, Algeria, Gabon, Eritrea, Côte d'Ivoire, Sierra Leone.

61 Eg, Concluding Observations and Recommendations for Côte d'Ivoire and Angola.

62 Eg, Concluding Observations and Recommendations for Uganda and Liberia.

63 Where children are attached to *imams* (religious leaders) for religious teaching and instruction but end up on the streets as beggars: Concluding Observations and Recommendations for Nigeria. This is also raised in the Concluding Observations and Recommendations for Senegal and Guinea.

64 Eg, Child Frontiers Ltd (n 38) 32–37; Training Resources Group and Play Therapy Africa 'Strengthening child protection systems in sub-Saharan Africa: A working paper' Inter Agency Group on Child Protection Systems in Sub-Saharan Africa 2012 10, [https://www.unicef.org/protection/files/strengthening\\_child\\_protection\\_systems\\_in\\_sub-Saharan\\_Africa\\_-\\_August\\_2012.pdf](https://www.unicef.org/protection/files/strengthening_child_protection_systems_in_sub-Saharan_Africa_-_August_2012.pdf) (accessed 10 May 2020); Wessells (n 32), Krueger et al (n 34).

to child labour' and to support and capacitate community-based early warning and early intervention mechanisms.<sup>65</sup>

### 3.2.4 *Effective prevention actions*

The African Children's Committee frequently calls for an examination of 'root causes' to prevent child abuse and exploitation. This is closely linked to social norms and aligns with a systems approach to examine underlying vulnerabilities. In this regard, the Children's Committee has progressively made more specific and actionable recommendations.<sup>66</sup> For example, the Committee recommends Guinea to consider alternative income-generating activities for those who perpetrate female genital mutilation (FGM). More recent recommendations elaborate on the complex and overlapping factors contributing to children's vulnerability. This indicates a deepening understanding by the Committee of the challenges that children face. For example, the African Children's Committee's Observations for Gabon highlight poverty, social exclusion, the absence of legal identity or lack of citizenship, child labour and organised crime as factors making children vulnerable to sexual exploitation.<sup>67</sup>

### 3.2.5 *Essential services*

The African Children's Committee provides progressively more comprehensive recommendations for support to child victims of abuse and exploitation. For example, in its recommendations for Namibia and Zimbabwe the African Children's Committee makes the same recommendation for state parties to

set in place a child-friendly reporting mechanism for victims of abuse and torture, to increase the work pool of psychologists and social workers in the criminal justice system, to build the capacity of the police to adequately respond to rape cases, to improve the conviction rate of offenders, established victim support programmes, and to promote community outreach efforts with a view of raising awareness.<sup>68</sup>

Since 2017 the African Children's Committee has discussed the importance of accessible toll-free helplines for child victims.<sup>69</sup> The Children's Committee also elaborates on specialist services for child

<sup>65</sup> Para 32.

<sup>66</sup> Eg, Concluding Observations and Recommendations for Ethiopia, Guinea, Rwanda.

<sup>67</sup> Para 50.

<sup>68</sup> Paras 26 & 27, respectively. See also Concluding Observations and Recommendations for Gabon (recommending a child-friendly and accessible reporting and rehabilitation mechanism for victims) para 26.

<sup>69</sup> See Concluding Observations and Recommendations for Cameroon para 16.

victims of trafficking,<sup>70</sup> child victims of sexual exploitation in refugee camps<sup>71</sup> and children affected by armed conflict.<sup>72</sup>

### 3.2.6 *Children in conflict with the law*

The African Children's Committee recommends specialist training for the justice work force to support children in conflict with the law.<sup>73</sup> The Children's Committee also recommends improving legislative and policy standards for child justice, promoting diversion, and ensuring sufficient human and physical resources for child justice.<sup>74</sup> There are recommendations for dedicated areas for women who are pregnant or with small children in detention in situations where alternatives to detention cannot be found.<sup>75</sup> The African Children's Committee highlights the importance of consulting children and meaningfully considering their views in the context of administrative and judicial proceedings that concern them.<sup>76</sup>

70 Eg, Concluding Observations and Recommendations for Madagascar and Ghana.

71 Eg, Concluding Observations and Recommendations for Rwanda para 28; Eritrea para 23.

72 Eg, Concluding Observations and Recommendations for Liberia, Kenya, Rwanda.

73 Eg, Concluding Observations and Recommendations for Togo, Rwanda, Lesotho, Côte d'Ivoire.

74 Eg, Concluding Observations and Recommendations for Tanzania (to allocate enough human and physical resources); Togo (to establish child justice courts and structures); Sudan (to establish specialist courts and dedicated areas for children in detention centres); Liberia (to ensure 'well-resourced courts' and reform its system to implement the new law); Ethiopia (to develop laws and policies to see all forms of detention as a last resort and for the shortest period of time); Guinea (to conduct cases *in camera*, the separation of children and adults and the supply of facilities to prisons accommodating children); Mozambique (to make its system child-friendly and introduce diversion and ensure detention remains an option of last resort); Madagascar (to increase the number of specialised judges and establish rehabilitation centres for children nationwide); Namibia (to train officials and recruit psychologists and social workers to establish more child-friendly courts nationwide); Algeria and Gabon (to increase the pool of psychologists and social workers in the child justice system); Ghana (to advocate the use of detention as a measure of last resort and where children are detained, to ensure that they are not detained with adults and to undertake to develop alternatives to detention); Chad (to train enough judges, prosecutors and police and to improve conditions for children in detention); Comoros (to create separate detention centres for children); Angola (to establish juvenile courts, implement diversion, provide legal aid, and establish rehabilitation centres); Sierra Leone (to allocate adequate resources to family courts and child panels, legal aid for children, guidelines for non-custodial sentences, and to ensure that sentencing children to imprisonment is done as a measure of last resort and where they are imprisoned, to ensure that children are kept separately and provide necessary support).

75 Eg, Concluding Observations and Recommendations for Sudan.

76 Eg, Concluding Observations and Recommendations for Namibia and Angola.

### 3.2.7 *Alternative care*

With respect to family environment and alternative care, the African Children's Committee makes wavering indications on institutional care. The 2014 Concluding Observations for Liberia contain the first clear statement on prioritising family-based care and ensuring institutional care is a last resort. The Children's Committee discourages, or suggests the regulation of, informal adoption and traditional fostering arrangements.<sup>77</sup> State parties are recommended to introduce monitoring and minimum standards for institutions, including those that are privately run.<sup>78</sup>

### 3.3 **General Comment 5 and measures introducing safeguarding principles**

Except for the 2014 Concluding Observations and Recommendations for Liberia, the African Children's Committee does not expressly discuss the elements of a child protection system or encourage state parties to adopt a systems approach. This is likely to be influenced by the format of state party reporting, which aligns with the articles of the African Children's Charter. The African Children's Committee's position on child protection systems strengthening is articulated for the first time in General Comment 5 of 2018. The General Comment was inspired by a seminar hosted for the African Children's Committee in 2013 on systems strengthening for child protection in sub-Saharan Africa. There was a request from international partners for a dedicated General Comment on systems strengthening. However, the topic was ultimately combined with that of the African Children's Charter's General Measures of Implementation as a whole.

The General Comment recognises that all systems reflect a nested structure. In the case of child protection, the African Children's Committee explains that children are embedded in families or kin, living in communities that exist within a wider societal system. Given

<sup>77</sup> See also Concluding Observations and Recommendations for Ethiopia (family reunification is recommended as a priority for orphans and vulnerable children and where this is not possible, these children should be provided with necessary care until an alternative family environment is found).

<sup>78</sup> Eg, recommendations for Namibia and Zimbabwe 'to increase its social workers' work pool; to build the capacity of existing social workers; to strengthen already-existing and to establish new public alternative care facilities; to effectively supervise or monitor alternative care institutions; enter collaborate with CSOs' (paras 29 & 31, respectively). See also Rwanda (to standardise and closely monitor foster care and social welfare institutes) para 23; Gabon (to improve childcare services and monitor and supervise institutional facilities) para 31; Lesotho (to work with privately-run institutes to assist in record keeping and tracking children in their care) para 30.

the nested nature of systems, specific attention needs to be paid to coordinating the interaction of these sub-systems so that the work of each system is mutually reinforcing to the purpose, goals and boundaries of related systems. Well-functioning systems pay attention to developing and fostering cooperation, coordination, and collaboration among all levels of stakeholders, from community level upwards.<sup>79</sup> Systems may be formal and informal, and protection systems may interact with other systems such as health and education.

General Comment 5 also for the first time introduces safeguarding principles. The African Children's Committee states that

state parties should ensure that CSOs [civil society organisations] and international organisations that work directly with children must be required to adopt child safeguarding policies. Persons who have abused children should be prevented from working with them, including in civil society organisations, even as volunteers.<sup>80</sup>

This is an important directive for state parties, which has not yet been considered in Concluding Observations. The issues are highly relevant given the preponderance of organisations delivering services for children in the region. The African Children's Committee frequently recommends state party collaboration with CSOs and non-governmental organisations (NGOs)<sup>81</sup> but with no associated safeguarding measures. Safeguarding measures are necessary for all organisations – state and non-state. As this directive falls in a section of the General Comment directed at NGOs, community-based organisations and international NGOs, it might erroneously be taken to imply that state structures and their employees are exempted from safeguarding measures. Since direct contact with children is frequently found at county, provincial regional and district/local levels,<sup>82</sup> it should be an explicit injunction by the African Children's

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<sup>79</sup> Para 6.1.

<sup>80</sup> Para 6.7.

<sup>81</sup> Eg, Concluding Observations and Recommendations for Nigeria (to cooperate with NGOs working on child protection); Burkina Faso (to coordinate with government ministries, NGOs and CSOs to tackle harmful practices); Liberia (to work with CSOs to facilitate social welfare services to unaccompanied children); Ghana (in partnerships with CSOs to launch a comprehensive programme of rescue, rehabilitation and reintegration of children in child labour).

<sup>82</sup> Eg, in schools, shelters, places of safety, state-run orphanages, and health and primary healthcare facilities. A recurring issue identified in Concluding Observations was sexual violence and other forms of child exploitation perpetrated by teachers. Eg, Concluding Observations for Côte d'Ivoire para 23; Comoros para 30; and Angola para 49. See also Concluding Observations and Recommendations for Malawi (to harmonise the provisions of the Penal Code and Teaching Service Commission Act so that sexual offences committed against students by children are appropriately handled) para 27; Senegal (to ensure the investigation and prosecution of Koranic teachers who force children to beg or inflict other abuse, and to implement a binding national code of conduct for teachers and school officials as well as other measures to address the ongoing abuse of girls in school settings) paras 44 and 62; Benin (to ensure that children

Committee to state parties to identify safeguarding policies within government agencies in their remit. The Children's Committee should also request state parties to explain how the implementation of these policies is pursued at national, regional and district levels.

With respect to emerging measures on safeguarding, brief mention must also be made of Africa's Agenda for Children 2040: Fostering an Africa Fit for Children (Agenda 2040). Agenda 2040 is the African Children's Committee's vision and elaborates on paragraph 53 of the AU's Agenda 2063: The Africa We Want, that 'African children shall be empowered through the full implementation of the African Charter on the Rights of the Child'.<sup>83</sup> Agenda 2040 sets ambitious targets and goals under 10 aspirations, four of which directly concern children's rights to protection.<sup>84</sup> Agenda 2040 is to be implemented in each state party over five consecutive phases, the first of which concludes this year (2020). There are numerous targets to achieve by 2020, including that state parties

should have engaged with the UN, AU and aid agencies to ensure that children are protected from being sexually exploited by aid workers, military personnel and peacekeepers, and that the perpetrators of such acts be prosecuted and punished.<sup>85</sup>

The targets also state that national partners working with children 'should have a child protection policy and safeguarding policy in place, in order to ensure a safe environment for children by, for example, minimising risks of child abuse'.<sup>86</sup>

Safeguarding has also recently surfaced in the AU Policy on Addressing Sexual Abuse and Exploitation in Peace Support Operations

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are not forced to beg or undertake any child labour while enrolled in Koranic schools) para 40. This presents another opportunity for the African Children's Committee to elaborate on institutional safeguards that schools and other institutions should put into place to prevent child abuse.

83 African Children's Committee 'Africa's Agenda for Children 2040: Fostering an Africa fit for children' (2016) 9, [https://www.acerwc.africa/wp-content/uploads/2018/06/Agenda\\_2040\\_for\\_Children\\_Rights\\_in\\_Africa\\_15x24.pdf](https://www.acerwc.africa/wp-content/uploads/2018/06/Agenda_2040_for_Children_Rights_in_Africa_15x24.pdf) (accessed 31 May 2020).

84 The 10 aspirations constitute the following: (1) The African Children's Charter, as supervised by the African Children's Committee, provides an effective continental framework for advancing children's rights; (2) an effective child-friendly national legislative, policy and institutional framework is in place in all member states; (3) every child's birth and other vital statistics are registered; (4) Every child survives and has a healthy childhood; (5) every child grows up well-nourished and with access to the basic necessities of life; (6) every child benefits fully from quality education; (7) every child is protected against violence, exploitation, neglect and abuse; (8) children benefit from a child-sensitive criminal justice system; (9) every child is free from the impact of armed conflicts and other disasters or emergency situations; and (10) African children's views matter.

85 African Children's Committee (n 83) 97-99.

86 African Children's Committee (n 83) 101.

(PSO).<sup>87</sup> Although not explicitly mentioned by name, the document refers to the obligation for ‘all mission personnel ... to create and maintain an environment that prevents SEA [sexual exploitation and abuse] and have the duty to promote the implementation of the present policy’.<sup>88</sup> According to paragraph 10.9:

The AUC [African Union Commission] shall establish a mechanism to verify prior perpetrators of SEA are not deployed or redeployed to AU PSOs, in compliance with applicable laws and to the best of the AU’s abilities. This should include engaging with AU member states to ensure that they perform thorough vetting and screening as well as background and criminal reference checks of military and police personnel during pre-deployment verifications and of civilian personnel upon a request from the AUC.

The establishment of complaints mechanisms is also addressed in considerable detail. These build on safeguarding and child protection principles, albeit in the specific context of sexual abuse and exploitation in humanitarian operations. While not yet referenced by the African Children’s Committee in its Concluding Observations and Recommendations, General Comment 5, Agenda 2040 and the AU Policy on Addressing Sexual Abuse and Exploitation in PSO set out clear child protection and safeguarding standards for state parties.

#### 4 Future directions for child protection in Africa

Although it is now 30 years after the adoption of the African Children’s Charter, it is only in the last decade that state parties have systematically engaged in meaningful dialogue with the African Children’s Committee to harmonise domestic law, policies and practice in line with its provisions. There is progress across the region to develop more systemic responses to child protection based on strong normative frameworks. The development of the normative framework is one of the most important contributions of the African Children’s Charter and the African Children’s Committee. Some discriminatory laws and provisions inconsistent with the African Children’s Charter remain, but it is commonly agreed that the ‘child protection architecture, covering laws, policies and institutions, is by and large well developed and fairly well established in Africa’.<sup>89</sup>

87 AU Policy on Prevention and Response to Sexual Abuse and Exploitation in Peace Support Operations.

88 Para 7.1.

89 African Child Policy Forum ‘The African report on child wellbeing 2018: Progress in the child-friendliness of African governments’ (2018) xix, <https://www.africanchild.report/> (accessed 31 May 2020).

The major work remaining is to translate law reform and policies into practice. Instead of focusing on responses to situations of harm, prevention must be the foundation. The African Children's Committee's more recent recommendations elaborate on the complex and overlapping factors contributing to children's vulnerability and call for an examination of underlying vulnerabilities to inform effective preventive actions. This is important and reflects a deepening understanding of the challenges that children face and the gradual maturity of the sector on the continent. The demand for realistic budgets and human resources to accompany legal and policy frameworks is another more recent but critical component.<sup>90</sup> Finally, there is a need for increased and sustained evidence-based investment to promote positive social norms. This must move beyond merely raising awareness. Without supportive social norms and adequate financial and human resources for national and local child protection systems, population level changes in child protection will be elusive, and the achievement of Agenda 2040 unlikely.

Looking to the immediate and longer-term future of child protection and safeguarding on the continent, it is evident that there are new challenges that were not foreseen at the time of the African Children's Charter's development. The region is relatively more peaceful now than at any time in the recent past but there are increasingly intense domestic conflicts<sup>91</sup> in which children are direct targets.<sup>92</sup> Increasing climate-induced disasters also negatively and disproportionately impact children and heighten children's vulnerability to various forms of exploitation.<sup>93</sup> While the digital revolution is presenting enormous opportunities for learning,

90 A critique of child protection interventions in low-income countries is that they are based on unrealistic expectations including that 'serious human resource and capacity gaps, such as the absence of a cadre of professional social workers, can be bridged within the lifespan of the programme': A Krueger et al 'Child protection in development: Evidence-based reflections and questions for practitioners' (2015) 50 *Child Abuse and Neglect* 15 20, <https://linkinghub.elsevier.com/retrieve/pii/S0145213415002720> (accessed 18 January 2020).

91 African Child Policy Forum (n 89) xx.

92 See African Children's Committee 'Continental study on the impact of conflict and crisis on children in Africa' (2016), [https://www.acerwc.africa/wp-content/uploads/2018/07/Study\\_on\\_the\\_impact\\_of\\_armed\\_conflict\\_and\\_crisis\\_on\\_children\\_in\\_Africa\\_ACERWC\\_FINAL\\_ENGLISH.pdf](https://www.acerwc.africa/wp-content/uploads/2018/07/Study_on_the_impact_of_armed_conflict_and_crisis_on_children_in_Africa_ACERWC_FINAL_ENGLISH.pdf) (accessed 5 June 2020); based on research in seven countries experiencing active conflict as at the time of writing (Burundi, Central African Republic, Kenya, Libya, Nigeria, Somalia and South Sudan) and six in fragile post-conflict situations or major humanitarian crises (Democratic Republic of the Congo, Guinea-Bissau, Liberia, Mali, Sierra Leone and Sudan). See also UNICEF 'How the world failed children in conflict in 2018' (2018), <https://www.unicef.org/stories/how-world-failed-children-2018> (accessed 5 June 2020).

93 See further E Boshoff 'Protecting the African child in a changing climate: Are our existing safeguards adequate?' (2017) 17 *African Human Rights Yearbook/Annuaire Africain des Droits de l'Homme* Volume 1 (2017) 23, <http://www.pulp.up.ac.za/images/pulp/books/journals/AHRY/Boshoff.pdf> (accessed 5 June 2020).

entertainment, social inclusion and civic engagement for children and young people on the continent, it has also created new risks and forms of harm.<sup>94</sup> This also has implications for child safeguarding. In 2020 the African Children's Committee is debating a draft General Comment on article 27 of the African Children's Charter, which elaborates measures required to be taken by state parties to combat 'offline' and online sexual exploitation and abuse of children. As explained in the African Children's Committee's General Comment 5, child protection systems that contain the full array of measures to prevent and respond to all forms of child abuse and exploitation are integral to the implementation of the African Children's Charter, including to address forms of violence not contemplated at its inception.

The COVID-19 pandemic has also presented numerous and unprecedented challenges to existing child protection systems. The African Children's Committee has warned that beyond the immediate health impacts of COVID-19, the social and economic disruptions will harm children's rights and welfare.<sup>95</sup> To date, evidence of the impact of COVID-19 on children's protection in the region has mostly emanated from news articles and reports from international organisations, NGOs and CSOs.<sup>96</sup> There are indications of negative impacts of the rapid de-institutionalisation of children in various alternative care settings;<sup>97</sup> increased gender-based violence (including child marriage and FGM) due to prolonged school closures;<sup>98</sup> the criminalisation of children in street situations;<sup>99</sup> the increased risk of

94 United Nations Children's Fund 'Children in a digital world' (UNICEF 2017), [https://www.unicef.org/publications/files/SOWC\\_2017\\_ENG\\_WEB.pdf](https://www.unicef.org/publications/files/SOWC_2017_ENG_WEB.pdf) (accessed 10 June 2020).

95 African Children's Committee 'COVID-19 and its implication on children's rights and welfare: Guiding note to member states of the African Union' 1, [https://www.acerwc.africa/wp-content/uploads/2020/04/Guiding-Note-on-Child-Protection-during-COVID-19\\_English-1.pdf](https://www.acerwc.africa/wp-content/uploads/2020/04/Guiding-Note-on-Child-Protection-during-COVID-19_English-1.pdf) (accessed 21 May 2020). See also AU Peace and Security Council 'Communiqué on impact of the novel coronavirus disease (COVID-19) pandemic on the security and welfare of children in Africa', <http://www.peaceau.org/uploads/com-psc-924th-psc-meeting-on-the-impact-of-covid-19-on-children-in-africa-12-may-2020.pdf> (accessed 5 June 2020).

96 E Fraser 'Impact of COVID-19 pandemic on violence against women and girls' (UK Aid from the Department for International Development) 284 1, <http://www.sddirect.org.uk/media/1881/vawg-helpdesk-284-covid-19-and-vawg.pdf> (accessed 5 June 2020).

97 PS Goldman et al 'The implications of COVID-19 for the care of children living in residential institutions' (2020) 4 *The Lancet Child and Adolescent Health* 12.

98 "'Many girls have been cut': How global school closures left children at risk' *The Guardian* 1 June 2020, <https://www.theguardian.com/global-development/2020/jun/01/many-girls-have-been-cut-how-coronavirus-global-school-closures-left-children-at-risk> (accessed 9 June 2020).

99 "'Will we die of hunger?': How COVID-19 lockdowns imperil street children' *The Guardian* 15 April 2020, <https://www.theguardian.com/global-development/2020/apr/15/will-we-die-of-hunger-how-covid-19-lockdowns-imperil-street-children> (accessed 9 June 2020).

online abuse and exploitation;<sup>100</sup> and collapsing systems of family and community support. There are also reports of sexual exploitation by state officials and community members charged with enforcing community level quarantine, as well as increased risks of sexual exploitation and abuse associated with 'outsiders' transporting goods or providing services.<sup>101</sup> Data is continuing to emerge and confirms warnings of increased child protection risks and impacts of containment measures on service delivery.<sup>102</sup>

Although COVID-19 risks the regression of child protection gains, it also presents unprecedented opportunities to 'build back better'<sup>103</sup> child protection systems. The nature of the pandemic requires localised and dynamic mechanisms and means of support to vulnerable families and children, including through technology and engagement of children and young people who constitute almost half of Africa's population. The crisis demands improved coordination between various sectors (such as health, education, labour and social welfare) and actors supporting the emergency response, including across borders, and new collaborations with academia and the industry. COVID-19 has exposed weak systems on and across the continent (and the world) and is a renewed call for states to use the maximum available resources to invest and refocus action on child protection,<sup>104</sup> including to address underlying vulnerabilities that have exacerbated the effects of the pandemic.

## 5 Concluding remarks

This article has traversed the origins, development and implementation of the African Children's Charter and its contribution to understanding and addressing children's rights to protection over the last 30 years. The issues that precipitated the development of a regionally-specific child rights treaty largely related to child protection. Accordingly, it is not surprising that many of the substantive articles of the African Children's Charter are geared towards child protection. There was a

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100 Interpol 'Threats and trends, child sexual exploitation and abuse: COVID-19 impact' (2020), <https://www.interpol.int/en/News-and-Events/News/2020/INTERPOL-report-highlights-impact-of-COVID-19-on-child-sexual-abuse> (accessed 12 November 2020).

101 Fraser (n 96) 3.

102 United Nations Children's Fund 'Protecting children from violence in the time of COVID-19: Disruptions in prevention and response services' (UNICEF 2020).

103 UN 'COVID-19 and human rights: We are all in this together' (2020) 21.

104 See the African Children's Committee's General Comment 5: 'Whilst being aware of fiscal realities, the Charter standards were set intentionally – they do not allow states parties to claim that they do not have any resources for the implementation of social and economic goods for the fulfilment of children's rights.'

major shift in the child protection sector from an issues-based to a systems approach after the adoption of the Children's Charter, but this took time to be propagated by the African Children's Committee.

After a decade of dialogue between the African Children's Committee and state parties, the basic child protection architecture now is relatively well-developed across the region. However, increased political will and investment are required to translate laws and policies into practice and realise the ambitious Agenda 2040 vision. New challenges include increasingly intense domestic conflicts, climate-induced disasters, new risks and harms enabled by digital technology, as well as the unprecedented impacts of COVID-19. These challenges demand a systemic approach and will require the maximum available resources to invest and refocus action.

The article underscores the vital role of the African Children's Committee in articulating African perspectives and catalysing state party action to realise children's rights to protection in accordance with the Charter. Through the state party reporting process and with reference to General Comment 5 and forthcoming guidance, the Committee can continue meaningful dialogue with state parties to address persistent and new challenges to child protection by adopting a systemic approach.

## Age or maturity? African children's right to participate in medical decision-making processes

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**Summary:** *This article advocates an approach to children's participation in medical decision-making processes guided by the rationality of the best interests' principle, a child's evolving capacity and a child's age. Using a human rights-based approach, rooted in the UN Convention on the Rights of the Child and the African Children's Charter, it seeks to elucidate the contested three-way partnership between the child, its parent(s) and the assigned physician(s), which plays out in relation to most medical procedures involving children. In analysing legislation and case law, the article further aims to clarify the complex relationship between age and maturity in child participation; to facilitate a child's involvement in the three-way partnership; and to suggest the statutory recognition of an age indicator in domestic African law in relation to medical procedures.*

**Keywords:** *children's autonomy; children's right to participate; medical decision-making process; child's evolving capacity; best interests of the child; age and maturity*

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## 1 Introduction

The right to participate was first presented as a legally-binding right in article 25 of the International Covenant on Civil and Political Rights (ICCPR)<sup>1</sup> to secure (adult) citizens' participation in the politics of a member state.<sup>2</sup> Conventionally, this right was not fashioned for the benefit of children.<sup>3</sup> However, after the adoption of the United Nations (UN) Convention on the Rights of the Child (CRC)<sup>4</sup> and the African Charter on the Rights and Welfare of the Child (African Children's Charter),<sup>5</sup> it is broadly accepted that children also have a right to participate, albeit in different contexts. The analysis in this article specifically focuses on the position of children and their ability to meaningfully participate in medical decision-making processes involving them.

For African children, the right to participate is contained both in article 12 of CRC and in articles 4(2) and 7 of the African Children's Charter.<sup>6</sup> As indicated above, children's right to participate differs from adult participation. A child's right to participate under international human rights law may be distinguished from (adult) citizens' participation under, for example, article 25 of ICCPR, in that article 12 of CRC and articles 4(2) and 7 of the African Children's Charter do not guarantee a specific outcome such as, for example, casting a vote, or the free expression of political opinion. Despite the fact that international human rights law and medical practice encourage patients' involvement in medical decision-making processes, children often are not involved. This is so because decisions of parents and/or physicians, often argued to be based on the best interests of the child, make the opinion of the child redundant.<sup>7</sup>

To prevent the exclusion of the child in this regard, this article adopts a human rights-based approach to children's participation in medical decision-making processes, rooted in CRC and the African

1 Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

2 Other examples include arts 21 and 27 of the Universal Declaration of Human Rights 1948; art 13 of the African Charter on Human and Peoples' Rights 1981; and art 9 of the African Women's Protocol.

3 G van Bueren *The international law on the rights of the child* (1998) 131.

4 Adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3.

5 Adopted 11 July 1990, entered into force 29 November 1999, CAB/LEG/24.9/49 (1990).

6 L Ehlers & C Frank 'Child participation in African context' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 116-122.

7 W Wadlington 'Medical decision making for and by children: Tensions between parent, state, and Child' (1994) 2 *University of Illinois Law Review* 311.

Children's Charter.<sup>8</sup> Under international children's law, a child's right to participate crucially demands the recognition, respect and meaningful engagement of children during decision-making processes relating to all matters concerning them, both in private and in public. Furthermore, children's right to participate stresses the role of adults in enabling such participation. For instance, adults, especially those with the legal responsibility to care for a child, have an underlying mandate to continuously assess a child's evolving capacity based on the child's age, maturity and ability to contribute substantively in a decision-making process. The importance of this responsibility relates to the fact that the right to participation, unlike any other right, requires a child to be meaningfully engaged in a decision-making process. It is the meaningful engagement (or lack thereof), enabled by the relevant adult(s), which constitutes the enjoyment or abjuration of this right.

Against this background the objective of the article is to argue the need in domestic African law to incorporate a specific age indicator to protect children's right to participate in a medical decision-making process. The method of the article is to examine the three-way partnership between the child, its parent(s) and the assigned physician(s), to explain why it is important to identify an age indicator against which a child's general level of maturity can be measured under domestic law. This contribution further highlights the composition of the three-way partnership and how African states have defined and applied age in relation to legislation to ascertain the level of a child's maturity and ability to participate in a medical decision-making process. This objective and further discussion should be viewed from the perspective that the article ultimately suggests that the African human rights system, specifically the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), should adopt an age indicator that will further guide all African jurisdictions to properly implement child participation in a medical decision-making process.

The article is divided into five parts. These include the introduction; the nexus between the best interests of the child and a child's right to participate in a medical decision-making process; an analysis of the power imbalance relating to the three-way partnership in a child's medical decision-making process; an in-depth discussion around the

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8 According to the Office of the High Commissioner for Human Rights, a human rights-based research approach must be guided by a systematic understanding of the context and the challenges that contribute to a human rights problem. See United Nations Human Rights Office of the High Commissioner (OHCHR) *Manual on human rights monitoring*, <https://www.ohchr.org/Documents/Publications/Chapter08-44pp.pdf> (accessed 8 June 2020).

interlinked caveats of age and maturity identified under international children's law as crucial to children's right to participate; and the conclusion.

## 2 Nexus between the best interests of the child and child participation

In most cases a medical decision-making process, which concerns a child, requires a three-way partnership, involving the child, its parent(s) and the assigned physician(s). Notwithstanding the fact that children's participation is essential for the fulfilment of all children's rights, as mentioned above, it is important to recognise its practical implications, especially in the context of a medical decision-making process. This right could, for example, assign children with the daunting task of making sense of a complex medical procedure involving the child.

For obvious reasons the three-way partnership usually evokes negotiation, compromise and the unwavering necessity to protect the best interests of the child. However, as is further discussed in part 3, parents and physicians involved in this partnership have (clear) mandates, while in most cases, and especially during severe and life-threatening episodes in a child's life, the role or mandate of the child is ill-defined and sometimes non-existent.

The best interests of the child and child participation are two of four<sup>9</sup> key aspects of international children's law identified as guiding principles in children's rights jurisprudence.<sup>10</sup> A proper definition and method of application of these principles is not clearly provided under international children's law.<sup>11</sup> However, according to the United Nations Children's Fund (UNICEF), these principles 'form nothing less than a new attitude toward children [as] they give an ethical and ideological dimension to the convention'.<sup>12</sup> According

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9 The four general principles also include non-discrimination(equality) and survival and development.

10 See, eg, T Morag 'The principles of the UN Convention on the Rights of the Child and their influence on Israeli law' (2014) 22 *Michigan State International Law Review* 531.

11 L Lundy & B Byrne 'The four general principles of the United Nations Convention on the Rights of the Child: The potential value of the approach in other areas of human rights law' in E Brems et al (eds) *Children's rights law in the global human rights landscape* (2017) 52.

12 See <https://www.unicef.org/armenia/en/stories/four-principles-convention-rights-child> (accessed 8 June 2020).

to the CRC Committee, to underpin the protection of a particular child's right a combination of these principles is possible.<sup>13</sup>

Relating to child participation, the CRC Committee further provides that the best interests principle fortifies the functionality of a child's right to participate.<sup>14</sup> This means that the decision, or lack thereof, to involve a child in a medical decision-making process must be motivated by the best interests of the child concerned.<sup>15</sup> Rodriguez argues that even though the best interests principle is inherently dependent on the specific situation of a particular child, the principle is ideologically unclear on a method of application.<sup>16</sup> For instance, as discussed in part 3, there hardly is uniform agreement on who, in the three-way partnership, is to make the final decision to include or exclude a child from a medical decision-making process. Here, the CRC Committee argues that to determine what is in the best interests of the child, one should start with the assessment of the child's evolving capacity.<sup>17</sup> As argued in parts 3 and 4, the evolving capacity of a child usually matures with age.<sup>18</sup> Indeed, while it is generally accepted that physicians should lead in relation to medical questions, it is uncertain as to whether they are better placed to permit child participation in relation to, for instance; abortion, contraception or sterilisation which may also involve moral, ethical and religious considerations. In *Gillick v West Norfolk*,<sup>19</sup> Lord Fraser states that parental rights exist for the benefit of the child and the child's best interests requires the physician to advise or to treat the child-patient. In *Christian Lawyers Association v Minister of Health*<sup>20</sup> it was equally established that, in relation to the termination of pregnancy, the best interests of the pregnant girl allows for a flexible criterion for capacity to consent irrespective of the opinion of the girl's parents.<sup>21</sup> Based on the best interests principle, both cases arguably advocate an approach which first and foremost supports child participation in the three-way partnership. This is because the

13 CRC Committee General Comment 12 CRC/C/GC/12 (2009), <https://digital.library.un.org/record/671444?ln=en> (accessed 10 June 2020).

14 CRC Committee (n 13) paras 70-74.

15 D Archard & M Skivenes 'Balancing a child's best interests and a child's views' (2009) 17 *International Journal of Children's Rights* 1.

16 NG Rodriguez 'Translating "best interest": Child welfare decisions at the US-Mexico border' (2016) 39 *Political and Legal Anthropology Review* 154. See also A Skelton 'Too much of a good thing: Best interests of the child in South African jurisprudence' (2019) 52 *De Jure* 559-561.

17 CRC Committee General Comment 14 CRC/C/GC/14 (2013), <https://www.refworld.org/docid/51a84b5e4.html> para 44 (accessed 26 June 2020).

18 S Varadan 'The principle of evolving capacities under the UN Convention on the Rights of the Child' (2019) 27 306.

19 *Gillick v West Norfolk and Wisbech Area Health Authority & Another (Gillick)* [1986] 1 AC 112, [1985] 3 All ER 402, [1985] 3 WLR 830.

20 *Christian Lawyers Association v Minister of Health* 2005 (1) SA 509 (T) (*Christian Lawyers*).

21 *Christian Lawyers* (n 20) 516D.

best interests of a child principle recognises a child as a reciprocal partner in the partnership and validates the child's autonomy.<sup>22</sup>

### 3 Power imbalances in the three-way partnership

According to Kennedy, the imbalance of power in medical decision-making processes is primarily due to the fact that physicians often hold information and a skill-set which the child-patient and parents do not possess.<sup>23</sup> Regarding parents, parental control and authority mixed with an emotional and psychological connection to the child sometimes exaggerates a protectionist approach to a child's involvement in the partnership.<sup>24</sup> Nonetheless, parents have an unequivocal right to be involved in this partnership, first and foremost as it falls under their responsibility as primary caregivers.<sup>25</sup> For instance, under article 18 of CRC and article 20(1) of the African Children's Charter, parents have the primary responsibility for the upbringing and development of the child. Correspondingly, as primary caregivers, parents often hold critical health-related information about the child that may not be known to the physician. Thus, parents cannot, and should not, be excluded from this partnership as their role is crucial to the well-being of the child. Based on the legal recognition of parents as the primary caregivers and the strategic skill-set of physicians, it seems that the challenge of balancing powers within this partnership has less to do with the child-patient and more to do with parents and physicians.<sup>26</sup> In most African countries national legislations have defined the parental role and related responsibilities in the three-way partnership. For instance, in Uganda sections 5 and 6 of the Children's Act<sup>27</sup> confer on every parent or guardian the responsibility to care for their child and to ensure the child's well-being. In Ethiopia, article 20(3) of the Civil Code confers<sup>28</sup> on the guardian the power to submit a child

22 A Ford 'Do children have the right to contribute to medical decisions about their own care? An analysis of policy and practice in the United Kingdom and the United States' (2017) *Health and Human Rights Journal*, <https://www.hhrjournal.org/2017/08/do-children-have-the-right-to-contribute-to-medical-decisions-about-their-own-care-an-analysis-of-policy-and-practice-in-the-united-kingdom-and-united-states/> (accessed 13 June 2020).

23 I Kennedy *Treat me right: Essays in medical law and ethics* (1988) 387.

24 See, eg, on parents' motivations for the participation of their children in medical research, A Dar 'Decision-making about child participation in medical research: A relational approach' (2015) 27 *Child and Family Law Quarterly* 109.

25 D Archard *Children: Rights and childhood* (1993) 130.

26 C Himonga & A Cooke 'A child's autonomy with special reference to reproductive medical decision-making in South African law: Mere illusion or real autonomy' (2007) 15 *International Journal of Children's Rights* 323. See also RJ McDougall et al 'Overriding parents' medical decisions for their children: A systematic review of normative literature' (2013) 40 *Journal of Medical Ethics* 448.

27 Children Act, Cap 59 (amended) of 2016.

28 Civil Code Proclamation 165/1960.

to a medical examination or treatment, beneficial to their health. Similarly, articles 257(1) and (2) of the Revised Family Code of Ethiopia<sup>29</sup> provides that the guardian shall watch over the health of the minor and shall take the necessary measures for the recovery of the minor in case of sickness.

In other African countries, such as Tanzania, parents have a shared responsibility to take care and ensure the protection of a child through the provision of medical care.<sup>30</sup> In Egypt, parental involvement is recognised especially in cases of organ transplants. Section 116 of its Child Law<sup>31</sup> warns that anyone who fails to recognise parental consent, especially with regard to organ transplants, shall be punished by imprisonment.<sup>32</sup> In Nigeria, section 39(c)(i) of the Code of Medical Ethics provides an interesting twist both to parental involvement and the role of a child in the three-way partnership. It provides, *inter alia*, that children aged between 16 and 18

have a statutory right of their own to consent to procedures and this takes precedence over parental objections, but does not invalidate the right of others to consent on their behalf. However, where the child of this age group objects and parental consent is obtained in an emergency situation, appropriate treatment or procedure can be given.<sup>33</sup>

The Nigerian Code of Medical Ethics makes crucial a point: Where a child is able to substantively and logically participate and consent to a medical process, parental opinion can be overridden.<sup>34</sup> As is further analysed in part 4, the issue of age is vital to demarcate the role of the child in the three-way partnership. For example, in *Gillick*, Mrs Gillick's objection to the provision of contraceptives to her daughters, without her prior knowledge and consent, was overruled by the Court. Lord Fraser concluded that it would be 'verging on the absurd to suggest that a girl or boy aged fifteen could not effectively consent, for example to have a medical examination of some trivial injury to his [or her] body or even to have a broken arm set'.<sup>35</sup> He went on to conclude:<sup>36</sup>

29 The Revised Family Code Proclamation 213/2000 (Revised Family Code).

30 See, generally, secs 8 & 16 of the Law of the Child Act 21 of 2009 consolidating all the laws relating to children.

31 Child Law 12 of 1996 (amended by Law 126) of 2008.

32 According to sec 116 of the Child Law (n 31) anyone who fails to recognise parental consent, especially in the case of an organ transplant, shall be punished by imprisonment.

33 The Code of Medical Ethics of 2004 of Nigeria.

34 See also L Krappmann 'The weight of the child's view (article 12 of the Convention on the Rights of the Child)' (2010) 18 *International Journal of Children's Rights* 502.

35 *Gillick* (n 19) 169.

36 *Gillick* 405.

The consent of the parents should normally be asked, but they may not be immediately available. Provided the patient, whether a boy or girl, is capable of understanding what is proposed, and of expressing his or her own wishes, I see no good reason for holding that he or she lacks the capacity to express them validly and effectively and to authorise the medical man to make the examination or give the treatment which he wishes.

Therefore, parental opinion is prioritised and only set aside if it is not in the child's best interests. Consequently, as discussed further below, the rights of a child and their parents continue to require constant safeguarding and balancing. As stated above, the contestations that take place within the three-way partnership seldom is between the child and the physician, but rather between the parents and the physician, where parents may challenge the medical approach or dominate the child-patient for personal, cultural or religious reasons.<sup>37</sup>

As mentioned in the introduction, unlike the roles of parents and physicians, a child's role in the partnership is further weakened by the fact that international children's law does not provide contents to the role of the child-patient in medical decision-making processes. For example, article 5 of CRC simply guarantees the exercise of the child's right, including the right to self-determination, according to their evolving capacity. In this regard it directs adults (in the three-way partnership: parents and physicians) to provide appropriate direction and guidance in the exercise of their rights in accordance with a child's evolving capacity. Therefore, besides the fact that it is the child's health and a child has an unequivocal right to participate in all matters concerning their health, international children's law is implicitly and explicitly silent on the actual role of child-patients in the three-way partnership.

The undermined position of the child-patient in this partnership is further exacerbated by the child's age and maturity. The scope of a child's right to participate under CRC and the African Children's Charter reflect these limitations. Consequently, it grants powers to states and parents to give due weight to a child's views, based on the child's age and maturity. Thus, where a child expresses an opinion, the substance of such an opinion should be vetted against the impact it may or may not have on the health or well-being of the child-patient. For example, in the CRC Committee's Concluding Observations on

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37 JMT Labuschagne et al 'Parental rights to participate in a child's personality development and its religious and moral upbringing and the child's right to freedom of choice: Observations on the field of tension caused by the irrational in a human rights dispensation' (2004) 25 *Obiter* 41 48-51.

Liberia, the Committee expresses that it is 'concerned that as a result of prevailing traditional attitudes, children are often not consulted about decisions affecting them ... in the family'.<sup>38</sup> In this regard the CRC Committee recommends that Liberia strengthen its efforts to ensure that children have the right to express their views, 'in the family ... and [in] other institutions and bodies as well as in society at large'.<sup>39</sup>

Technically, from the outset, adults' judgment of a child's competence is pre-conceived even before consultations begin.<sup>40</sup> Kruger affirms that children's presumed lack of developmental maturity makes them uniquely vulnerable in a medical decision-making process.<sup>41</sup> However, a child's right to participate in a medical decision-making process tempers the powers given to parents and physicians under international children's law, as the latter do not, separately and/or jointly, have the legal authority over a child's health without acting with due diligence. According to Freeman, this due diligence should extend to respecting the scope of the best interests of the child and child participation, the roles of the parties in the three-way partnership and specifically the responsibilities of parents in a medical decision-making process.<sup>42</sup> As discussed in part 2, parents have an unequivocal obligation to act in the best interests of a child at all times. However, the absence of demonstrated and consistent protection of the best interests of the child will bring parental involvement and their decision-making capacity into question.<sup>43</sup>

Nevertheless, within international children's law, the demand of paramountcy of the best interests of a child remains unclear. In *De Reuck v Director of Public Prosecutions*, for instance, the South African Constitutional Court held that 'paramount consideration' in

38 CRC Committee Concluding Observations: Liberia, 1 July 2004, CRC/C/15/Add.236, <https://www.refworld.org/docid/42d28f214.html> para 28 (accessed 14 June 2020).

39 CRC Committee (n 38) para 29.

40 See, eg, research conducted in Ireland, I Coyne et al 'Giving children a voice: Investigation of children's experiences of participation in consultation and decision-making in Irish hospitals' (2006), [http://www.dcy.gov.ie/documents/research/Giving\\_Children\\_a\\_Voice.pdf](http://www.dcy.gov.ie/documents/research/Giving_Children_a_Voice.pdf) (accessed 2 May 2019).

41 H Kruger 'The protection of children's right to self-determination in South African law with specific reference to medical treatment and operations' 2018 (21) *Potchefstroom Electronic Law Journal* 2.

42 M Freeman 'Rethinking Gillick' (2005) 13 *International Journal of Children's Rights* 201.

43 See, eg, the decision in *P v M* (590/2014) [2017] ZACPEHC 14 (14 February 2017) decided in the High Court of South Africa (Eastern Cape Local Division, Port Elizabeth) where Chetty J granted sole custody of a child from a divorced marriage to the applicant because the respondent has a poor record of acting in the best interests of the child concerned.

section 28(2) of the South African Constitution of 1996<sup>44</sup> does not automatically mean that a child's best interests can never be limited by other rights.<sup>45</sup> Accordingly, the weight of the understanding and application of a child's best interests should be governed by a thorough, candid and contextual analysis. Eekelaar suggests that a thorough judgment of what is best for a child depends on a case-by-case analysis.<sup>46</sup> He warns that 'if the best solution to the issue in question is considered to have a detrimental effect on a child's interest, it may need to be modified or abandoned ... the focus remains finding what is best for the child'.<sup>47</sup>

Therefore, even though international children's law insists on the importance of meaningfully involving children in medical decision-making processes, parents and physicians have the ultimate decision-making power to ascertain whether it is in the best interests of a child to be included or excluded from the process.<sup>48</sup> However, no parental or physician's right or responsibility will have any substance or meaning if the medical decision arrived at is not in the best interests of the child.<sup>49</sup> A child's welfare must be the ambit within which any decision relating to a child is made. A medical decision is a crucial process in a child's life, which could either ensure continuity of a child's development or possibly end it. Hence, even though the child-patient might not make any substantive contribution to the process, it is crucial that as a minimum, there is some form of conversation within the partnership to permeate some level of access to information that would lead to an informed consent by the child to a preferred medical procedure. However, the question remains as to whether an equal partnership in medical decision-making processes involving children is at all times feasible.

As briefly mentioned above, from the outset there is an existing imbalance in the power structure between the physician, parent(s) and the child-patient. From a practical perspective this imbalance is manifested through a child's physical and psychological vulnerability which also affects their ability to make choices that are more progressive than those of adults. In a medical context, as mentioned,

44 Constitution of the Republic of South Africa, 1996 (Constitution).

45 *De Reuck v Director of Public Prosecutions* 2003 (3) SA 389 (W).

46 J Eekelaar 'The role of the best interests principle in decisions affecting children and decisions about children' (2015) 23 *International Journal of Children's Rights* 3.

47 Eekelaar (n 46) 5.

48 AJ Kleinfeld 'The balance of power among infants, their parents and the state' (1970) 4 *Family Law Quarterly* 63; see also SJ Baskin 'State intrusion into family affairs: Justifications and limitations' (1974) 26 *Stanford Law Review* 1383.

49 See, eg, *Kaiser v Chambers* 1969 (4) SA 224 (C) 228G, where the Court referred to the best interests of the child as a 'golden thread which runs through the whole fabric of our [South African] law relating to children'.

physicians hold technical information and skills and as such are vested with specific powers. Equally, from a natural and legal perspective, parents have an unmatched responsibility to provide primary care. Conversely, the child has no specific role apart from being the patient while having a right to participate in all decisions relating to its health.

In *Castell v De Greeff*<sup>50</sup> the Western Cape High Court provided content to the concept of a child's participation in the three-way partnership through the lens of a patient-focused approach. This method recognised the child's fundamental rights of autonomy and self-determination.<sup>51</sup> In this case, the Court held that physicians have a legal obligation to obtain a patient's informed consent before any medical intervention.<sup>52</sup> Even though this is the standard procedure, the case of children is different as it introduces limitations to this legal requirement to consent during a medical decision-making process due to the perceived immaturity of a child and the imposing presence of parents and physicians.

Notwithstanding the necessary parental presence and opinion, the Nigerian Court of Appeal in *Esanubor v Faweya*<sup>53</sup> held that where parental opinion regarding a child's health is not in the best interests of the child, it should be set aside by the medical doctor or a higher authority.<sup>54</sup> This case is crucial to understanding the complexity of the power imbalance that exists in the three-way partnership. Succinctly, the Court in *Esanubor* establishes that even though parents enjoy vast powers in the upbringing of their child, the best interests of the child trumps such authority. Furthermore, in a medical decision-making process a physician has the power to override parental opinion where it interferes with a child's best interests. Related to this, the following part presents an analysis of the two main delineating factors that constrain a child's role in the three-way partnership: a child's age and their maturity.

#### 4 A child's age and maturity

The aspect of 'age' is central in children's rights jurisprudence. Under international children's law a 'child' is defined as anyone below the age of 18 years. As a result, every child is entitled to all the rights in CRC and the African Children's Charter. Under certain rights, for

50 *Castell v De Greeff* 1994 (4) SA 408 (C).

51 *Castell v De Greeff* (n 50) 425-426.

52 As above.

53 *Esanubor v Faweya* [2009] All FWLR (Pt 478) (CA) (*Esanubor*).

54 *Esanubor* (n 53) para 380.

instance, a child's right to be protected from economic exploitation, both instruments oblige state parties to provide for a minimum age for admission to employment.<sup>55</sup>

Under a child's right to participate none of the instruments explicitly mandates state parties to provide for a minimum age for admission into a decision-making process on matters concerning the child. Instead, the instruments provide 'age' and 'maturity' as 'tools' to enable the state to give appropriate due weight to a child's views.<sup>56</sup> As discussed further in part 4.1, the aspects of age and maturity are different but interlinked concepts that are analysed as a combined caveat to a child's right to participate. As requirements, guiding state party and/or parental or adult interactions with children, 'age' and 'maturity' to date have been recognised as distinguished features that determine the weight given to a child's opinion on their health.<sup>57</sup> Broadly, this makes sense because not every child might be able to express an immediate opinion in a medical decision-making process. However, at a later stage the child may have an opinion and may wish to express it. As is argued below in part 4.1, the absence of an age indicator, as a starting point when ascertaining children's maturity and ability to participate in the partnership, has contributed to limiting children's enjoyment of their right to be involved in medical decision-making processes.

#### 4.1 The importance of an age indicator

Except for CRC and the African Children's Charter, there is no other binding international human rights instruments with a proliferation of joint parental and state obligations. Both instruments assign parents and state parties with separate and joint duties to safeguard the effective protection of certain children's rights depending on the age of the child.<sup>58</sup> Also, as indicated above, both instruments stipulate that a child is any person below the age of 18 years. However, CRC indicates an exception: If the age of majority under the law applicable

55 See art 15 of the African Children's Charter and art 32 of CRC.

56 Other caveats contained in a child's right to participate include a child's ability to form an opinion, a child's ability to communicate their opinion freely and the due weight criterion. For further details on these caveats, see A Parkes *Children and international human rights law: The right of the child to be heard* (2013) 1.

57 See, generally, CRC Committee General Comment 12 *The right of the child to be heard* (2009) UN Doc CRC/C/GC/12 para 12.

58 See, eg, art 3 of CRC and art 4(1) of the African Children's Charter according to which the state and parents are obliged to ensure that the best interests of the child is the primary consideration in all actions concerning the child.

to the child is attained earlier that age will indicate the threshold.<sup>59</sup> The African Children's Charter contains no such exception.<sup>60</sup>

Notwithstanding the indication of the age of 18 as the threshold to adulthood in international children's law, the definition of a child differs across different legal disciplines. For instance, in criminal matters the category of punishment a child offender receives depends on the age of the child. In *Centre for Child Law v Minister for Justice & Constitutional Development*<sup>61</sup> the applicant brought an application to challenge the constitutionality of the Criminal Law Amendment Act<sup>62</sup> providing the minimum sentence provision for children 16 and 17 years old at the time of the offence. Section 28 of the South African Constitution defines a child as anyone below the age of 18. South Africa furthermore is a state party to CRC and the African Children's Charter. Nevertheless, the Constitutional Court held that 'the minimum sentencing legislation, in so far, as it is applicable to children who are 16 and 17 years old is not inconsistent with the Constitution'.<sup>63</sup> Generally, across Africa there are varied ages of responsibility that are lower than the identified age of 18 stipulated in CRC and the African Children's Charter.<sup>64</sup> These inconsistencies reflect a seemingly irreconcilable clash between international children's law and domestic law.

As discussed in part 4, a child's right to participate does not identify a compulsory age limit that will mandate a child's involvement in a decision-making process. However, the state and parents are required to measure a child's opinion based on the child's age and maturity. As discussed further in part 4.2, this article argues that a child's age and not a child's maturity should be the deciding factor whether or not to involve a child in a medical decision-making process concerning the child. This is because striking a balance between a child's mental capacity and right to be involved in the three-way partnership, in respect of ascertaining the developmental level at which a child gains sufficient competence to participate in a

59 Art 1 CRC.

60 For more details on the differences between these instruments, see D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157; D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 127.

61 *Centre for Child Law v Minister of Justice & Constitutional Development* 2009 (6) SA 632 (CC).

62 Criminal Law (Sentencing) Amendment Act 38 of 2007.

63 *Centre for Child Law* (n 61) 126.

64 See, eg, Child Rights International Network (CRIN) 'Minimum ages of criminal responsibility in Africa', <https://archive.crin.org/en/home/ages/Africa.html> (accessed 14 June 2020).

medical decision-making process, is a complex exercise. As is further argued below, an age indicator could provide a realistic and time-friendly measure for a child to participate meaningfully in a medical decision-making process.<sup>65</sup> The validity of an age indicator ostensibly is limited in context as, for practical reasons, a child's cognitive ability to withstand pressure in most cases matures with age.

Therefore, the institution of an age indicator to presume maturity and consequently decisional competence strengthens a child's right to participate. As pointed out in the introduction, the absence of an indication of when a child could meaningfully participate in a medical decision-making process is a significant gap in international children's law. The CRC Committee through its General Comment 12 has welcomed the introduction of 'age' as a basic indicator to ascertain children's maturity and level of competence to, for example, participate in a medical decision-making process.<sup>66</sup> As discussed further under 4.2, the Committee's position,<sup>67</sup> understood in conjunction with article 5 of CRC,<sup>68</sup> arguably endorses a flexible approach that recognises a child's evolving capacities and rejects arbitrary age restrictions.<sup>69</sup> Consequently, where a younger child, that is, a child who falls below the age indicator, demonstrates the mental capacity to express an informed view on their health-related treatment, due weight should be given to such views regardless of the child's age.<sup>70</sup>

#### 4.2 African examples of the implications of an age indicator

As highlighted throughout this article, the question of whether a child is competent to participate in a medical decision-making process is contentious. One of the contestations specifically refers to

65 CRIN (n 64) para 102.

66 As above.

67 See General Comment 12 para 102, where the Committee 'welcomes the introduction in some countries of a fixed age at which the right to consent transfers to the child, and encourages states parties to give consideration to the introduction of such legislation. Thus, children above that age have an entitlement to give consent without the requirement for any individual professional assessment of capacity after consultation with an independent and competent expert. However, the Committee strongly recommends that states parties ensure that, where a younger child can demonstrate capacity to express an informed view on her or his treatment, this view is given due weight.'

68 This article deals with parental guidance and the child's evolving capacities. It introduces the notion that a child should be allowed to participate in all matters concerning the child when the child acquires that ability to do so. It further mandates state parties to consider a child's level of development when instituting a minimum age of participation on particular issues.

69 CRIN 'Age is arbitrary: Setting minimum ages' 21, <https://www.crin.org/en/library/publications/age-arbitrary-discussion-paper-setting-minimum-ages> (accessed 8 April 2019).

70 As above.

the question of whether the decision to involve a child in the three-way partnership should be determined by the child's age, maturity or both. This article argues that it makes sense to consider both but 'age' should trump 'maturity' at the point of deciding whether or not to include a child in the partnership. The reason why it is important to consider age and not maturity at the point of involving a child in the partnership is because a child's ability to meaningfully engage in a decision-making process often is a function of intellectual reach that matures with age. Also, because the ability to ascertain a child's intellectual reach often requires special skills and considerable time, the aspect of age is critical.<sup>71</sup> An age indicator, unlike a child's maturity, could provide a basic and an immediate response to the legal obligation to include or the practical challenge to exclude a child-patient from a medical decision-making process.<sup>72</sup>

As argued above, the concept of child participation as it is prescribed under international children's law obliges physicians and parents to consider a child-patient competent to participate meaningfully in the three-way partnership. However, practically this is not achievable for several reasons.<sup>73</sup> Therefore, there is an urgent need to further delineate the concept of child participation under international children's law by adding a minimum age to allow physicians and parents to anticipate a child's competence. This is crucial as it will provide a fair and judicious starting point to ascertain a child's maturity.

Before considering the reasons for introducing such an age indicator, as is further discussed in part 4.3 below, and as a point of departure for such an initiative it is worth considering how different African jurisdictions have regulated the age of child participation in medical decision-making processes. Thus, to create a framework within which to understand the 'minimum age' requirement, some contrasting, not always uniform, examples of African domestic regulations are set out below.

71 E Ochaíta & MA Espinosa 'Children's participation in family and school life: A psychological and developmental approach' (1997) 5 *International Journal of Children's Rights* 279-284-88.

72 For an in-depth analysis of the presumptive competence of child, see H Rodham 'Children under the law' (1974) 9 *Harvard Educational Review* 22.

73 Some of these reasons could include a child's lack of sufficient competence, negative parental influence and severe medical conditions. For further details on these reasons and more, see P Grootens-Wiegers et al 'Medical decision-making in children and adolescents: Developmental and neuroscientific aspects' (2017) 17 *BMC Pediatrics* 2.

In South Africa section 129(2)(3) of chapter 7, part 3 of the Children's Act<sup>74</sup> confers on children over the age of 12 years the right to participate in medical decision-making processes relating to the child.<sup>75</sup> However, a child younger than 12 is allowed to participate if the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment required.<sup>76</sup> Therefore, section 129(2)(3) does not permanently eliminate a child under the age of 12 as a competent participant. Rather, it confirms the participation of all children of a certain age in the three-way partnership. However, the role of the child could be affected if the child fails to display the level of mental capacity during a participatory process. If the child is not mature enough to make a justiciable contribution, the Children's Act introduces parents and physicians as competent to make the relevant decisions<sup>77</sup> guided by the best interests of the child.<sup>78</sup>

It is worth noting that according to the Children's Act, the responsibilities of parents and physicians are only activated when the child's contribution is not in their best interests. Therefore, even though there is an age indicator, a child's evolving capacity trumps the age indicator when a child displays sufficient aptitude even when the child is below the age of 12 years.<sup>79</sup> According to Appelbaum, this is a correct clinical position because a certain level of mental competence is needed to balance a child's autonomy with the legal requirement to protect a child's right to participate in a medical decision-making process.<sup>80</sup>

In Mauritania the age limit of 12 is also recognised in accordance with the principles of Maliki Muslim law.<sup>81</sup> However, unlike in South Africa, the age limit of 12 is not as an absolute primary determinant of a child's mental competence. In Mauritania the age limitation

74 Children's Act 38 of 2005 (Children's Act).

75 Children's Act (n 74) ch 7 part 3 sec 129(2)(a). See also DJ McQuoid-Mason 'Can children aged 12 years or more refuse lifesaving treatment without consent or assistance from anyone else?' (2014) 104 *South African Medical Journal* 466-467.

76 Children's Act (n 74) ch 7 part 3 sec 129(2)(a).

77 Children's Act (n 74) sec 129(4)(a)(b).

78 See ch 2 of the Act.

79 See, eg, sec 129(1) of the Children's Act, referring to sec 5(1) of the Choice on Termination of Pregnancy Act, which confers the right of consent to an abortion on every girl child (irrespective of age) when she has the mental capacity to do so.

80 PS Appelbaum 'Clinical practice. Assessment of patients' competence to consent to treatment' (2007) 357 *The New England Journal of Medicine* 1834.

81 See, eg, art 15 of the Code of Obligations and Contracts which stipulates that '[a]ny person in possession of his mental faculties and not having been forbidden so to do is fully capable of exercising his civil rights'. See also CRC Committee on the CRC Consideration of reports submitted by States Parties under article 44 of the Convention: Mauritania UN Doc CRC/C/8/Add.42 paras 18-29 & 47-48.

considers children under the age of 12 as absolutely incapable, and children from 12 and above as persons with limited mental capacity.<sup>82</sup>

However, not all African states identify the age of 12 as a threshold for maturity. For example, in Tunisia article 42 of the Code for the Protection of the Child<sup>83</sup> sets the age indicator at the age of 13.<sup>84</sup> In Ethiopia<sup>85</sup> and Eswatini<sup>86</sup> children are not considered to have sufficient mental competence at any stage of their development. In article 7 of the Revised Family Code of Ethiopia<sup>87</sup> a minor is defined as anyone below 18. Moreover, article 257(2) of the Revised Family Code states that '[i]n case of sickness of the minor, the guardian shall take the necessary measures for his recovery'.<sup>88</sup> Similarly, in Eswatini the provisions of the Mental Health Order<sup>89</sup> recognises a child as anyone below 18 years. However, the Mental Health Order provides that persons under the age of 21 require parental consent to access medical services.<sup>90</sup>

In Namibia a different approach to child participation has been developed. The Child Care and Protection Act<sup>91</sup> holds that 'every child that is of an age, maturity and stage of development as to be able to participate in any matter concerning that child' should be allowed to participate. The provision proceeds to add that the child must be able to participate in 'an appropriate way'. Based on the detailed analysis of the context of child participation by the CRC Committee,

82 CRC Committee (n 81) para 19. This provision is supplemented by art 164 of the Personal Status Code which provides that '[a] person who reaches the age of discernment before reaching the age of majority does not enjoy full legal capacity'.

83 Code de La Protection de L'enfant Loi n° 95-92 du 9 Novembre 1995 (Code for the Protection of the Child).

84 See, generally, art 42 which states: 'Le délégué à la protection de l'enfance doit obligatoirement informer les parents et l'enfant âgé de 13 ans de leur droit de refuser la mesure proposée. Dans le cas où aucun accord n'est établi dans un délai de vingt jours à partir du moment où le délégué à la protection de l'enfance s'est saisi du cas, le dossier est soumis au juge de la famille. Il en est ainsi dans le cas où l'accord est résilié par l'enfant ou par ses parents ou par celui qui en a la charge.' For details, see Code de La Protection de L'enfant (n 83), relative à la publication du code de la protection de l'enfant.

85 See, eg, art 215 of the Revised Family Code of 2002 which states that '[a] minor is a person of either sex who has not attained the full age of eighteen years'.

86 The Age of Majority Act (1853) stipulates the age of majority to be 21 years. See also CRC Committee Initial Report of States Parties Due in 1997, Swaziland (2006) CRC/C/SWZ/1, <https://www.refworld.org/docid/45377ec90.html> para 66 (accessed 26 June 2020).

87 Revised Family Code (n 29).

88 See, generally, The Revised Family Code of 2000, <http://www.refworld.org/pdfid/4c0ccc052.pdf> (accessed 20 April 2020). See also CRC Committee Consideration of reports submitted by States Parties under Article 44 of the Convention: Ethiopia UN Doc CRC/C/129/Add.8 para 60.

89 Public Health Order: The King's Order-in-Council of 20/1978 (Mental Health Order).

90 CRC Committee Consideration of reports submitted by States Parties under Article 44 of the Convention: Swaziland (n 86) para 77.

91 Child Care and Protection Act 3 of 2015 (Child Care and Protection Act).

the addition of the latter condition arguably is counterproductive to the participation of the child and the best interests of the child as it further compounds a child's position in the three-way partnership in two distinct ways. First, it could be interpreted to require that a child must be able to articulate its opinion at the same level as adults. Second, it could also be interpreted to require that a child must be able to fully understand the subject matter of the decision-making process.<sup>92</sup> Construed in this way, this arguably creates a high threshold for child participation.

### 4.3 Reasons for introducing an age indicator to determine maturity in medical decision-making processes

The importance of introducing an age indicator in domestic law, as a primary determinant of a child's maturity and mental competence to participate in a medical decision-making process, cannot be overstated. According to the CRC Committee, it indeed is a welcome idea.<sup>93</sup> Moreover, as argued throughout this article, the aspect of 'age' is more important in the implementation of children's right to participate in medical decision-making processes than it is in any other decision-making processes. This is so because health-related decisions are personal and an erroneous decision could lead to bodily harm or death. The CRC Committee has reaffirmed the importance of a comprehensive understanding of the context of children's right to participate in a medical decision-making process by stating that before parents give their consent, children of sufficient maturity should be given a chance to express their views freely and their views should be given due weight.<sup>94</sup> In this regard, Kassan and Mahery suggest that a child-patient should be allowed to participate in a medical decision-making process if they comply with two requirements, namely, age and maturity.<sup>95</sup>

The suggestion made in this article, that African jurisdictions that do not include an age reference in terms of medical decision-making processes such as in South Africa and Mauritania, should be amended to include a reference to a fixed age that will allow a child to be involved in the three-way partnership formed around a

92 CRC Committee General Comment 12 (n 57). See also K Herbots & J Put 'The participation disc: A concept analyses of [a] child ['s right to] participation' (2015) 23 *International Journal of Children's Rights* 154.

93 CRC Committee (n 67).

94 CRC Committee General Comment 4 Adolescent health and development in the context of the Convention on the Rights of the Child UN Doc CRC/GC/2003/4 para 32.

95 D Kassan & P Mahery 'Special child protective measures in the Children's Act' in T Boezaart (ed) *Child Law in South Africa* 208-209.

medical decision-making process, may be justified based on three main considerations.

The first is the widespread domestication of international children's rights and the increasing development of domestic children's rights protection programmes on the continent. This arguably is related to the widespread acceptance and recognition of children as right bearers on the continent. Except for the Saharawi Arab Democratic Republic, all AU states are parties to CRC, and 49 out of these 54 states have also ratified the African Children's Charter.

Second, the need for an age indicator to safeguard a child's right to participate in a medical decision-making process specifically relates to the fact that it is different from other participatory processes.<sup>96</sup> Also, according to Grootens-Wiegers, a medical decision-making process requires adequate mental competence and the maturity to take responsibility for the decision made.<sup>97</sup> However, the content of child participation as stipulated in article 12 of CRC and articles 4(2) and 7 of the African Children's Charter only requires a child to express a view and not for the child to take responsibility for the decision made. It is the responsibility of parents and the physician in the three-way partnership to give due weight to the views of the child and to take responsibility for the final decision. As discussed in parts 4 1 and 4 2, an age indicator is necessary in the partnership to make it compulsory for a child of a certain age to express a view in a medical decision-making process.

Third, and related to the aforementioned considerations, is the impact of the increasing global recognition of a child, as an autonomous person and the growing re-ordering of parent-child relationship.<sup>98</sup> In *S v M*<sup>99</sup> Sachs J held that the ultimate responsibility of parents

is to ensure that [they] serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cell phones and expensive shoes. It is to show their children how to

96 Eg, decision-making processes around a child's education, clothing and food evoke minimal levels of responsibility as compared to a medical decision-making process that could result in a permanent disability or death if not well thought out.

97 Grootens-Wiegers (n 73) 2.

98 For more on the parent-child relationship, see A Twum-Danso 'Reciprocity, respect and responsibility: The 3Rs underlying parent-child relationships in Ghana and the implications for children's rights' (2009) 17 *International Journal of Children's Rights* 415.

99 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable.<sup>100</sup>

What is more, a child's right to participate recognises that there are certain aspects of a child's private life and person that need protection. Some of these aspects include a child's bodily integrity, respect, freedom and autonomy. It is the combination of these unique features of a child's right to participation that influenced Freeman to regard this right as the kingpin of children's rights protection.<sup>101</sup> In other words, the right to participation breathes life into and holds the other rights in CRC and the African Children's Charter together as it ensures a child's autonomy and ability to contribute to the enjoyment of all rights.

## 5 Conclusion

As technology and other sophisticated means of treatment are increasingly introduced into the medical field, medical decision-making becomes more complicated to explain and understand. As a result, physicians and parents are progressively faced with the difficult task of ascertaining whether or not to involve a child-patient in a medical decision-making process. As in most legal child protection schemes in Africa, when it is established that it is impossible for a child-patient to participate, parents and physicians are allowed to trump a child's right to participate and make decisions guided by the best interests of the child. Therefore, as argued in this article, the reference exclusively to the 'best interests' or to 'age' and/or 'maturity', without further clarifications or parameters, is largely insufficient in establishing and protecting a child in a medical decision-making process.

Children's right to participate has been lauded as an empowerment right. However, the inclusion of caveats in international children's law, such as age and maturity, has both complicated its implementation and opened up the door for further clarifications and protection under domestic law. Moreover, the inclusion of claw-backs in international children's law, such as the reference to the views of the child being given 'due weight', weakens the central intention of the protection of this right as it applies to children.

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100 *S v M* (n 99) para 134.

101 M Freeman 'The importance of a children's rights perspective in litigation' (1996) 2 *Butterworths Family Law Journal* 84.

As has been argued in this article, one of the obvious ways to ascertain a child's involvement in a medical decision is through an evaluation of the child's level of development and evolving capacity. However, since this approach generally is laborious and time consuming, the article has argued that the institution of an age indicator in domestic African law as the minimum threshold to involve a child in a medical decision-making process should be encouraged.

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## Childhood sexuality in Africa: A child rights perspective

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**Summary:** *It is an undeniable fact that children in Africa face many challenges in their sexual health and development trajectories. One of the challenges that children face is ideological, that is, the social construction of childhood sexuality and the effects of that construction on law and policy and on what information and services children may access regarding sex and sexuality. Adults tend to represent children as sexually innocent and incompetent, and their actions toward children focus on preserving this sexual innocence and averting sexual risks.*

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*The article discusses how this ideological positioning of children shapes sexuality education, and the criminalisation of sexual conduct between consenting adolescents. Legal instruments and related interpretive instruments such as court judgments and the General Comments and Recommendations of treaty-monitoring bodies play an important role as they construct meanings of childhood sexuality that align with or contradict dominant representations of childhood as sexual innocence which has effects for children's sexual rights. The article analyses how General Comments of the Committee on the Rights of the Child and the African Committee of Experts have represented childhood sexuality. It argues for the transformation of views about children toward perceiving children as having sexual agency to the extent of their evolving capacities, as a prerequisite to addressing challenges that children face in Africa relating to sexuality. It recommends that the African Committee of Experts should, in its interpretation of the African Children's Charter, construct childhood sexuality positively to represent children as sexual agents rather than positioning them as sexually innocent which also implies viewing any sexual activity of the child as inherently harmful or as a mark of deviance or corruption.*

**Key words:** *African Committee of Experts on the Rights and Welfare of the Child; childhood sexuality; sexuality education; criminalisation of adolescent sexuality; African Charter on the Rights and Welfare of the Child*

## 1 Introduction

Children in Africa continue to face many challenges related to sexuality, such as child marriage, early childbearing, sexually-transmitted infections (STIs) including HIV, sexual violence, and child abuse.<sup>1</sup> Sexual violence is widespread, especially against girls. The gender disparity arises from a complex set of factors including traditional beliefs and cultural attitudes to gender roles that influence how families treat and relate to girls.<sup>2</sup> The transition from childhood to early adolescence is a critical period as this is the time when social norms and expectations intensify to shape the sexual life trajectories

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1 DY Melesse et al 'Adolescent sexual and reproductive health in sub-Saharan Africa: Who is left behind?' (2020) 5 *BMJ Global Health* 1; E Tarkang et al 'Risky sexual behaviours among young people in sub-Saharan Africa: How can parents use the Ottawa Charter for Health Promotion for change?' (2019) 16 *Journal of Social Aspects of HIV/AIDS Research* 77; African Child Policy Forum *Breaking the silence: Violence against children with disabilities in Africa* (2010) 12.

2 African Child Policy Forum *Childhood scars in Africa: A retrospective study on violence against girls in Burkina Faso, Cameroon, Democratic Republic of the Congo, Nigeria and Senegal* (2010) iv.

of adolescents.<sup>3</sup> Research reveals that sexual violence increases from the age of 10, and the most at risk ages are between 14 and 17.<sup>4</sup>

The responses to childhood sexual behaviours such as early romantic relationships, and to challenges including sexual abuse of children are based on shared beliefs that people have about the sexual nature of the child, especially whether and to what extent a child has the capacity to exercise sexual agency. Russell defines sexual agency as the 'individuals' beliefs in their ability to act upon sexual needs in a relationship, such as enjoying sex, refusing unwanted sex, or insisting on the use of protection.<sup>5</sup> These beliefs about the sexual nature of a child underlie how people think and talk about childhood sexuality and represent the child through language and symbolic systems such as texts, including policy and legal instruments.<sup>6</sup> This article examines and challenges dominant representations of the child as sexual in legal texts. The most important of these, for the African child, is the African Charter on the Rights and Welfare of the Child (African Children's Charter),<sup>7</sup> as well as the General Comments of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee).<sup>8</sup>

The article aims to create a balance in discussion on the entrenched beliefs and assumptions about childhood innocence and vulnerability, on the one hand, and sexual agency, on the other, in the African context and children's rights. The way in which people think, talk and represent the sexual child has implications for children's sexual rights. For instance, if a child is imagined as sexually innocent, comprehensive sexuality education (CSE) is limited, as it is perceived as tainting the sexual innocence of the child. This has further implications because poor or inadequate sexual health education impacts negatively on the rights of the child to information about sexual health.<sup>9</sup> Therefore, to realise the right to sexual health goes beyond recognising that children have the right to sexual health, and to recognise that the child is a sexual being with capacity to exercise

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3 RW Blum et al 'It begins at 10: How gender expectations shape early adolescence around the world' (2017) 61 *Journal of Adolescent Health* S3.

4 African Child Policy Forum *Breaking the silence: Violence against children with disabilities in Africa* (2010) 14.

5 ST Russell et al 'Sexuality development in adolescence' in LM Carpenter & J Delamater (eds) *Sex for life: From virginity to Viagra, how sexuality changes throughout our lives* (2012) 74.

6 V Burr *Social constructionism* (2015) 21.

7 Organisation of African Unity (OAU) African Charter on the Rights and Welfare of the Child 11 July 1990, CAB/LEG/24.9/49 (1990).

8 The African Children's Committee is a treaty-monitoring body created by art 32 of the African Children's Charter, and its mandate is described in arts 37 to 45.

9 C Kennedy & K Covell 'Violating the rights of the child through inadequate sexual health education' (2009) 17 *International Journal of Children's Rights* 143.

sexual agency to the extent of the child's evolving capacities. The article, therefore, promotes a shift in representation of children in laws and policies that impact on their sexuality in two areas, namely, sexuality education and non-exploitative sexual intercourse or activity between children.

In the article a child is defined in terms of article 2 of the African Children's Charter to mean a person below the age of 18 years. The status of childhood in law covers a range of developmental stages categorised broadly in three stages: early childhood, middle childhood and adolescence.<sup>10</sup> Adolescence, defined by the World Health Organisation (WHO) as the ages between 10 and 19, is marked by the transition from childhood to adult sexuality.<sup>11</sup> However, children have an evolving capacity for sexual agency and autonomy from early childhood.

The article uses the term 'age of consent' (to sexual intercourse or sexual activity) to describe the minimum age below which certain sexual acts are prohibited. Most laws do not explicitly prescribe an age of consent. Rather, they specify the minimum age, usually in criminal provisions. For instance, in Malawi sections 138, 160A and 160B of the Penal Code prohibit sexual intercourse or activity with a person of below the age of 16, implying that 16 is the age of consent. Age of consent laws have been misunderstood as meaning that children below the age of consent can have no sexual agency. Age of consent is a legal fiction designed to protect children from sexual exploitation by older persons, but this does not mean that the child has zero sexual agency.

The article applies a critical sexualities approach to analyse prevailing discourses of childhood sexuality, and shows how the dominant discourse of childhood innocence appearing in legal and policy texts represents the child as without sexual agency, and its implications for the rights of the child especially in relation to sexuality education and laws on age of consent to sex. It discusses the effect of the dominant representation of 'childhood innocence', and the construction of the child, especially the girl, as always vulnerable and the victim in any sexual encounter.<sup>12</sup> The article argues that in

10 Education Encyclopaedia 'Stages of growth in child development' <http://education.stateuniversity.com/pages/1826/Child-Development-Stages-Growth.html#ixzz0j0jMHgRB> (accessed 15 November 2020).

11 World Health Organisation The health of youth (Document A42/Technical Discussions/2) (1989).

12 KH Robinson *Innocence, knowledge and the construction of childhood: The contradictory nature of sexuality and censorship in children's contemporary lives* (2013) 11.

interpreting the African Children's Charter, the African Children's Committee should facilitate a shift from the dominant discourse of child as sexually innocent to children as sexually agentic, to promote the rights of the child relating to sexuality.

The African Children's Committee has the important role of guiding the implementation of the African Children's Charter. The African Children's Committee established 'Agenda 2040: Fostering an Africa fit for children' (Agenda 2040) to facilitate the effective implementation of the African Children's Charter. Aspiration 1 of the 10 aspirations of the Agenda 2040 is for the African Children's Charter to provide an effective continental framework for advancing the rights of the child. Aspiration 2 of the Agenda is for member states to have effective child-friendly national legislation, policy and institutional frameworks. One area that needs greater visibility is laws and policies that have an impact on childhood sexuality. This article highlights the importance of recognising children as sexual beings to facilitate the realisation of rights relating to their sexuality.

## 2 Sexuality and the images of childhood in Africa

The meaning of child as sexual or asexual is reflected in a people's world view and cultural knowledges and practices. Through a new sociology of childhood studies, this part discusses shifts in the way in which societies in their cultural imaginaries construct the child as sexual, and the status of childhood in relation to sexuality.<sup>13</sup>

Children's positions as blank slates, passive and docile is being reformulated to one that conceptualises children as active and autonomous agents.<sup>14</sup> In Africa, a new focus on children as social actors who navigate social and economic circumstances is evident as many scholars address children's attempts to survive war, conflict, poverty and HIV.<sup>15</sup> Much of the research has stressed development goals and a rights-centred approach as children endure and negotiate treacherous circumstances and structural inequalities. Considering these conditions, Cheney suggests that African children have been

13 A James et al *Theorising childhood* (1998); J Qvortrup *Studies in modern childhood: Society, agency, culture* (2005).

14 As above.

15 C Campbell et al 'Re-thinking children's agency in extreme hardship: Zimbabwean children's draw-and-write about their HIV-affected peers' (2015) 31 *Health and Place* 54; Y Ofofu-Kusi *Children's agency and development in African societies* (2017); P Mizen 'Bringing the street back in: Considering strategy, contingency and relative good fortune in street children's access to paid work in Accra' (2018) 66 *The Sociological Review* 1059; D Bhana *Childhood sexuality and AIDS education: The price of innocence* (2016).

perceived as in need of being rescued and objectified as such in development programmes.<sup>16</sup> This is especially the case in relation to development aid that reproduces children's construction as victims.

Notwithstanding a rights-based framing committed to children's self-determination in much of Africa, two overlapping themes continue to frame the image of African childhoods and function to deny children's agency, and this has negative effects for children's sexual rights and autonomy. Abebe and Ofosu-Kusi refer to these themes as attempts to indigenise and victimise children.<sup>17</sup> The first theme draws from a homogenous account of African childhoods as exotic and indigenous. This fuels a differentiated consideration of childhoods in Africa as other, exotic and subordinate to Western childhoods.<sup>18</sup> In other words, African childhoods are perceived as traditional and cultural and thus separate from Western sexualities and norms. These traditional/indigenous norms and cultures are used to prop up arguments that focus on 'risky cultural practices' that create harm for children.<sup>19</sup>

Overlapping with the construction of childhood as indigenous and traditional in Africa is the recurrent theme focusing on children as victims. Childhood and children in the literature have come to symbolise social stress, suffering from disease, malnutrition and hunger, overpopulation, crime and anarchy, war and poverty.<sup>20</sup> Children are seen as pitiful objects, withering away in circumstances not of their own doing, displaced by war and facing death. In this, children are seen as innocent victims needing protection.<sup>21</sup> Dependence on external funding and aid to deal with everyday problems further instantiates children as victims to be rescued from dire conditions.<sup>22</sup> While social, political and economic circumstances in reality do place limits on children's rights and chances to achieve their full potential, the effect of the routine position of children as victims remains powerful and limiting.

Abebe and Ofosu-Kusi point out that as a result of this victim discourse, African childhoods often are represented as catastrophic and in a state of collapse.<sup>23</sup> The preoccupation with 'unchildlike'

16 KE Cheney 'Deconstructing childhood vulnerability: An introduction' (2010) 2 *Childhood in Africa* 5.

17 T Abebe & Y Ofosu-Kusi 'Beyond pluralising African childhoods: Introduction' (2016) 23 *Childhood* 304; See also A Mbembe *On the postcolony* (2001).

18 Abebe & Ofosu-Kusi (n 17).

19 Bhana (n 15) 107.

20 Mbembe (n 17).

21 Abebe & Ofosu-Kusi (n 17) 303-304.

22 Cheney (n 16) 6.

23 Abebe & Ofosu-Kusi (n 17) 304.

experiences inevitably has led to the construction of sexuality and children within the realm of passivity, innocence, vulnerability and suffering.<sup>24</sup> This position remains a striking feature of childhoods in Africa neglecting children's own agency, capability in and the negotiation of their social environments. Indigeneity and victimisation converge to produce dominant narratives of childhood sexuality in Africa based on ignorance and innocence, reinforcing gender binaries and male sexual power.<sup>25</sup> Sexuality tends to be viewed as cultural and indigenous especially around the construction of a hypersexualised masculinity and suffering femininity.<sup>26</sup>

An abiding concern in the literature has been a focus on gender inequalities, and girls' vulnerability to sexual danger, disease and sexual victimisation.<sup>27</sup> Scholarship has emphasised the ways in which girls' sexuality in Africa is predicated upon notions of vulnerability, victimisation, gender inequalities and sexual innocence.<sup>28</sup> Indeed, much of the research focused on childhood sexuality and girls, in particular where it concerns rape, sexual coercion, child marriage, early child bearing and the risk to unsafe sexual practices in the context of HIV.<sup>29</sup> In this regard, the optic in the research is especially focused on sexual danger, sexual and reproductive health, the inability of girls to control and negotiate sex, resulting in poor sexual health outcomes.<sup>30</sup> In this context, sexual docility remains profound in the depiction of girls' sexuality.<sup>31</sup> Instead of focusing on girls' own account of sexuality, they are seen as passive receivers of culture,

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- 24 SC Aitken 'Global crises of childhood: Rights, justice and the unchildlike child' (2001) 33 *Area* 120.
- 25 See A Mama *Women's studies and studies of women in Africa during the 1990s* (1996) 9, where it is asserted that historically, African sexualities have been framed within racist colonial narratives based on sexuality as primitive and exotic.
- 26 See, eg, S Tamale 'Researching and theorising sexualities in Africa' in S Tamale (ed) *African sexualities: A reader* (2011) 15 which argues that the construction of a male sexual predator is linked historically to the framing of African sexualities as exotic and othered.
- 27 J Parkes *Gender violence in poverty contexts: The educational challenge* (2016); FK Muhanguzi 'Gender and sexual vulnerability of young women in Africa: Experiences of young girls in secondary schools in Uganda' (2011) 13 *Culture, Health and Sexuality* 71 3; MLJ le Mat 'Sexual violence is not good for our country's development'. Students' interpretations of sexual violence in a secondary school in Addis Ababa, Ethiopia' (2016) 28 *Gender and Education* 562.
- 28 Bhana (n 15) 11; J Heslop et al 'Sexuality, sexual norms and schooling' in J Parkes (ed) *Gender violence in poverty contexts: The educational challenge* (2015) 135-136.
- 29 N Ansell 'Challenging empowerment: AIDS-affected South African children and the need for a multi-level relational approach' (2014) 19 *Journal of Health Psychology* 22; Campbell et al (n 15).
- 30 Le Mat (n 27); C Mitchell 'Challenging turbulent times: Towards a framework for girl-led transnational dialogues to combat sexual violence' (2018) 16 *Journal of Social Policy Studies* 519-520; Melesse et al (n 1) 7.
- 31 Le Mat (n 27) 565.

gender and male power where African men and boys are assumed to be all-powerful.

The persistent focus on girls and children more generally as innocent and victims of sexuality in Africa has produced an environment that has not sufficiently addressed children's own sexual cultures and the ways in which they negotiate sexuality amid the constraints. As Bhana illustrates, missing in African research around childhood sexuality is the attention to gender, culture and social values through which both boys and girls actively produce sexuality beyond danger.<sup>32</sup> Indeed, it is the very disturbing sexual context which demands that we recognise children with rights, as promulgated in countries across the continent, so that we can hear from children themselves about the issues that matter to them. Danger discourses have done little to address children's vulnerability to sexual harm. What is required is attention to children's own standpoints and recognising their agency including in matters relating to their sexuality development.

### 3 Law as discourse

The images of childhood and sexuality reflect in law and legal discourse. The authors take the position that law is discourse as it shapes meanings including those about childhood sexuality. In everyday usage, the term 'discourse' refers to conversations or discussions that people have. Language as one form of communication is an important aspect of discourse. In social theory, discourse takes on a more complex meaning.<sup>33</sup> Foucault defined discourse as 'practices that systematically form the objects of which they speak'.<sup>34</sup> Discourse, therefore, refers to some form of communication through what people say or do. This communication creates and sustains knowledge or 'truth' by which people live.<sup>35</sup> As Scheider has explained, 'things people say or write draw from a pool of generally accepted knowledge in a society, while at the same time feeding back into society to shape or reinforce such knowledge'.<sup>36</sup> In similar words, Baxter defines discourse as

forms of 'knowledge' – powerful sets of assumptions, expectations, explanations – governing mainstream social and cultural practices.

32 D Bhana 'Love, sex and gender: Missing in African child and youth studies' (2017) 42 *Africa Development* 253.

33 N Fairclough *Language and power* (2001).

34 M Foucault *The archaeology of knowledge* trans SMA Smith (1972) 49.

35 Fairclough (n 33).

36 F Scheider 'Getting the hang of discourse theory' 6 May 2013, <http://www.politicseastasia.com/studying/getting-the-hang-of-discourse-theory/> (accessed 11 July 2020).

They are systematic ways of making sense of the world by determining power relations within all texts, including spoken interaction.<sup>37</sup>

Knowledge is always related to another important aspect of discourse, namely, power. Power is the ability of groups to enforce their version of knowledge to count as true.<sup>38</sup> In Foucauldian discourse theory, truth is a human and social construction, rather than a transcendental reality.<sup>39</sup> Power shapes how adults think and talk about children and represent them as incapable of sexual agency even when children contradict these assumptions. Dominant discourses about childhood sexuality influence the formulation and enforcement of age of consent laws resulting in the idiosyncratic effect of disempowering children and perpetuating gender stereotypical assumptions about childhood sexuality.<sup>40</sup> This is observed in the Kenyan Court decision of *Martin Charo v Republic*<sup>41</sup> where a judge suggests that an adolescent girl (in this case a 14 year-old girl) who voluntarily engages in sexual activity should not be protected by a defilement law despite the fact that this law was designed to protect children from harmful sexual conduct.

Court judgments such as the Charo case demonstrate that laws are discursively produced and both shape and reflect ideas about sexuality, age and gender.<sup>42</sup> As Kessler describes, 'law as discourse shapes consciousness by creating the categories through which the social world is made meaningful'.<sup>43</sup> Also, law 'legitimizes and reinforces existing relations of domination by constituting these relations in ways that give them the appearance of being natural and unexceptional'.<sup>44</sup> Laws, therefore, do not merely represent social reality, but actively construct the objects of which they speak, that is, they signify, and constitute social identities, subjectivities, power relations and knowledge, for instance, about the sexual nature of children. Therefore, beyond prescribing the minimum age for sex and proscribing illegal sexual acts, age of consent laws enforce what is believed to be honourable, natural and objective. Age of consent laws may make it seem natural that children are sexually passive,

37 J Baxter *Positioning gender in discourse* (2003) 46.

38 N Gavey 'Feminist poststructuralism and discourse analysis: Contributions to feminist psychology' (1989) 13 *Psychology of Women Quarterly* 462.

39 As above.

40 S Angelides 'Feminism, child sexual abuse, and the erasure of child sexuality' (2004) 10 *GIQ: A Journal of Lesbian and Gay Studies* 142.

41 Criminal Appeal 32 of 2015; [2016] eKLR (High Court of Kenya).

42 J Niemi-Kiesiläinen et al 'Legal texts as discourses' in Å Gunnarsson et al (eds) *Exploiting the limits of law: Swedish feminism and the challenge to pessimism* (2007) 69.

43 M Kessler 'Lawyers and social change in the postmodern world' (1995) 29 *Law and Society Review* 772.

44 As above.

or the laws are applied rationally and objectively when they punish children for non-exploitative sex with peers.<sup>45</sup>

This idea of law as discourse applies to all legal texts including national laws and international legal texts such as the Convention on the Rights of the Child (CRC) and the African Children's Charter. These legal documents draw from prevailing discourses to create versions of 'truth' about childhood sexuality. However, they may contain both dominant and marginal discourses, that is, the notions of children as sexually innocent, but also children as sexually agentic.

#### **4 Discourses of childhood in the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child**

The CRC and the African Children's Charter are the two important legal instruments that create and reflect constructions of meanings of childhood. The child rights treaties draw from other discursive resources and embody various competing meanings of childhood.<sup>46</sup> Holzcheiter analysed CRC and identified four representations of childhood in international politics that are reflected in CRC.<sup>47</sup> Her analysis also applies to the African Children's Charter because its substantive provisions are similar to those of CRC. She describes these discourses as the unruly or irrational child, the immanent child, the innocent child and the evolving child.<sup>48</sup> These discourses are to be understood as fluid and, therefore, shifting, overlapping and interacting, even as they reflect fairly fixed and identifiable meanings of childhood as understood in a particular context.<sup>49</sup>

The discourse of the unruly or irrational child emphasises the child as immature, irresponsible, irrational, vulnerable and as an object of parental or state protection.<sup>50</sup> It is reflected in international politics in welfarist and paternalistic approaches to dealing with children.<sup>51</sup> In cultural practices it is reflected in the ways in which adults think and represent children as requiring adults' assistance to make health

45 See ZR Eisenstein *The female body and the law* (1988) 43.

46 A Holzcheiter *Children's rights in international politics* (2010).

47 Holzcheiter (n 46) 99.

48 As above.

49 K Sherbine 'Emerging childhoods and immanent becomings: Considering difference in one child's encounters with popular culture' (2016) 37 *Discourse: Studies in the Cultural Politics of Education* 3.

50 Holzcheiter (n 46) 163.

51 As above.

decisions or guided or taught how to behave properly.<sup>52</sup> In the child rights treaties it is reflected in the principle of best interests of the child, and in articles that recognise children as needing protection such as protection from child labour (article 32 of CRC; article 15 of the African Children's Charter); sexual exploitation (article 34 of CRC; article 27 of the African Children's Charter); and armed conflict (article 38 of CRC; article 22 of the African Children's Charter).

The discourse of immanent child emphasises the child as an incomplete or future adult.<sup>53</sup> As a future adult the child needs to be trained and prepared to become a responsible member of society. This discourse strikes the greatest resonance with the idea that education is an important aspect of child development, as enshrined in article 29 of CRC and article 11 of the African Children's Charter.<sup>54</sup>

The discourse of childhood innocence emphasises the childhood as a blissful state of innocence and purity, thereby placing a duty on adults to do everything to preserve this state.<sup>55</sup> It is imagined that children 'lose' this innocence as they grow up, but then they could lose it too soon if they know or get involved in 'adult things' such as that of a sexual nature, before they are old enough, or what Egan and Hawkes have called improper sexualisation.<sup>56</sup> The discourse of the innocent child provides powerful motivations for adults to shield the children from sexual experiences that are deemed harmful to them such as sexual practices or knowledge. This discourse inspired strong reactions against sexuality education on the African continent.<sup>57</sup> It is also the reason why children have been punished

52 D Lupton 'The reproductive citizen: Motherhood and health education' in K Fitzpatrick & R Tinning (eds) *Health education: Critical perspectives* (2014) 49; S Lyle 'The construct of the child: The "C" in PwC' in B Anderson *Philosophy for children: Theories and praxis in teacher education* (2016) 31.

53 Holzscheiter (n 46) 102 describes the notion of immanent child as tracing back to John Locke, and meaning "adult-to-be", that is, 'a human being with potential – incomplete and yet to be' – which is utterly ignorant and unreasonable and moves towards reason while becoming an adult'. See also P Moss & P Petrie *From children's services to children's spaces: Public policy, children and childhood* (2002) 58.

54 Holzscheiter (n 46) 166.

55 S Brennan & J Epp 'Children's rights, well-being, and sexual agency' in A Bagattini & C Macleod (eds) *The nature of children's well-being: Theory and practice* (2015) 299.

56 G Hawkes & RD Egan 'Landscapes of erotophobia: The sexual(ised) child in the postmodern Anglophone West' (2008) 12 *Sexuality and Culture* 199.

57 The African Group at a 65th UN General Assembly on 25 October 2010 rejected the idea that there is a right to comprehensive sexuality education when this was proposed in the interim report of the Special Rapporteur on Education, Mr Vernor Muñoz. See the media report International Service for Human Rights 'Majority of GA Third Committee unable to accept report on the human right to sexual education' 26 October 2010, <https://www.ishr.ch/news/majority-ga-third-committee-unable-accept-report-human-right-sexual-education> 26 October 2010 <https://www.ishr.ch/news/majority-ga-third-committee-unable-accept-report-human-right-sexual-education> (accessed 17 October

harshly for engaging in consensual sex in the name of protecting their innocence.<sup>58</sup>

There is also the discourse of the evolving or agentic child which represents the child as having an evolving capacity for autonomy, for responsibility, and for forming views to which adults must have due regard. This perspective is an important paradigm shift that CRC entrenches in that children who were perceived as mute, and as primarily an object of charity and protection, now are perceived as having agency to participate in shaping their social world.<sup>59</sup> In particular, article 12 of CRC and article 7 of the African Children's Charter embody this novel vision of the child who is understood as capable of forming his or her own views and as possessing the right to express their views freely on issues affecting them.

In matters pertaining to sexuality, the discourse of childhood as innocent tends to be dominant while the discourse of childhood as agentic is marginal. In Uganda section 129A of the Penal Code proscribes consensual sex between children. In Kenya section 8 of the Sexual Offences Act 2006 has been interpreted as prohibiting sex for children below the age of 18.<sup>60</sup> The underlying belief is that children are incapable of sexual agency. According to some court judgments,<sup>61</sup> which are analysed later, children must not and cannot engage in sexual intercourse or activity. This is how the judge in this article, are interpreting the law to mean that children are sexually innocent and incompetent and cannot or should not have sexual desires.<sup>62</sup>

As will be elaborated below, the General Comments of the CRC Committee and the African Children's Committee reveal an interplay of these representations of childhood sexuality as unruly, immanent, innocent and agentic. The discussion in this article focuses on the child as sexually agentic which is a marginal discourse in the texts produced by the two committees, and the implications on advancing the rights of the child in Africa.

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2019); see also M Kahi'u 'Bishops in Kenya renew campaign against comprehensive sexuality education commitment' Association for Catholic Information in Africa, 24 May 2020, <https://www.aciafrica.org/news/1388/bishops-in-kenya-renew-campaign-against-comprehensive-sexuality-education-commitment> (accessed 14 November 2020).

58 See, eg, *CKW v Attorney-General and Director of Public Prosecutions* [2014] eKLR, Petition 6 of 2013 (High Court of Kenya) discussed in more detail later in the article.

59 Holzscheiter (n 46) 166.

60 See *CKW v AG* case described later in this article.

61 See, eg, *Martin Charo v The Republic* Criminal Appeal 32 of 2015; [2016] eKLR (High Court of Kenya).

62 *Criminal Appeal 32 of 2015*; [2016] eKLR (High Court of Kenya).

In General Comment 7 the CRC Committee discusses the implications of CRC on young children. The Committee exhorts state parties to fully recognise young children as rights holders.<sup>63</sup> It encouraged state parties to adopt a positive agenda for young children in the early childhood phase of below the age of eight years.<sup>64</sup> The Committee encouraged state parties to shift away from traditional beliefs that consider early childhood as a state of immaturity and passive learning, and to view every child as an individual human being with his or her 'own interests, concerns and points of view'.<sup>65</sup>

Similarly, the General Comments of the African Children's Committee reveal competing discourses of childhood. In General Comment 3 on article 31 on the responsibilities of the child, the African Children's Committee addresses how state parties should understand and balance the responsibilities of the child and the enjoyment of rights by the child.<sup>66</sup> The text of the General Comment and its focus on responsibilities of the child strongly reflect the discourse of child as immanent, that is, as an adult-to-be. For instance, it states that 'placing responsibilities upon children is underscored by the role that responsibilities play in helping to shape the future of children as responsible adult members of society.'<sup>67</sup> The General Comment also exhorts States to teach and train children to become responsible citizens of society. However, with regard to when it is that children should make contributions to society, the view of the ACERWC is that children contribute to society 'in the here and now, not only in the future.'<sup>68</sup> By recognising the here and now, the General Comment mitigates the discourse of child as immanent becomings which emphasises the future over the present. General Comment 3 of the African Children's Committee also makes the link with article 7 of the African Children's Charter on having the views of the child heard.<sup>69</sup> This means that children should be involved in various aspects of life processes in the present. It is argued in this article, therefore, that issues of sexuality should not be future-orientated, because children are sexually agentic in the here and now, to the extent of their evolving capacities.

63 United Nations Committee on the Rights of the Child (CRC Committee) General Comment 7 (2005) Implementing Child Rights in Early Childhood, 20 September 2006, CRC/C/GC/7/Rev.1 paras 1-2.

64 CRC Committee (no 63) para 5.

65 As above.

66 African Children's Committee General Comment on article 31 of the African Charter on the Rights and Welfare of the Child on 'the responsibilities of the child' (2017) para 1.

67 African Children's Committee (n 66) para 7.

68 African Children's Committee para 11.

69 African Children's Committee para 19.

Representation of children as sexually agentic is marginal in the work of the Committees, and especially the African Children's Committee. However, the General Comments of the two Committees contain text that constructs children as having sexual agency. For instance, the CRC's General Comment 3<sup>70</sup> recognises that children are vulnerable to HIV/AIDS because they do not have proper information and guidance at their *first sexual experience*;<sup>71</sup> and that girls face challenges because of judgmental attitudes about *their sexual activity*.<sup>72</sup> The General Comment therefore recommends that states should pay attention to *sexual behaviours of children* even if they do not conform to societal expectations;<sup>73</sup> that states should provide appropriate information to children to enable them to *deal positively and responsibly with their sexuality*;<sup>74</sup> and that states should be supportive to children when they *begin to express their sexuality*.<sup>75</sup>

In General Comment 20,<sup>76</sup> the CRC Committee recognises that adolescents need support as they *explore their emerging beliefs and identities and sexualities*.<sup>77</sup> The Committee also recommended that states should *avoid criminalising consensual sex between adolescents*.<sup>78</sup> The Committee has more pointedly highlighted the same view in its Guidelines on the Optional Protocol on the sale of children, child prostitution and child pornography, issued in 2019. It provides that 'states parties should not criminalise adolescents of similar ages for consensual sexual activity'.<sup>79</sup> Furthermore, in its General Comment 24 on the rights of children in the child justice system, the Committee reflects on the decriminalisation of status offences which, if committed by adults, are not considered crimes. The Committee points out that 'adolescents who engage with one another in consensual sexual acts are also sometimes criminalised', and the Committee urges state parties to remove such offences from their statute books.<sup>80</sup> It is notable that the Committee's jurisprudence is paying increasing attention to this issue, and demonstrating recognition of a child as sexually agentic.

70 CRC Committee General Comment 3 (2003) HIV/AIDS and the Rights of the Child, 17 March 2003, CRC/GC/2003/3.

71 CRC Committee (n 70) para 2.

72 CRC Committee (n 70) para 8.

73 CRC Committee (n 70) para 11.

74 CRC Committee (n 70) para 16.

75 As above.

76 CRC Committee General Comment 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20.

77 CRC Committee (n 76) para 16.

78 CRC Committee (n 76) para 40.

79 CRC Committee Guidelines regarding the involvement of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 10 September 2019, CRC/C/156 para 73.

80 CRC Committee General Comment 24 (2019) on children's rights in the child justice system CRC/C/GC/24, 18 September 2019 para 12.

The 2017 joint General Comment of the African Children's Committee and the African Commission on Human and Peoples' Rights (African Commission)<sup>81</sup> is the only General Comment that has some, albeit few, instances of language that represents the African child as having sexual agency. The General Comment encourages States to provide *sexuality education* and information in schools.<sup>82</sup> It recommends that the sexuality education should contain information about what constitutes *consent to sex* as distinct from consent to marriage.<sup>83</sup> From the perspective of law as discourse, the idea that consent to sex fundamentally differs from consent to marriage perhaps is one of the most powerful statements any General Comment has ever made affirming childhood sexual agency on the African continent.

## 5 Recognising sexual agency of children

This part discusses how sexual agency has been undermined in the two specific areas of sexuality education and age of consent to sex laws. The article argues that the African Children's Charter could be interpreted to recognise children as sexually agentic to facilitate addressing some of the sexuality-related challenges children face in Africa.

### 5.1 Sexuality education

Comprehensive sexuality education (CSE) involves the teaching and learning of the psycho-social and physical aspects of sexuality. The basic premise of CSE is to ensure that young people are equipped with knowledge, skills and values that address their sexual health, their rights and gender equality.<sup>84</sup> Beyond an exclusive focus on sexual danger such as HIV, pregnancy and sexual coercion, CSE seeks to develop healthy sexualities, and equitable and respectful sexual relationships underpinned by the sanctity of children's rights. The roll-out of CSE is based on age and the cultural context.<sup>85</sup> Unlike traditional versions of sexuality education that promote sexual

81 The African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child 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, 2017.

82 African Commission and African Children's Committee (n 81) para 36.

83 As above.

84 United Nations Educational, Scientific and Cultural Organisation (UNESCO) *International technical guidance on sexuality education. An evidence-informed approach* (2018).

85 As above.

danger and abstinence, CSE recognises children's right to a positive and pleasurable sexuality. This understanding of CSE as a rights-based curriculum intervention is in direct conflict with dominant views around childhood sexual innocence. As a result, there has been a backlash against CSE in South Africa (and other countries) witnessed by vitriolic outbursts by many parents, teachers and civil society attacking CSE as a vehicle that promotes children's premature sexual conduct and in direct conflict with the beliefs, values and religious principles.<sup>86</sup> Clearly, CSE is highly political and how it is viewed depends on the particular position taken and through which children's rights are denied or advanced.

Comprehensive sexuality education confronts childhood sexual innocence and concomitantly concerns about age are invoked. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) supports the provision of CSE to learners from the age of five years.<sup>87</sup> In light of the tension that exists between notions of childhood sexual innocence and children's right to CSE, age limits often are advanced to mediate these tensions. The authors of this article take the view that age categories tend to disregard the sexual agency of younger children especially those in the early childhood category.

Educators are both vital in and barriers to implementing a rights-based sexuality education based on the rights of the child to sexual knowledge.<sup>88</sup> Religious, cultural and normative understandings of sexuality as an adult domain are often reproduced in the teaching of sexuality education. These conservative ideas are premised upon sexual innocence leading to abstract and technical deliberations in the classroom about sexuality rather than a focus on the sexual rights

86 See R Matshili 'Uproar over comprehensive sexuality education's 29 October 2019 IOL', <https://www.iol.co.za/pretoria-news/uproar-over-comprehensive-sexuality-education-36192973> (accessed 14 November 2020); R Matshili 'ACDP march against sex education plan' 19 August 2019, <https://www.iol.co.za/pretoria-news/acdp-march-against-sex-education-plan-30970782> (accessed 14 November 2020).

87 UNESCO (n 84).

88 HK Altinyelken & M le Mat 'Sexual violence, schooling and silence: Teacher narratives from a secondary school in Ethiopia' (2018) 48 *Compare: A Journal of Comparative and International Education* 653; P Iyer & P Aggleton 'Sex education should be taught, fine ... but we make sure they control themselves': Teachers' beliefs and attitudes towards young people's sexual and reproductive health in a Ugandan secondary school' (2013) 13 *Sex Education* 50; N de Lange et al 'Voices of women teachers about gender inequalities and gender-based violence in rural South Africa' (2012) 24 *Gender and Education* 500; Muhanguzi (n 27) 718; LS Young et al 'Feminine sexual desire and shame in the classroom: An educator's constructions of and investments in sexuality education' (2019) 19 *Sex Education* 496-497; FE Leach & C Mitchell *Combating gender violence in and around schools* (2006).

of the child.<sup>89</sup> Sexual innocence discourses shape educators' delivery of sexuality education programmes. Sexuality education thus is marshalled to accomplish the goals of sexual innocence and sexual ignorance rather than to promote sexual rights and children's best interests in the realm of sexual health and well-being.

Sexuality education is often focused on adults' perception of sex-as-risk rather than an investment in children's own voices about sexuality in ways that matter to them.<sup>90</sup> Furthermore, it is girls' sexuality that is placed on high levels of scrutiny based on the gender binary which assumes girls' sexual innocence and the ideal around sexual respectability.<sup>91</sup> Boys, on the other hand, are assumed to have sexual agency. Teachers also have difficulty addressing sexuality as pleasure and working with children who express sexual desire.<sup>92</sup> Adult hierarchies and generational differences do not recognise children as sexual, thus hindering addressing sexuality comprehensively.<sup>93</sup>

Le Mat found that teachers in Ethiopia often draw on culture to avoid sexuality.<sup>94</sup> Similarly, Bhana found that teachers in South Africa suggested that the discussion of sex or mentioning the word 'sex' is a cultural violation in relation to generational hierarchies and cultural norms which make discussion of sexuality a taboo.<sup>95</sup> Studies have also suggested that many teachers on the continent normalise sexual violence and inequalities such that discussions about their interventions show little empathy for children's right to sexual safety.<sup>96</sup> These studies with teachers show the reinforcement of gender binaries, following the theme of victimisation where boys' expression of sexuality, even in violent ways, is condoned and normalised through biological and sociological definitions around masculinity and sexuality, whereas girls are presumed to be sexually docile.

89 Le Mat (n 27) 576; Bhana (n 15) 99.

90 L. Allen 'Denying the sexual subject: Schools' regulation of student sexuality' (2007) 33 *British Educational Research Journal* 231.

91 S. Lamb 'Feminist ideals for a healthy female adolescent sexuality: A critique' (2010) 62 *Sex Roles* 295.

92 The difficulty to accept children as capable of sexual desire and recognising this as a normal aspect of sexual development not only is confined to the education sector but is pervasive in society. The judge in the case of *Charo*, eg, had found it difficult to believe that a child of 14 could express sexual desire and voluntarily engage in sexual intercourse, and yet be a normal child.

93 D. Bhana 'Discourses of childhood innocence in primary school HIV/AIDS education in South Africa' (2008) 7 *African Journal of AIDS Research* 153; Young et al (n 88) 294.

94 Le Mat (n 27).

95 Bhana (n 15).

96 Lamb (n 91).

What then are the effects of the continued silence and neglect in advancing the rights of children in relation to their sexual health and education? First, by avoiding sex and discussion about sexuality beyond danger, childhood is sanitised and cleansed of the sexual dimension of life. Second, by defining childhood sexuality as innocence and based on age hierarchies, little attention is paid to what really matters to children in relation to sexuality. This means that the environment is not conducive to children raising issues around sexual violence, rape and coercion because any discussion about sex and sexuality is prohibited. Third, by continuing to focus on sex-as-risk, sexuality is framed only within the discourse of contamination, taboo and wrongdoing.<sup>97</sup> Positive elements of sexuality are dismissed, ignored and attention to sexual health is impaired. Fourth, the inability of children to address parents and teachers about their sexual experiences reproduces sexual shame and secrecy. Sexual violence, therefore, cannot be addressed precisely because children are not given the right to express themselves about sexual matters. This means, finally, that the issues around cultural norms, gender inequalities and socio-political and economic contexts that reproduce girls' vulnerability to sexual risk are not addressed and neither are the norms that reproduce differential ways through which feminine and masculine constructions of sexuality are sustained as a binary.

An emerging body of work on African children's sexual agency acknowledges children's sexual rights, their sexual desires, and investment in relationship dynamics.<sup>98</sup> This kind of research which addresses children as agents seeks to acknowledge their rights beyond sexual innocence and ignorance about sexual matters and has yielded great insight into what really matters to children.<sup>99</sup> Future research must continue on this path taking heed of children's rights and ensuring a multidimensional focus on sexuality, gender, class and broader inequalities that shape childhood sexualities.

This article provides a point of departure from the ongoing indigenisation and victimisation of childhood sexuality in Africa fuelled by discourses of sexual innocence, ignorance and inequalities. Instead, the authors argue for advancing sexual rights for children as promulgated in laws and policies. As Abebe and Ofosu-Kusi indicate:<sup>100</sup>

97 Altinyelken & Le Mat (n 88); Le Mat (n 27).

98 R Jewkes & R Morrell 'Sexuality and the limits of agency among South African teenage women: Theorising femininities and their connections to HIV risk practices' (2012) 74 *Social Science and Medicine* 1736; Bhana (n 15).

99 D Bhana 'The (im)possibility of child sexual rights in South African children's account of HIV/AIDS' (2006) 37 *IDS Bulletin* 64.

100 Ofosu-Kusi (n 15) 304.

Childhood situated only in dimensions of innocence and vulnerability, while realistic, is only a partial account ... Just as there are hardships and deprivation so too are there opportunities and privileges, especially when the complex social, cultural, economic and political realities, in their multifarious and dynamic forms, are taken into consideration.

Finally, there is a need to create the conditions for addressing children as sexual beings with rights in all social institutions and reconceptualising childhood sexuality in Africa from the hollow depiction of victimisation and vulnerability to sexual agency as children navigate their social and cultural realities. Indeed, as Schalet suggests, when children exercise sexual autonomy they must do so with the necessary skills, knowledge and understanding of their rights about how, when and who they engage with in sexual conduct.<sup>101</sup>

## 5.2 Age of consent to sex laws

The authors support the growing consensus to decriminalise non-exploitative sexual conduct between the child and adolescent peers, and this part explains the rationale. Laws that punish children for engaging in non-exploitative sex reinforce notions of childhood sexual innocence in ways that negatively impact on the rights of the child.

The colonial era brought age of consent laws which imposed a conceptualisation of sexuality based on gender, class and racial stereotypes. When age of consent laws were introduced among the colonised peoples, they were not intended to prevent harm to women and girls, whose consent was not considered relevant as they were viewed as non-agentic and sexually passive.<sup>102</sup> In fact, as Bannerji observed, the formulation of these laws was largely in the interests of men as women and girls did not have a say in their formulation.<sup>103</sup> The aim of these laws, therefore, was to restrain male

<sup>101</sup> A Schalet 'Sex, love, and autonomy in the teenage sleepover' (2010) 9 *Contexts* 16.

<sup>102</sup> M Ingram *Carnal knowledge: Regulating sex in England, 1470-1600* (2017) 29-32. Writing about England in the 1500s, Ingram describes that 'men – especially young men and those in the prime of life – were characteristically assumed to be powerfully attracted to women and likely to give vent to their passions if they were not restrained by their own powers of reason and self-control, backed up by the strictures of the law and social pressure. In the act itself, men were conventionally viewed as the prime agents. They had the 'carnal knowledge' or the 'use' of women's bodies; more euphemistically, they 'meddled' or 'lay' with them; in the language of the street, they 'fucked', 'swived' or 'japed' them.' On the other hand, however, '[w]omen were characteristically viewed as more passive yet also powerfully inclined to sexual activity in certain circumstances – most obviously if they were of age to marry and had hopes or expectations of marriage'.

<sup>103</sup> H Bannerji *Inventing subjects: Studies in hegemony, patriarchy and colonialism* (2001) 83.

sexual behaviour which was viewed as inherently aggressive and dangerous.

In post-colonial Africa some countries, such as Malawi and Zambia, retained the colonially-inherited age of consent laws, while others, such as Botswana, have modified the colonial versions and yet others have undertaken substantive reforms, such as Kenya.<sup>104</sup> There are many variations of age of consent laws, but for the purpose of this discussion what is notable is the restriction of sexual agency of adolescents who engage in consensual sex.

The fundamental idea of criminal law is that a person who harms another should be held responsible. However, meanings of 'harm' vary across cultures, and also change over time. If society views something as harmful, a criminal justice response is likely to follow. However, views about children, myths and morality may also influence what is regarded as harmful.

Historically, myths about childhood innocence and incapacity also shielded sex offenders. Children's incapacity led to legal cautionary rules that their testimony could not be relied upon, allowing perpetrators to escape conviction if there were no other witnesses.<sup>105</sup> Hetero-normative bias also meant that the sexual penetration of a female child constituted rape, whereas the sexual penetration of a male child was a lesser offence.<sup>106</sup> Also, children who were not forcibly raped were seen to have acquiesced, and the idea that children could be 'groomed' was not understood.<sup>107</sup> So clearly, law reforms were necessary. There has been a raft of new sexual offence laws in Africa introducing changes, many of which are necessary to ensure the protection of child victims of sexual abuse.<sup>108</sup> However, some of these laws have also introduced new problems which, although they are intended to assist children, trap children in a non-agentic

104 See table of laws regulating consensual sex of adolescents in G Kangaude & A Skelton '(De)criminalising adolescent sex: A rights-based assessment of age of consent laws in Eastern and Southern Africa' (2018) 8 *SAGE Open* 6.

105 R Meintjies 'A call for a cautionary approach to common sense' (2001) 1 *Child Abuse Research in South Africa* 40.

106 In *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC) the Constitutional Court broadened the definition of rape to include anal penetration of a female child, and shortly afterwards the Criminal Law (Sexual Offences and Related Matters Amendment Act) 32 of 2007 ensured that all penetrative acts were treated on an equal basis.

107 B Pithey & K Muller 'Section 18: Sexual grooming of children' in D Smythe & B Pithey (eds) *Sexual offences commentary* (2011) 11-1.

108 United Nations Population Fund (UNFPA) *Harmonising the legal environment for adolescent sexual and reproductive health and rights: A review in 23 countries in East and Southern Africa* (2017), [https://esaro.unfpa.org/sites/default/files/pub-pdf/2017-08-Laws%20and%20Policies-Digital\\_0.pdf](https://esaro.unfpa.org/sites/default/files/pub-pdf/2017-08-Laws%20and%20Policies-Digital_0.pdf) [https://esaro.unfpa.org/sites/default/files/pub-pdf/2017-08-Laws%20and%20Policies-Digital\\_0.pdf](https://esaro.unfpa.org/sites/default/files/pub-pdf/2017-08-Laws%20and%20Policies-Digital_0.pdf) (accessed 12 July 2020).

identity, and in some cases criminalise them for acts of which, if they were adults, they would not be guilty. Thus, paradoxically, the very laws that aim to protect them from harm create or result in other harms.

The inclusion in criminal law of an age of sexual consent may be an indication that the law maker considers it to be harmful for a child below a specific age to be engaging in sex with a person over that cut-off age. However, it may also reflect the 'innocent child' if the law punishes children engaging in non-exploitative sex. Regulating sexual conduct with children was not novel in pre-colonial Africa. Without suggesting cultural homogeneity across the African region, it has been observed that puberty and rituals (rather than age demarcations) were the signifiers that a child had become an adult and would now take on adult roles.<sup>109</sup> While dynamic and changing, cultural norms continue to regulate the sexual behaviour of adolescents, with sexual intercourse traditionally considered suitable to those who are married or in permanent relationships. However, noting the heterogeneity in the discursive production of childhood sexuality, there is evidence that some cultures permit or in the past permitted certain types of sexual acts between adolescents.<sup>110</sup> Norms regulating young people's sexual conduct were gendered, with boys generally more free to express their sexuality – although pre-marital pregnancy could give rise to a requirement to pay damages to the family of the girl.<sup>111</sup>

In recent years there have been several judgments in African countries that have grappled with the difficult concepts of consent, sexual agency and the need to provide protection of children from adult sexual assault. In *Teddy Bear Clinic v Minister of Justice and Constitutional Development*<sup>112</sup> the issue before the South African Constitutional Court was whether sections 15 and 16 of the Criminal

109 Kangaude & Skelton (n 104); see further P Talavera 'The myth of the asexual child in Namibia' in S Lafont & D Hubbard (eds) *Unravelling taboos: Gender and sexuality in Namibia* (2007) 58-68; PM Nyakwaka 'Gender and sexuality among the Luo of Kenya: Continuity and change' in JW Khamasi and SN Maina-Chinkuyu (eds) *Sexuality: An African perspective: The politics of self and cultural beliefs* (2005) 37-50; W Ncube 'The African cultural fingerprint? The changing concept of childhood' in W Ncube *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 11-27.

110 See S Kiragu 'Conceptualising children as sexual beings: Pre-colonial education among the Gikũyũ of Kenya' (2013) 13 *Sex Education* 585; JW Khamasi 'Teachings on sexuality: A case of spilt milk' in JW Khamasi and SN Maina-Chinkuyu (eds) *Sexuality: An African perspective: The politics of self and cultural beliefs* 51; N Erlank 'Missionary views on sexuality in Xhosaland in the nineteenth century' (2001) 11 *Le Fait Missionnaire* 9.

111 E Preston-Whyte, M Zondi & H Gumede 'Teenage pregnancy, whose problem? Realities and prospects for action in KwaZulu-Natal' (1990) 3 *Southern African Journal of Demography* 13.

112 2014 (2) SA 168 (CC).

Law (Sexual Offences and Related Matters) Amendment Act of South Africa were unconstitutional for criminalising consensual sexual conduct between adolescents in the age group 12 to 16. The Court held that by imposing criminal liability on adolescent sexual conduct that is otherwise normative, the provisions had the effect of harming the adolescents they intended to protect in a manner that impugned their rights to dignity, privacy, and the best interests of the child principle. The Court found the law to be unconstitutional and directed Parliament to amend the law to decriminalise consensual sexual activity between adolescents. The subsequent law also had the effect of introducing a non-prosecution rule for 16 and 17 year-olds engaging in consensual sex with adolescents aged younger than 16 years, unless they were no more than two years apart in age.<sup>113</sup>

In *CKW v Attorney-General and Director of Public Prosecutions*<sup>114</sup> the Kenyan High Court dealt with a challenge to the defilement provisions. Defilement is a statutory offence arising from a consensual act where the law deems the person below the age of sexual consent to be incapable of consent (which is 18 years in Kenya). A 16 year-old boy was facing defilement charges under sections 8(1) and 8(4) of the Sexual Offences Act, 2006 of Kenya (SOA) for having consensual sex with a girl of 16. He petitioned the High Court to declare sections 8(1) and 11 (1) of the SOA invalid to the extent that they were inconsistent with the rights of children as protected under the Constitution of Kenya, for criminalising sexual conduct between adolescents below the age of 18. Despite considering the judgment of the South African Constitutional Court in the *Teddy Bear Clinic* case, the High Court of Kenya decided that the criminalisation of consensual sexual conduct between adolescents was in the best interests of the child, to protect children from harmful acts of sexual activity.

These two approaches, that is, non-criminalisation (South Africa) and criminalisation (Kenya), illustrate the different conceptualisations of childhood sexuality. In the *Teddy Bear Clinic* case Justice Sisi Khampepe, writing on behalf of a unanimous court, views the adolescent holistically, and favours their respect for their privacy and dignity. The adolescent is conceptualised as an agentic and autonomous being for whom sexual curiosity and sexual expression is normative.<sup>115</sup> Although the court also engages with the best interests

113 Criminal Law (Sexual Offences and Related Matters) Amendment Act 5 of 2015.

114 Petition 6 of 2013 (High Court of Kenya).

115 The Court described consensual sex between adolescents as 'developmentally normative conduct' in para 75 of the judgment and described autonomy as being intrinsically linked to 'dignity and privacy' in para 65 of the judgment.

of the child concept, it does so in a manner that focuses on harm that the law causes to the adolescents affected by it. First, the provisions increased harm and risk to adolescents by making it difficult for adolescents to seek support and assistance, because any person they told that they were engaging in unlawful sex would have to report this to the police, which would potentially drive adolescent sexual behaviour 'underground'. Second, the Court was concerned that the provisions caused 'a rupture' in family life by breaking down the lines of communication between parent and child. Third, the imposition of criminal liability under the impugned provisions, at worst, may lead to imprisonment and, at best, lead to diversion procedures, and any of these experiences would be traumatic. Fourth, the Court found that it was 'fundamentally irrational to state that adolescents do not have the capacity to make choices about their sexual activity, yet in the same breath to contend that they have the capacity to be held criminally liable for such choices'.<sup>116</sup>

In the *CKW* case the Court used best interests in a manner that focuses only on the non-agentic 'innocent' child<sup>117</sup> – despite the facts of the case which clearly show a consensual relationship between peers. It also puts everything in the 'basket' of children's best interests, whereas the *Teddy Bear Clinic* judgment found that the impugned provision breached several children's rights.

In *State v B Masuku*<sup>118</sup> the Zimbabwean High Court reviewed the case of a boy of 17, who had consensual sexual intercourse with his girlfriend of 15 and was consequently convicted of the offence of having sexual intercourse with a young person. In her decision Justice Amy Tsanga commented on the question of criminalisation of adolescent consensual sexual conduct. She was cognisant of the intention of criminal law to protect adolescents from adult sexual predation, to discourage early sexual debut between adolescents, and to protect adolescents from the risks and harms of sexual intercourse, including sexually-transmitted infections (STIs) and teenage pregnancies. However, she observed that an unintended consequence of the criminal law was that it also caught peers in romantic relationships, because the law did not distinguish between the predatory adult, and consenting adolescents. The judge clearly struggled with the problem before her and pointed out that ignoring the reality of consensual sex among teenagers would be an overly

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116 A Skelton 'Too much of a good thing? Best interests of the child in South African jurisprudence' (2019) 52 *De Jure* 569.

117 Indeed, in the *Charo* case the reasoning of the judge implied that only children that are sexually non-agentic and innocent were the ones the defilement laws should protect.

118 [2015] ZWHHC 106 CRB B467/14 (High Court of Zimbabwe).

punitive approach. In this regard she even provided advice to law and policy makers – and to society more broadly – that they should accept that teenagers do have consensual sex, and should avoid the dangers that arise from it through availing contraception and providing a more rigorous and open approach to sexual education in schools.

Some countries explicitly criminalise consensual sexual conduct between adolescents, for instance, Uganda. Other countries such as Malawi do not explicitly criminalise or decriminalise adolescent sexual conduct.<sup>119</sup> However, to protect adolescents from prosecution requires explicit decriminalisation because adolescents find themselves in a precarious position if the law is ambiguous or silent on whether children would be prosecuted for consensual sex. An example is the case of *YP v Republic*<sup>120</sup> in which the High Court of Malawi reviewed a case where a boy of 17 years was prosecuted for engaging in consensual sex with a girl of 15. One of the reasons the judge gave for discharging the case was that the boy was a child and therefore entitled to legal protection. The authors make the point here that the law should have been formulated in such a way as to prevent the prosecution of the child in the first place.

## 6 Conclusion

How the child is perceived and represented as sexual in legal texts such as the African Children's Charter as well as authoritative interpretive documents such as General Comments reflects and constructs dominant childhood discourses that form the basis for social action impacting on the sexual health and well-being of the child. If children are regarded as devoid of sexual agency and positioned always as potential victims of any sexual experience, then social institutions would treat them as such and sustain practices that disempower children. The article discussed ways in which dominant discursive constructs permeate the social and legal terrain to maintain the disempowerment of children because of the failure to recognise their sexual agency. Influential bodies such as the African Children's Committee should play an important role in shaping social discourse and practice about childhood sexuality to emphasise children's sexual rights rather than reinforce childhood sexual innocence. The African Children's Committee should undertake work to engage with the notion of the child as a person with an evolving sexual agency. Failure to engage fully with issues of childhood sexuality for

119 Kangaude & Skelton (n 104).

120 Criminal Appeal 16 of 2017; [2017] MWHC 87 (High Court of Malawi).

fear of raising controversy is complicit with dominant discourses of childhood innocence and undermines the potential of the African Children's Charter to transform the sexual health and well-being of children in Africa.

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## The applicability of the best interests principle to children of imprisoned mothers in contemporary Africa: Between hard and soft law

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**Summary:** *This article argues that article 30(d) of the African Charter on the Rights and Welfare of the Child in fact, in some instances, may impede the actualisation of the best interests of the children of incarcerated mothers in contemporary Africa, due to its inflexible and generalising formulation. The African Committee of Experts on the Rights and Welfare of the Child attempted to address the limitations inherent in article 30 by issuing its first General Comment on 'Children of incarcerated and imprisoned parents and primary caregivers', which promotes an individualised and far more flexible approach to the decision of whether to prohibit or allow children to reside in prison with their mothers. However, the persuasive value of a General Comment is limited by virtue of belonging to the category of soft law. Therefore, the African Children's Committee should explore the possibility of amending article 30(d) in order to preserve the best interests of children whose mothers are incarcerated.*

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**Key words:** *children's rights; best interests principle; imprisoned mothers; co-detention; soft law; treaty interpretation; Africa*

## 1 Introduction

Considering the fact that the majority of imprisoned women worldwide are mothers<sup>1</sup> and that in most parts of the world, especially in Africa, women commonly are the primary or sole caregivers of children,<sup>2</sup> it is reasonable to conclude that a sizeable number of children live with the consequences of their mothers' imprisonment. In other words, such children are either separated from their incarcerated mothers or they experience co-detention.

International and regional human rights treaties protect the right of children to both liberty<sup>3</sup> and a family environment.<sup>4</sup> Children's rights instruments prohibit the separation of children from their parents except in situations where the preservation of the child's best interests would otherwise require.<sup>5</sup> The African Charter on the Rights and Welfare of the Child (African Children's Charter) is unique in making special provision for the (unborn, infants or young)<sup>6</sup> children of imprisoned mothers. For the purposes of this article, of particular significance is article 30(d), which states that 'a mother shall not be imprisoned with her child'. Article 30 applies in equal measure to children born in remand or prison facilities as to those accompanying their mothers upon incarceration. However, the interpretative document based on this article, General Comment 1 on 'Children of incarcerated and imprisoned parents and primary caregivers' of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), stipulates that every such

- 1 R Taylor 'Women in prison and children of imprisoned mothers' Preliminary Research Paper, Quaker United Nations Office (2004) 24, [https://quino.org/sites/default/files/resources/Preliminary%20Research%20Paper\\_women%20in%20prison%20and%20children%20of%20imprisoned%20mothers.pdf](https://quino.org/sites/default/files/resources/Preliminary%20Research%20Paper_women%20in%20prison%20and%20children%20of%20imprisoned%20mothers.pdf) (accessed 6 October 2020). United Nations Office on Drugs and Crime *Handbook on women and imprisonment* (2014) 18, with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules) (2014), file:///Users/ramona/Downloads/women\_and\_imprisonment\_-\_2nd\_edition.pdf (accessed 6 October 2020).
- 2 Prison Reform Trust 'What about me? The impact on children when mothers are involved in the criminal justice system' (2018) 5, 10, 14, <http://www.prisonreformtrust.org.uk/portals/0/documents/what%20about%20me.pdf> (accessed 4 August 2020). United Nations Office on Drugs and Crime (n 1) 17.
- 3 Art 3 Universal Declaration; art 9 ICCPR; art 6 African Charter.
- 4 Art 10(1) ICESCR; art 23(1) ICCPR; art 8(1) CRC; art 19 African Children's Charter.
- 5 Art 19(1) African Children's Charter; art 9(1) CRC; General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration (2013) of the Committee on the Rights of the Child (art 3, para 1) VA1 (c) 59, 61.
- 6 Art 30(1) African Children's Charter.

case must be individually considered by weighing various factors pertaining to the child (their age, gender, maturity, relationship with their mother)<sup>7</sup> and the availability of appropriate alternative caregiving arrangements, ensuring that the best interests of the child take pre-eminence.<sup>8</sup> The treaty body goes even further by admitting that in some instances it may be decided 'that it is in children's best interests to live in prison with their mothers'.<sup>9</sup> Therefore, there seems to be an incompatibility between the prohibitive and rigid character of article 30(d) of the African Children's Charter and the flexibility and openness of General Comment 1 with regard to deciding the fate of children whose mothers are kept in carceral facilities. The General Comment promises to better support the actualisation of the best interests of the child, due to its individualistic approach to the decision-making process. However, the question arises as to whether a general comment (as soft law) can override the provisions of a treaty article (as hard law).

A distinction needs to be made between the nature of obligations outlined in articles 30(a) to (c) and 30(d). Articles 30(a) to (c) provide for the obligations of state parties to undertake measures in order to avoid the result anticipated in article 30(d), which imposes an obligation of result. In fact, it may be argued that the combination of the words 'ensure' and 'shall' in article 30(d) places a strict and categorical obligation on state parties to 'ensure that a mother shall not be imprisoned with her child'. Therefore, whatever measures state parties decide to undertake, either to comply with the non-custodial measures provided for in article 30(a) or the alternative institutional measures provided for in articles 30(b) and (c), they must do so with a view to ensuring that the result in all cases is that a mother is not imprisoned with her child.

## 2 Brief overview of the best interests rule

The 'best interests' principle intends to uphold the rights and well-being of children in every action undertaken in the private or public arena by any person and authority.<sup>10</sup> This principle is not a novel concept,<sup>11</sup> as the Declaration of the Rights of the Child (1959) refers to it in the context of the child's holistic development where the 'best interests of the child shall be the paramount consideration'.<sup>12</sup> In

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7 General Comment 1 (2013) para 24(c).

8 General Comment 1 para 1.4.

9 General Comment 1 para 55.

10 Art 4(1) African Children's Charter; art 3(1) CRC.

11 General Comment 14 (art 3 para 1) IA2.

12 Declaration of the Rights of the Child (1959) Principle 2.

the African Children's Charter, the 'best interests' principle overrides all other considerations,<sup>13</sup> and its relevance is inclusive to all rights and freedoms bestowed upon children in the regional document.<sup>14</sup> The 'best interests' rule is a 'dynamic concept',<sup>15</sup> a 'criterion against which a state party has to measure all aspects of its laws and policy regarding children',<sup>16</sup> because 'all actions taken by a state affect children one way or another'.<sup>17</sup> In order to guarantee its efficiency, the 'best interests' concept must be sufficiently 'flexible and adaptable',<sup>18</sup> giving carefully consideration to each child's unique circumstances<sup>19</sup> and vulnerabilities. This assessment cannot be conducted without involving children's substantive participation or without an explicit intent to preserve the family environment.<sup>20</sup>

Regarding its practical application, the principle became the subject of intense scholarly debate and criticism due to its being perceived as deprived of objectivity,<sup>21</sup> vague, indeterminate and open-ended,<sup>22</sup> which may inform 'arbitrary and subjective decisions'.<sup>23</sup> Establishing what would be best for a particular child is rather a speculative exercise.<sup>24</sup> For this reason, some scholars find it ineffective and advocate its abandonment,<sup>25</sup> while others still believe in its capability to provide guidance in decisions concerning children. One point of criticism refers to the fact that since 'there are different conceptions of what is in a child's best interests',<sup>26</sup> this principle may

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- 13 A Skelton 'The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' (2009) 9 *African Human Rights Law Journal* 486.
  - 14 T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 110. See also M Gose *The African Charter on the Rights and Welfare of the Child. An assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child Community Law Centre* (2002) 25, <https://dullahomarinate.org.za/childrens-rights/Publications/Other%20publications/The%20African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf> (accessed 4 August 2020).
  - 15 General Comment 14 IA1.
  - 16 F Viljoen 'The African Charter on the Rights and Welfare of the Child' in T Boezaart (ed) *Child law in South Africa* (2009) 336.
  - 17 General Comment 14 IVA1 (b) 20; III.14 (a).
  - 18 General Comment 14 IVA3.32.
  - 19 General Comment 14 IVA3.32; VA48, 49.
  - 20 General Comment 14 VA1 (a)-(g).
  - 21 B Clark 'A "golden thread"? Some aspects of the application of the standard of the best interest of the child in South African family law' (2000) 1 *Stellenbosch Law Review* 15.
  - 22 S Parker 'The best interests of the child - Principles and problems' (1994) 8 *International Journal of Law and the Family* 26.
  - 23 M Skivenes 'Judging the child's best interests: Rational reasoning or subjective presumptions?' (2010) 53 *Acta Sociologica* 339.
  - 24 J Heaton 'Some general remarks on the concept "best interests" of the child' (1990) 53 *Journal for Contemporary Roman-Dutch Law* 96.
  - 25 H Reece 'The paramountcy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 303.
  - 26 M Freeman *A commentary on the United Nations Convention on the Rights of the Child. Article 3. The best interests of the child* (2007) 27.

be utilised by officials invested with decision-making powers 'to justify any decision'.<sup>27</sup> In order to avoid situations in which decisions with regard to a child's best interests are informed by an individual's system of values and beliefs,<sup>28</sup> scholars have attempted to provide specific indicators<sup>29</sup> in assisting with the determination of a child's 'best interests', such as psychological considerations,<sup>30</sup> 'continuity and stability in relationships',<sup>31</sup> and the child's opinion.<sup>32</sup>

Some scholars have argued that applying the 'best interests' standard may generate conflictual situations and may be detrimental to the rights of others (primary caregivers, community or society). Insofar as children's rights should not be given less weight than adults' rights,<sup>33</sup> they cannot trump other's rights either. In other words, the 'best interests' standard cannot not be absolute.<sup>34</sup> This becomes more relevant in traditional settings such as African communities where the child's best interests are intimately linked to those of the nuclear or extended family<sup>35</sup> and, in some cases, the best interests of the child must cede in favour of the larger group's interests.<sup>36</sup> However, upholding children's best interests should eventually lead to the preservation of societal welfare.<sup>37</sup> A child's 'best interests' can be fully understood in the context of cultural and socio-economic specificities of the community, provided that its core is being preserved.<sup>38</sup> The 'implications of the principle will vary over time and from one society ... to another'.<sup>39</sup> However, in a conflictual situation, the welfare of the child must override cultural practices detrimental to him or her.<sup>40</sup> Traditional values and treaty provisions

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- 27 M King 'Playing the symbols – Custody and the law commission' (1987) 17 *Family Law* 189; H Reece 'The paramountcy principle: Consensus or construct?' (1996) 49 *Current Legal Problems* 298.
- 28 RH Mnookin 'Child-custody adjudication: Judicial functions in the face of indeterminacy' (1975) 39 *Law and Contemporary Problems* 267.
- 29 Mnookin (n 28) 260.
- 30 Clark (n 21) 19.
- 31 Mnookin (n 28) 264 265.
- 32 Skivenes (n 23) 341.
- 33 Reece (n 25) 302.
- 34 J Elster 'Solomonic judgments: Against the best interest of the child' (1987) 54 *University of Chicago Law Review* 26.
- 35 B Rwezaura 'The concept of the child's best interests in the changing economic and social context of sub-Saharan Africa' (1994) 8 *International Journal of Law and the Family* 100.
- 36 P Alston 'The best interests principle: Towards a reconciliation of culture and human rights' (1994) 8 *International Journal of Law and the Family* 5.
- 37 Freeman (n 26) 41.
- 38 A An-na'im 'Cultural transformation and normative consensus on the best interests of the child' (1994) 8 *International Journal of Law and the Family* 63; Rwezaura (n 35) 109.
- 39 P Alston & B Gilmour-Walsh *The best interests of the child. Towards a synthesis of children's rights and cultural values* (1996) 2.
- 40 Art 21(1) African's Children Charter.

must corroborate to generate the highest level of protection for children.<sup>41</sup>

## 2.1 Best interests of children of imprisoned mothers

The best interests rule becomes highly instrumental in the context of imprisoning a child's mother. Opinions concerning this sensitive matter bifurcate into strictly prohibiting or permitting children to accompany their mothers in prison (for a particular period of time provided by domestic legislation). Research conducted on this controversial topic attempts to substantiate the advantages and disadvantages of both sides.

Despite inaccurate data, it is estimated that as at 2017, approximately 19 000 children were living in prison with their primary caregivers, usually the mother.<sup>42</sup> Proponents of co-detention argue that it may afford infants and young children an opportunity to bond and develop a secure attachment with their mother,<sup>43</sup> an 'inseparable biological and social unit',<sup>44</sup> with undeniable (short and long-term) consequences for the child's psychological, social and educational development.<sup>45</sup> Being breastfed is beneficial to the child by significantly reducing morbidity and mortality rates in the first two years of life.<sup>46</sup> This temporary arrangement could provide a higher level of mental stability for both mother and child and could prevent child abandonment. However, the mother's familiar and nurturing presence may be the only reassuring element in the midst of a hostile environment such as the prison. Carefully considering the myriad of difficulties associated with prison life and in order to preserve the best interests of the child, supporters of co-detention rather recommend the creation of special institutions where the impact of co-detention on the holistic development of the child could be mitigated.<sup>47</sup>

41 An-na'im (n 38) 70, 71.

42 United Nations Global Study on Children Deprived of Liberty (2019) 343, [https://www.chr.up.ac.za/images/publications/UN\\_Global\\_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf](https://www.chr.up.ac.za/images/publications/UN_Global_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf) (accessed 6 October 2020).

43 J Poehlmann 'Representations of attachment relationships in children of incarcerated mothers' (2005) 76 *Child Development* 679.

44 World Health Organisation 'Global strategy for infant and young child feeding' (2003) 3, <https://apps.who.int/iris/bitstream/handle/10665/42590/9241562218.pdf;jsessionid=16D8237EB1F86CF19528078350560F44?sequence=> (accessed 6 October 2020).

45 R Parke & KA Clarke-Stewart 'Effects of parental incarceration on young children' Working papers prepared for the 'From prison to home' conference (2002) 4-6.

46 BL Horta & CG Victora *Long-term effects of breastfeeding: A systematic review* (2013) 1.

47 AE Jbara 'The price they pay: Protecting the mother-child relationship through the use of prison nurseries and residential parenting programs' (2012) 87 *Indiana Law Journal* 1825.

On the other hand, it has been argued that children should never be punished for their parents' crimes and that, therefore, they should not be deprived of their right to liberty, especially if the conditions of detention are not in favour of such choice.<sup>48</sup> Co-detention leads to multifaceted violations of children's rights<sup>49</sup> and may expose them to various risks, depending on the level of prison development and the duration of the stay. Most contemporary African prisons find themselves 'at odds with human rights standards',<sup>50</sup> being under-resourced, understaffed and overcrowded, evidently translating into overall precarious conditions of detention.<sup>51</sup> Therefore, such institutions are ill-equipped or completely unable to provide for the specific needs of children.<sup>52</sup> Truth be told, most African prisons do not even provide special accommodation for children in co-detention, with the exception of pioneering South Africa as well as certain prison facilities in Ethiopia, Ghana, Kenya and Uganda, where since 2014 mother and baby units have been created.<sup>53</sup> The majority of African prisons do not provide for the basic necessities of infants and young children such as formula, bottles,<sup>54</sup> clothing and hygiene products, with sporadic exceptions (Botswana, Ethiopia, Malawi, Namibia, South Africa, Swaziland, Tanzania and Uganda).<sup>55</sup> In certain African countries, non-governmental organisations (NGOs) or religious organisations have stepped in to fill this huge gap.<sup>56</sup> Children residing in prison facilities with their mothers lack a balanced diet,

48 V Chirwa Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa: Prisons in Malawi (2001) 36 in L Townhead 'Women in prison and children of imprisoned mothers: Recent developments in the UN HR system' Quaker United Nations Office (2006) 5, [http://www.wunrn.org/news/2006/08\\_21\\_06/082706\\_women\\_in.pdf](http://www.wunrn.org/news/2006/08_21_06/082706_women_in.pdf) (accessed 6 October 2020).

49 General Comment 1 para 4.

50 J Sarkin 'Prisons in Africa: An evaluation from a human rights perspective' (2008) 5 *International Journal of Human Rights* 22; MC van Hout & R Mhlanga-Gunda "'Mankind owes to the child the best that it has to give": Prison conditions and the health situation and rights of children incarcerated with their mothers in sub-Saharan African prisons' (2019) 19 *BMC International Health and Human Rights* 2, <https://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/s12914-019-0194-6> (accessed 4 August 2020).

51 66th ordinary session: Intersession activity report, Honorable Commissioner Maria Theresa Manuela, Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa (13 July-7 August 2020) 9, [file:///Users/ramona/Downloads/Activity%20Report%20Comm%20Manuela%2066OS\\_ENG.pdf](file:///Users/ramona/Downloads/Activity%20Report%20Comm%20Manuela%2066OS_ENG.pdf) (accessed 4 August 2020).

52 O Robertson 'Children imprisoned by circumstance' Human Rights and Refugees Publications (2008) 16, [https://quino.org/sites/default/files/resources/ENGLISH\\_Children%20Imprisoned%20by%20Circumstance.pdf](https://quino.org/sites/default/files/resources/ENGLISH_Children%20Imprisoned%20by%20Circumstance.pdf) (accessed 6 October 2020). Van Hout & Mhlanga-Gunda (n 50) 2.

53 Van Hout & Mhlanga-Gunda (n 50) 7.

54 Human Rights Watch Submission for the Day of General Discussion on Children of Incarcerated Parents (2011) 2, <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2011/Submissions/CRCDayofDiscussionSubmission.pdf> (accessed 6 October 2020).

55 'Laws on children residing with parents in prison' (2004) The Law Library of Congress, Global Legal Research Centre 8-68.

56 Van Hout & Mhlanga-Gunda (n 50) 7.

as food normally is not allocated to these children,<sup>57</sup> their mothers expected to share their meagre portion with them. Additional food for nursing mothers and their children was reported to be provided only in carceral facilities in South Africa, Ethiopia, Kenya, Uganda and Namibia.<sup>58</sup> Unsanitary living conditions in mixed and overcrowded prison facilities, in close proximity to other prisoners, may exacerbate prior vulnerabilities in infants and young children, increase morbidity levels or may turn out to be fatal.<sup>59</sup> Insufficient space and a lack of facilities for play, cognitive stimulation and education in infants and young children in co-detention is detrimental to their overall development.<sup>60</sup> Life in prison may also expose children to various types of abuse,<sup>61</sup> aggressive language or behaviour of prison staff or inmates, leading to the development of aggressive tendencies<sup>62</sup> and other negative emotional, mental or behavioural outcomes.<sup>63</sup> Being cut off from free society, children residing in carceral facilities may upon release experience difficulties in relating to others and adjusting to a completely different environment.<sup>64</sup> These children also experience shame, humiliation and stigma of having lived in prison,<sup>65</sup> adversely impacting on their self-esteem.<sup>66</sup> According to

57 Chirwa (n 48) 18.

58 Van Hout & Mhlanga-Gunda (n 50) 8.

59 Robertson (n 52) 24.

60 RD Parke & KA Clarke-Stewart 'Effects of parental incarceration on young children' Working papers prepared for the 'From prison to home' conference (2002) 14; O Robertson 'Collateral convicts: Children of incarcerated parents' Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011, Appendix 2: Babies and children living in prison – age limits and policies around the world (2012) 25, [https://www.quino.org/sites/default/files/resources/ENGLISH\\_Collateral%20Convicts\\_Recommendations%20and%20good%20practice.pdf](https://www.quino.org/sites/default/files/resources/ENGLISH_Collateral%20Convicts_Recommendations%20and%20good%20practice.pdf) (accessed 6 October 2020).

61 R Taylor 'Women in prison and children of imprisoned mothers' Preliminary research paper (2004) 52, [https://quino.org/sites/default/files/resources/Preliminary%20Research%20Paper\\_women%20in%20prison%20and%20children%20of%20imprisoned%20mothers.pdf](https://quino.org/sites/default/files/resources/Preliminary%20Research%20Paper_women%20in%20prison%20and%20children%20of%20imprisoned%20mothers.pdf) (accessed 6 October 2020).

62 P Reebye 'Aggression during early years – Infancy and preschool' (2005) 14 *Journal of the Canadian Academy of Child and Adolescent Psychiatry* 16-20.

63 United Nations Global Study on Children Deprived of Liberty (2019) 351, [https://www.chr.up.ac.za/images/publications/UN\\_Global\\_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf](https://www.chr.up.ac.za/images/publications/UN_Global_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf) (accessed 7 October 2020). S Sarkar & S Gupta 'Prevalence of aggressive behaviour among children co-detained with imprisoned mothers in a selected prison of North India' (2017) 2 *International Journal of Paediatrics and Child Care* 1-5, <https://symbiosisonlinepublishing.com/pediatrics-childcare/pediatrics-child-care12.php> (accessed 6 October 2020).

64 O Robertson 'Children imprisoned by circumstance' (2008) *Human Rights and Refugees Publications* (2008) 29 30.

65 O Robertson 'Collateral convicts: Children of incarcerated parents' Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011, Appendix 2: Babies and children living in prison – age limits and policies around the world (2012) 29; Prison Reform Trust (n 2) 5.

66 R Manjoo 'Pathways to, conditions and consequences of incarceration for women' Report of the Special Rapporteur on Violence against Women, its Causes and Consequences (2013) para 79.

national laws, children who are permitted to reside in prison with their mothers can only do so for a specific period of time, after which they must be removed. This type of separation from their mother is as dramatic for both the child and the mother.

State party reports submitted to the African Children's Committee during the last decade to some extent provide information regarding children whose mothers are incarcerated. In most African states these children's circumstances remain alarming due to insufficient funds allocated to the renovation of prisons, the recruitment of qualified staff and the provision of basic services. As at 2017, Niger reported no special treatment for pregnant offenders or the mothers of infants and young children.<sup>67</sup> In Chad, prisons are mixed and do not provide for the special needs of pregnant offenders or the mothers of infant and young children.<sup>68</sup> As at 2017, Burkina Faso reported no measures taken since 2006 to implement article 30 of the African Children's Charter.<sup>69</sup> In Kenya, female probation hostels accommodate mother offenders accompanied by their infants or young children (until the age of two), who can access education through early childhood development (ECD) centres, as well as basic services.<sup>70</sup> Articles 320 to 323 of the Benin Child Code set the legal framework for the protection of children of incarcerated mothers.<sup>71</sup> In Eswatini infants and young children may reside in prison with their mothers until the age of two, but information regarding the conditions of detention is unavailable.<sup>72</sup> Tanzania in 2015 adopted legislative measures for the protection of the children of incarcerated mothers.<sup>73</sup> The government

- 67 Republic of Niger Report submitted by Niger under art 43(1)(b) of the African Charter on the Rights and Welfare of the Child (2017) 105, <https://acerwc.africa/wp-content/uploads/2018/04/EN-CADBE-Niger-Adopt%C3%A9-le-23-mars-2017-1.pdf> (accessed 8 August 2020).
- 68 Republique du Tchad Rapport initial et les premier, deuxieme, troisieme et quatrieme rapports du Tchad relative a la mise en oeuvre de la CADBE (2014) 101, <https://acerwc.africa/wp-content/uploads/2018/04/Rapport-initial-Tchad-Fr.pdf> (accessed 8 August 2020) 101.
- 69 Burkina Faso Deuxieme and troisieme rapports periodiques cumules du Burkina Faso sur la mise en oeuvre de la Charte Africaine des Droits et du Bien-etre de l'Enfant en application a l'article 43-1 de la Charte 63 64, [https://acerwc.africa/wp-content/uploads/2018/04/Burkina-Faso\\_2%C3%A8me-et-3%C3%A8me-rapprt-CADBE-VERSION-final-d%C3%A9c-2011.pdf](https://acerwc.africa/wp-content/uploads/2018/04/Burkina-Faso_2%C3%A8me-et-3%C3%A8me-rapprt-CADBE-VERSION-final-d%C3%A9c-2011.pdf) (accessed 8 August 2020).
- 70 Republic of Kenya The second and third state party periodic report 2012-2017 on the African Charter on the Rights and Welfare of the Child (2018) 70, [https://acerwc.africa/wp-content/uploads/2019/09/Kenya\\_2nd\\_Periodic\\_Report.pdf](https://acerwc.africa/wp-content/uploads/2019/09/Kenya_2nd_Periodic_Report.pdf) (accessed 8 August 2020).
- 71 Republic of Benin Combined (Initial and Periodic) report of Benin on the implementation of the African Charter on the Rights and Welfare of the Child (1997-2015) IXc, <https://acerwc.africa/wp-content/uploads/2018/04/Benin-Initial-Report-Eng.pdf> (accessed 8 August 2020).
- 72 The Kingdom of Swaziland's Initial Report on the African Charter on the Rights and Welfare of the Child 2016 64, <https://acerwc.africa/wp-content/uploads/2018/04/Final-ACRWC-report-Swaziland-30-Nov-2016-2.pdf> (accessed 8 August 2020).
- 73 United Republic of Tanzania Consolidated 2nd, 3rd and 4th reports on the implementation of the African Charter on the Rights and Welfare of the Child by

of Sierra Leone reported having provided medical, psycho-social and parenting support to mothers of infants in prison, despite dire conditions of detention.<sup>74</sup> In Mauritania, female offenders are accommodated in separate sections of the prison where children can reside with them until the age of five, although insufficient resources impede their proper development.<sup>75</sup> Rwanda enacted legislation (Law 54/2011) which prioritises non-custodial sentences for pregnant mothers and mother offenders. When custodial sentences cannot be avoided, special wards are reserved for mothers with children under the age of three years, who receive food supplements and benefits from ECD centres. However, a mother is imprisoned with her child only under special circumstances where the judge deems it necessary.<sup>76</sup> In 2019 Guinea reported the creation of special facilities for holding pregnant offenders and mothers of infants and young children, as well as the prevention of imprisoning a mother with her child if all conditions for the well-being and optimal development of the child are not met.<sup>77</sup> Namibian authorities created 'special provisions' regarding 'sentencing, treatment and accommodation' of pregnant mothers and the mothers of infants and young children.<sup>78</sup> A prison reform has since 2006 been initiated in Ghana to the benefit of mothers imprisoned with their children.<sup>79</sup> Since 2009, several female correctional centres in South Africa have been equipped with child-friendly mother and baby units, which allow children to reside in prison with their mothers until the age of two and to benefit from healthcare services and ECD centres.<sup>80</sup> With a view to actualising

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the Government of the United Republic of Tanzania (2015) 51, <https://acerwc.africa/wp-content/uploads/2018/04/Tanzania-Consolidated-2nd-3rd-and-4th-Periodic-Reports-FINAL-Oct-2015-1.pdf> (accessed 8 August 2020).

- 74 Government of the Republic of Sierra Leone Initial Report on the African Charter on the Rights and Welfare of the Child (2002-2014) 111, <https://acerwc.africa/wp-content/uploads/2018/04/Sierra-Leone-GSL-State-Party-Report-on-the-ACRWC-Final-for-Web-Email.pdf> (accessed 8 August 2020).
- 75 Republique Islamique de Mauritanie Rapport initial sur les mesures d'application des dispositions de la Charte Africaine des Droits et Bien-etre de l'Enfant prises par la Mauritanie, <https://acerwc.africa/wp-content/uploads/2018/04/Initial-Report-Mauritania-French.pdf> (accessed 8 August 2020).
- 76 Second and Third Periodic Reports of the Republic of Rwanda on the Implementation of the African Charter on the Rights and Welfare of the Child, Period: 2006-2013 (2014) 41, <https://www.acerwc.africa/initial-and-periodic-reports/> (accessed 7 August 2020).
- 77 Republique de Guinee Deuxieme, troisieme, quatrieme, cinquieme and sixieme rapports periodiques sur l'application de la Charte Africaine des Droits et du Bien-etre de l'Enfant (CADBE) sec 176, [https://acerwc.africa/wp-content/uploads/2020/01/Guinea\\_1st\\_Periodic\\_Report.pdf](https://acerwc.africa/wp-content/uploads/2020/01/Guinea_1st_Periodic_Report.pdf) (accessed 8 August 2020).
- 78 State Party Report of the Republic of Namibia on the African Charter on the Rights and Welfare of the Child (2004-2012) 85 (report on file with author).
- 79 Initial, First and Second Consolidated Report of the Republic of Ghana to the African Committee of Experts on the Rights and Welfare of the Child (2005-2013) (2014) 88 (report on file with author).
- 80 South Africa's second country report to the African Committee of Experts in the Rights and Welfare of the Child on the African Charter on the Rights and Welfare of the Child (Reporting period 2013-2016) (on file with author) 72 73.

the best interests of the children of mother offenders, authorities have established a day care centre in the biggest female prison in Zimbabwe and proposed to make operational an open prison for female offenders.<sup>81</sup>

On the other hand, separating children from their incarcerated mothers at the point of incarceration may prove to be in a child's best interests only if conducive alternative care is available to adequately compensate for the loss of parental care. However, in certain instances, the absence of such alternatives outside the prison environment may simply mean that 'it is in the child's best interest to remain with the mother'<sup>82</sup> as the only available option.<sup>83</sup> It has been established that being raised in a family environment most often represents the best alternative for children,<sup>84</sup> as it provides them with a sense of belonging, stability and continuity. The children of female prisoners separated from their mothers often experience unstable living arrangements<sup>85</sup> and end up in (formal or informal) settings such as kinship care, with their fathers, in foster or institutional care, with adoptive parents, or on the streets. Siblings may be separated to relieve the caregiver's financial burden.<sup>86</sup> In the absence of their mother, children may suffer different forms of traumatisation<sup>87</sup> and might be exposed to abuse, exploitation and discrimination while in alternative care.<sup>88</sup> Their academic performance may deteriorate,<sup>89</sup> while some children may be forced to drop out of school due to the caregivers' inability to pay fees. Children separated from their incarcerated mothers commonly experience emotional or mental disturbances,<sup>90</sup> which manifest through problematic behaviour,<sup>91</sup>

81 Initial Report of the Government of the Republic of Zimbabwe under the African Charter of the Rights and Welfare of the Child (2013) 61, [https://acerwc.africa/wp-content/uploads/2018/04/Zimbabwe\\_Initial\\_Report\\_under\\_the\\_ACRWC.pdf](https://acerwc.africa/wp-content/uploads/2018/04/Zimbabwe_Initial_Report_under_the_ACRWC.pdf) (accessed 8 August 2020)

82 General Comment 1 para 50.

83 Van Hout & Mhlanga-Gunda (n 50) 1 6.

84 Preamble to the African Children's Charter.

85 M Bastick & L Townhead 'Women in prison. A commentary on the UN Standard Minimum Rules for the Treatment of Prisoners' (2008) 42, [https://www.peacewomen.org/sites/default/files/HR\\_Prisoners\\_QUNO\\_2008\\_0.pdf](https://www.peacewomen.org/sites/default/files/HR_Prisoners_QUNO_2008_0.pdf) (accessed 6 October 2020).

86 O Robertson 'The impact of parental imprisonment on children' Women in Prison and Children of Imprisoned Mothers Serles Research Paper (2007) 34, [https://www.quno.org/sites/default/files/resources/ENGLISH\\_The%20impact%20of%20parental%20imprisonment%20on%20children.pdf](https://www.quno.org/sites/default/files/resources/ENGLISH_The%20impact%20of%20parental%20imprisonment%20on%20children.pdf) (accessed 6 October 2020).

87 General Comment 1 para 3.

88 JL Roby 'Children in informal alternative care' (2011) UNICEF Discussion paper 20, [http://www.unicef.org/protection/Informal\\_care\\_discussion\\_paper\\_final.pdf](http://www.unicef.org/protection/Informal_care_discussion_paper_final.pdf) (accessed 3 October 2015).

89 J Murray & DP Farrington 'The effects of parental imprisonment on children' (2008) 37 *Crime and Justice* 135. Prison Reform Trust (n 2) 5.

90 CF Hairston 'Focus on children with incarcerated parents. An overview of the research literature' Report prepared for the Annie E Casey Foundation (2007) 18.

91 Murray & Farrington (n 89) 133.

whether 'externalising behaviours such as aggression, defiance, and disobedience' or 'internalising behaviours such as depression, anxiety and withdrawal'.<sup>92</sup> When children are not made privy to the truth regarding their mother's incarceration, her sudden disappearance may be perceived by the child as bereavement.<sup>93</sup> The frequency and quality of children's contact with their incarcerated mother may be impacted by factors such as distance, cost implications, unfriendly visiting arrangements or caregivers' reluctance,<sup>94</sup> adversely affecting the purpose for which it was intended.

Although incarcerated women represent a minority of the prison population,<sup>95</sup> the number of custodial sentences imposed on women and, implicitly, the number of women in carceral facilities worldwide has skyrocketed by 50 per cent in the last two decades,<sup>96</sup> due to harsher policies and stricter sentencing guidelines.<sup>97</sup> The inability of many women offenders to pay fines, to bail themselves out of prison or to hire a lawyer exacerbates the issue.<sup>98</sup> This female demographic increase in prisons seems unjustified, given that the majority of women are usually imprisoned for non-violent offences (most often property or drug-related).<sup>99</sup> Although incarceration is an expensive undertaking for states and its effectiveness in reducing crime rates – especially in the short term – has not yet been elucidated,<sup>100</sup> custodial sentences seem to have remained one of the frequently employed ways of punishing offenders, including women.<sup>101</sup> Evidence has proved that the existence of dependent minor children and their alternative care arrangements are not always taken into account when sentencing women offenders.<sup>102</sup> Imprisoned mothers often elect not

92 Hairston (n 90) 19.

93 O Robertson 'Collateral convicts. Children of incarcerated parents' Recommendations and good practice from the UN Committee on the Rights of the Child Day of General Discussion 2011 (2012) 46.

94 NG la Vigne et al 'Broken bonds. Understanding and addressing the needs of children with incarcerated parents' (2008) Urban Institute Justice Policy Centre 1 6.

95 R Brett 'Introduction and overview' in R Taylor 'Women in prison and children of imprisoned mothers' Preliminary research paper (2004) ii.

96 Van Hout & Mhlanga-Gunda (n 50) 1. See also AE Jbara 'The price they pay: Protecting the mother-child relationship through the use of prison nurseries and residential parenting programmes' (2012) 87 *Indiana Law Journal* 1825; R Epstein 'Mothers in prison: The sentencing of mothers and the rights of the child' Howard League 'What is Justice?' Working Papers 3 (2014) 3, [https://howardleague.org/wp-content/uploads/2016/04/HLWP\\_3\\_2014.pdf](https://howardleague.org/wp-content/uploads/2016/04/HLWP_3_2014.pdf) (accessed 6 October 2020).

97 C Kruttschnitt & R Gartner 'Women's imprisonment' (2003) 30 *Crime and Justice* 9.

98 United Nations Office on Drugs and Crime (n 1) 109.

99 United Nations Office on Drugs and Crime 12 103; Manjoo (n 66) 7 8.

100 D Inniss 'Developments in the law: Alternatives to incarceration' (1998) 111 *Harvard Law Review* 1929 1930.

101 General Comment 1 para 48.

102 Epstein (n 96) 10; H Millar & Y Dandurand 'The impact of sentencing and other judicial decisions on the children of parents in conflict with the law. Implications

to mention their caregiving responsibilities towards minor children, from fear of losing custody.<sup>103</sup> Consequently, it is not uncommon for such children to end up on the streets, at risk of becoming victims of trafficking and exploitation. In order to prevent such – and other – unfavourable outcomes of maternal incarceration, the African Children’s Committee stepped in by issuing General Comment 1 in an attempt to ensure that the child’s best interests remain the primary consideration and to promote the use of non-custodial sentences for sole or primary caregivers in line with considerations about ‘the child-caring responsibilities of a convicted person’.<sup>104</sup>

### 3 The (in)compatibility between article 30(d) and General Comment 1

‘International law-making is a complex and dynamic process characterised by the use of different instruments, including non-binding ones, and the participation of diverse actors, including non-state actors.’<sup>105</sup> One such instrument in the field of human rights law is represented by General Comments which, by nature, scope and purpose, are interpretative documents<sup>106</sup> through which treaty bodies ‘give voice to their understanding of substantive treaty provisions’.<sup>107</sup> Although they belong to the more encompassing category of soft law, thereby creating non-binding obligations for states, their ‘great persuasive force’<sup>108</sup> and ‘practical effects’<sup>109</sup> in the international legal discourse, of which they form an integral part,<sup>110</sup> must be acknowledged. Soft law ‘plays a crucial role in creating a common understanding of the existing rules, and their interpretation’.<sup>111</sup> The notion of soft law escapes the rigid confines of

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for sentencing reform’ February 2017 7, [https://icclr.org/wp-content/uploads/2019/06/Millar-and-Dandurand-2017\\_Impact-of-Sentencing-on-Children-on-Parents\\_07\\_02\\_2017.pdf](https://icclr.org/wp-content/uploads/2019/06/Millar-and-Dandurand-2017_Impact-of-Sentencing-on-Children-on-Parents_07_02_2017.pdf) (accessed 4 August 2020).

103 Robertson (n 86) 47.

104 General Comment 1 para 35.

105 M Barelli ‘The role of soft law in the international legal system: The case of the United Nations Declaration on the Rights of Indigenous Peoples’ (2009) 58 *International and Comparative Law Quarterly* 964, <http://www.jstor.org/stable/25622251> (accessed 21 September 2020).

106 C Blake ‘Normative instruments in international human rights law: Locating the general comment’ (2008) Centre for Human Rights and Global Justice Working Paper 17 4.

107 F Viljoen *International human rights law in Africa* (2012) 31.

108 As above.

109 F Snyder ‘The effectiveness of European community law: Institutions, processes, tools and techniques’ (1993) 56 *Modern Law Review Limited* 32, <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1993.tb02852.x> (accessed 24 September 2020).

110 AT Guzman & TL Meyer ‘International soft law’ (2010) 2 *Journal of Legal Analysis* 176.

111 S Lagoutte, T Gammeltoft-Hansen & J Cerone (eds) *Tracing the roles of soft law in human rights* (2016) 6-7.

a uniform definition. However, for the purpose of this article soft law refers to 'non-binding rules or instruments that interpret or inform our understanding of binding legal rules'.<sup>112</sup> The debate around the place and topicality of soft law in the international human rights law system is still ongoing, soft law being regarded either as 'law, quasi law, or not law at all'.<sup>113</sup> Some legal scholars and law practitioners argue that 'soft law cannot be simply dismissed as non-law',<sup>114</sup> while others argue that 'it is not law at all, strictly speaking'.<sup>115</sup> For some scholars its imprecise or ambiguous<sup>116</sup> character seems to be incongruent with the notion of law itself, which requires certainty. However, despite their influential nature in law-making processes, soft law instruments have always been shadowed by questions around 'authoritativeness',<sup>117</sup> legitimacy and state compliance.<sup>118</sup> Soft law generates weaker levels of compliance by states than hard law.<sup>119</sup> Although the use of soft law 'provides the benefits of speed, informality, less onerous procedural limitations',<sup>120</sup> it lacks 'enforceability and formal legal status'<sup>121</sup> and leads to political rather than legal consequences.<sup>122</sup> Soft law, in general, 'elevate[s] the level of protection in situations where, according to practical experience, violations of human rights standards are likely to occur'.<sup>123</sup> In this case a mother's incarceration might impede the realisation of the best interests of her minor dependent children.

General Comment 1 was intended to 'strengthen understanding of the meaning and application of article 30 and its implications'<sup>124</sup> and to support stakeholders in its effective implementation through

112 AT Guzman & TL Meyer 'International soft law' (2010) 2 *Journal of Legal Analysis* 174.

113 D Shelton 'Normative hierarchy in international law' (2006) 100 *The American Journal of International Law* 292, <https://www.jstor.org/stable/3651149> (accessed 25 September 2020).

114 Barelli (n 105) 959.

115 Guzman & Meyer (n 112) 172.

116 As above.

117 C Blake 'Normative instruments in international human rights law: Locating the general comment' Centre for Human Rights and Global Justice Working Paper 17 (2008) 25.

118 See B Kabumba 'Soft law and legitimacy in the African Union: The case of the Pretoria Principles of Ending Mass Atrocities Pursuant to article 4(H) of the AU Constitutive Act' in O Shyllon (ed) *The Model Law on Access to Information for Africa and other regional instruments: Soft law and human rights in Africa* (2018), <https://www.corteidh.or.cr/tablas/33768.pdf> (accessed 21 September 2020).

119 Guzman & Meyer (n 112) 180.

120 Human Rights Council Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism A/74/335 29 August 2019, <https://digitallibrary.un.org/record/3828852?ln=en> (accessed 25 September 2020).

121 S Lagoutte, T Gammeltoft-Hansen & J Cerone (eds) *Tracing the roles of soft law in human rights* (2016) 3.

122 Shelton (n 113) 319.

123 C Tomuschat *Human rights: Between idealism and realism* (2008) 39.

124 General Comment 1 para 8(a).

legislation, policy and practice.<sup>125</sup> The document was informed by the realisation that whenever mothers are imprisoned, their children's rights are violated, whether they reside in prison with their mothers or are separated from them.<sup>126</sup> Soft law documents are widely used in the field of human rights, being commonly intended to 'humanise' hard law and to address shortcomings with regard to specific provisions in hard law documents.<sup>127</sup> General Comment 1 was aimed at correcting a deficiency in the wording of article 30(d) and its adjacent consequences in terms of preserving the best interests of the children of imprisoned mothers. The African Children's Committee is rightfully challenging 'stereotyped and oversimplified' narratives involving the children of imprisoned mothers, that would suggest 'a uniformity of situations' in which such children find themselves.<sup>128</sup> The reality is that every such child experiences unique circumstances, rendering the use of generalisations impossible.<sup>129</sup> For this reason, when deciding what would be in the best interests of a child whose mother is incarcerated, the African Children's Committee is advocating a 'nuanced', 'individualised, qualitative approach' as opposed to a 'categorical approach based on generalised and simplistic assumptions'.<sup>130</sup> Article 30(d) finds itself at odds with the approach proposed in General Comment 1 exactly by adopting such an approach deprived of individualisation. Article 30(d) proposes a 'blanket' solution, which obviously cannot be applied to all children of incarcerated mothers and expect to see their best interests actualised. From this perspective the two documents seem to be impossible to reconcile.

The rationale of article 30(d) was based on the premise that, ideally, children should grow up 'in a family environment in an atmosphere of happiness, love and understanding',<sup>131</sup> which most African prisons are unable to provide. Undoubtedly, the treaty body's intention was to confer upon African children the highest level of protection in the circumstances of their mothers' incarceration, considering the precarious conditions in most African prisons. However, the treaty does not address ancillary challenges arising, in a contemporary African context, from attempting to implement such a narrow directive.

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125 General Comment 1 paras 6 & 8(b).

126 General Comment 1 paras 3 & 4.

127 Kabumba (n 118) 172 189.

128 General Comment 1 para 14.

129 As above.

130 General Comment 1 para 15.

131 General Comment 1 para 54.

Article 30(d) seems to be based on the assumption that in the absence of the mother, her dependent child or children can be cared for by the father or a member of the extended family. In contemporary Africa, however, this assumption is rather questionable, for a number of reasons. First, these women are often undereducated, unemployed, economically unstable,<sup>132</sup> single mothers, engaged in unstable relationships. Therefore, when imprisoned the probability of their child or children being taken care of by the father is highly unlikely. This stands in sharp contrast with situations where the father is the one incarcerated, in which case the mother is almost always assuming child care responsibilities.<sup>133</sup> Therefore, a mother's incarceration usually generates a greater impact on the child's life as compared to a father's imprisonment.<sup>134</sup> Second, the structure of the broader family – worldwide, but especially in Africa – has been greatly weakened over the past few decades by poverty, armed conflicts, displacement, migration, pandemics and other social misfortunes, leading to the inability of its members to assume caregiving responsibilities for the children of an incarcerated mother. Third, the stigma associated with imprisonment may adversely affect the willingness of the broader family to accommodate the children of imprisoned mothers.<sup>135</sup> Therefore, changes in contemporary African society require readjustments in the way mother offenders are punished, bearing in mind that what happens to the mother directly or indirectly affects the well-being of her children.

It is the understanding of the African Children's Committee that a mother's incarceration should not impede the enjoyment by her children of all the rights stipulated in the treaty, as these children 'have equal rights with all other children'.<sup>136</sup> Depriving them of their rights would be tantamount to discrimination.<sup>137</sup> When sentencing mother offenders, judges are expected to balance the best interests of the child involved, 'the gravity of the offence and public security'.<sup>138</sup> Illustrative in this regard are the five-step guidelines provided in the *S v M* decision, with the aim of promoting 'uniformity of principle, consistency of treatment and individualisation of outcome'.<sup>139</sup>

<sup>132</sup> Taylor (n 1) 5.

<sup>133</sup> JM Kjellstrand et al 'Characteristics of incarcerated fathers and mothers: Implications for preventing interventions targeting children and families' (2012) 34 *Children and Youth Services Review* 2409-2415, <https://www.sciencedirect.com/journal/children-and-youth-services-review/vol/34/issue/12> (accessed 8 August 2020).

<sup>134</sup> Prison Reform Trust (n 2) 5.

<sup>135</sup> E Saunders & R Dunifon *Children of incarcerated parents* (2011) 4; Manjoo (n 66) 23.

<sup>136</sup> General Comment 1 para 19.

<sup>137</sup> General Comment 1 para 20.

<sup>138</sup> General Comment 1 para 39.

<sup>139</sup> *S v M* 2007 18 (CC) para 36.

Although priority must as much as possible be given to non-custodial sentences,<sup>140</sup> in situations where a custodial sentence cannot be avoided, its impact on the dependent children should be carefully thought through, keeping in mind that ‘the final outcome’ in any situation involving children is determining and realising their best interests.<sup>141</sup> Although the best interests principle should not be invoked as a pretext to avoid maternal incarceration if the law requires it for preserving public safety,<sup>142</sup> a mother’s incarceration without her child imposes limitations on the child’s right to parental care and protection (article 19 of the African Children’s Charter).<sup>143</sup> Given that pre-trial detention can be excessively protracted in Africa and, therefore, detrimental to the child-mother relationship, it is imperative to prioritise criminal cases against mother offenders and to ‘minimise arrests’ in favour of alternative measures (bail, summons, written notices and life bonds).<sup>144</sup> The current international and regional theoretical framework in support of non-custodial measures for mother offenders<sup>145</sup> is solid enough to have altered the way in which sentencing women offenders in contemporary Africa is being determined. Such alternatives are also supported by the African ‘cultural approach to justice’ aimed at reconciliation and restoration.<sup>146</sup> Despite the relative success of adopting alternative options in selected African countries,<sup>147</sup> their efficiency is rather limited by public prejudices or scepticism, monitoring challenges, corruption, untrained staff, legal rigidity, and a lack of political engagement, among others.<sup>148</sup> Since the aim of incarceration should

140 General Comment 1 para 24(a).

141 General Comment 1 paras 22 & 24(b).

142 General Comment 1 para 39.

143 General Comment 1 para 38.

144 General Comment 1 paras 41-46.

145 UN Standard Minimum Rules for Non-Custodial Measures (1990); Kampala Declaration on Prison Conditions in Africa (1996); Kadoma Declaration on Community Service Orders in Africa (1997); Arusha Declaration of Good Prison Practice (1999); Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa (2003).

146 V Stern ‘An alternative vision: Criminal justice developments in non-Western countries’ (2001) 28 *Social Justice* 92-93.

147 Penal Reform International and the Zimbabwean National Committee on Community Service ‘Community service in practice’ (1997) 3, <https://www.penalreform.org/resource/community-service-practice/> (accessed 6 October 2020). L Mugambi ‘Implementation of CS orders programme: The Kenyan experience’ Paper presented at the training of magistrates and state attorneys on implementation of community service in Uganda. Workshop Report (2012) Annex 11. A Skelton ‘Alternative sentencing review’ (2004) 6 *Civil Society Prison Reform Initiative Research Paper Series* (7) 13; Penal Reform International ‘Alternatives to imprisonment in East-Africa: Trends and challenges’ (2012) 7, <https://www.penalreform.org/resource/alternatives-imprisonment-east-africa-trends-challenges/> (accessed 6 October 2020).

148 Prison Reform International Global prison trends. Special focus 2020: Alternatives to imprisonment, <https://cdn.penalreform.org/wp-content/uploads/2020/05/Global-Prison-Trends-2020-Penal-Reform-International-Second-Edition.pdf> (accessed 6 October 2020).

be the 'reformation', 'integration' and 'rehabilitation' of mother offenders, the African Children's Committee proposes various alternatives to incarceration, in line with African tradition with regard to justice.<sup>149</sup> However, in many African countries the scarcity of resources allocated to prison renovations or to the creation of 'special alternative institutions' for mother offenders would suggest that in order to preserve the child's best interests, co-detention should be considered only as a matter of last resort.<sup>150</sup>

Realising a child's best interests is inclusive of realising his or her right to life, survival and development, which requires providing basic services (health, food, shelter, education and an adequate standard of living) and protecting the child from violence and abuse<sup>151</sup> – an extremely difficult or almost unattainable task in most prison facilities across the continent.<sup>152</sup> The living conditions of children in co-detention should be 'as close as possible' to those of children living in free society, surrounded by a team of specialised staff.<sup>153</sup> However, the Children's Committee acknowledges the fact that separating children from their imprisoned mothers could also impose limitations on the enjoyment by her children of their rights to life, survival and development.<sup>154</sup> When children are separated from their mothers, state parties are under an obligation to ensure their best interests by providing viable alternative arrangements for their care, decided upon on a case-by-case basis and upon meaningful consultation with the child.<sup>155</sup>

### 3.1 Applying treaty interpretation principles to article 30(d)

In order to achieve its purpose, treaty interpretation must adhere to certain rules, similar to those employed in domestic law interpretation, keeping in mind that such rules do not obey a hierarchical order.<sup>156</sup> Article 31 of the Vienna Convention on the Law of Treaties provides a general rule of interpretation: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'<sup>157</sup> Different 'judicial attitudes'<sup>158</sup>

149 General Comment 1 paras 60 & 61.

150 General Comment 1 para 50.

151 General Comment 1 para 26.

152 General Comment 1 para 27.

153 General Comment 1 para 29.

154 As above.

155 General Comment 1 paras 29 & 40.

156 J Dugard *International law. A South African perspective* (2007) 417 418.

157 Vienna Convention on the Law of Treaties (1969) art 31(1).

158 Dugard (n 156) 417.

originate from this overarching principle. However, the literal and the progressive approach, respectively, dominate the realm of treaty interpretation.<sup>159</sup> A literal or textual<sup>160</sup> interpretation of a treaty is done by giving effect to the 'grammatical meaning' of the words.<sup>161</sup> The progressive or teleological<sup>162</sup> treaty interpretation 'emphasises the object and purpose of a treaty',<sup>163</sup> taking into account social and linguistic changes in circumstances from the time of drafting to the time of interpreting a treaty.<sup>164</sup> Both theories have over time been criticised: the former for its rigidity; the latter for its subjectivity and for granting excessive interpretative powers to treaty-monitoring bodies.<sup>165</sup>

Although there is theoretical consensus between article 30 and its General Comment with regard to the promotion and protection of the best interests of children of mother offenders, there are aspects in both documents that are obviously incongruent and apparently irreconcilable. Section 20 of the General Comment in question sharply contrasts with article 30(d) by referring to 'children imprisoned with their parents/primary caregivers' – a peculiar group of children who should not have existed in the first place, if article 30(d) would have been read and applied *ad litteram* by judicial officers. In the same vein, section 55 of the General Comment is even further removed from article 30 by advocating co-detention as being 'in children's best interests' (provided that safeguards are put in place), as opposed to the categorical prohibition of article 30(d).

The wording of article 30(d) is unequivocal, namely, that 'a mother shall not be imprisoned with her child'. A literal/textual interpretation of this sentence can only mean that upon their mothers' incarceration, children should be separated from them. The use of a purposive interpretation does not arise in this context, as purposive interpretation is applied only when the meaning of a treaty is 'ambiguous or obscure',<sup>166</sup> which evidently is not the case. Therefore, article 30(d) does not call for such an interpretation. In fact, 'it is not permissible to interpret what has no need of interpretation'.<sup>167</sup> However, in spite of the clear meaning of article

159 RN Graham 'A unified theory of statutory interpretation' (2002) 23 *Statute Law Review* 92.

160 Dugard (n 156) 417.

161 As above.

162 As above.

163 As above.

164 Graham (n 159) 104.

165 Graham (n 159) 113.

166 Arts 32(a) & (b) Vienna Convention.

167 E de Vattel *Le droit des gens* 199 (1916) 1758 in J Tobin 'Seeking to persuade: A constructive approach to human rights treaty interpretation' (2010) 23 *Harvard Human Rights Journal* 48.

30(d), the African Children's Committee embarked on its purposive interpretation – a decision motivated by mainly two factors. The first factor is to ensure 'a better protection of children of imprisoned parents and caregivers',<sup>168</sup> in line with the best interests principle. The second is to respond to changes in circumstances in African society from the time of drafting the Children's Charter's to the time of issuing General Comment 1.

While the treaty provides that children should not accompany their mothers in prison (article 30(d)), its General Comment seems to contradict this rigid, crystal clear wording by stating that, in certain cases, co-detention may be an option for children in contemporary Africa. Thus, General Comment 1 reads into article 30(d) a meaning that is not manifestly present. Although 'a soft law document is to be preferred to no document at all',<sup>169</sup> and although the African Children's Committee's intention is commendable, this approach may lead to ambiguity with regard to the nature and scope of stakeholders' obligations emanating from treaties, which in turn might 'favour non-compliance'.<sup>170</sup> Also, if state compliance with treaty regulations is difficult to enforce, how much more difficult will it be to enforce compliance with soft law guidelines? Elaborating further on the impact of uncertainty that might be introduced by very elastic interpretations of treaty provisions, it has been rightly pointed out that when a General Comment goes 'far beyond the text' of the treaty it intends to interpret, it actually 'undermines the principle of legal security by reading into a legal text a content that simply is not there'.<sup>171</sup> Interpretative bodies may sometimes sacrifice 'fidelity to a text ... in order to ... keep pace with the perceived necessities of changing times'.<sup>172</sup>

General Comment 1 is the legitimate product of the African Children's Committee's interpretative mandate, but the inflexibility of article 30(d) could not be corrected through an interpretative act, but rather through an amendment. Due to its lack of sensitivity to changes in circumstances in contemporary Africa over a time span of two decades, article 30(d) of the African Children's Charter is unable

<sup>168</sup> General Comment 1 para 8(f).

<sup>169</sup> Barelli (n 105) 964.

<sup>170</sup> Barelli (n 105) 972.

<sup>171</sup> K Tomasevski 'Experiences with legal enforcement of the right to education as food-for-thought in exploring models for an optional protocol to the International Covenant on Economic, Social and Cultural Rights' United Nations Doc. E/CN.4/2004/WG.23/CRP.4, para 8.

<sup>172</sup> DF Vagts 'Treaty interpretation and the new American ways of law reading' (1993) 4 *European Journal of International Law* 499 in J Tobin 'Seeking to persuade: A constructive approach to human rights treaty interpretation' (2010) 23 *Harvard Human Rights Journal* 22.

to support the actualisation of the best interests of the children of incarcerated mothers. For this reason, the Children's Committee has decided to interpret the provision of article 30(d) in light of Africa's new realities. However, although the content of General Comment 1 indeed is a reflection of children's rights activism, the Committee embarked on a task beyond its mandate. Ideally, the Committee should have rather sought (and can still seek) an amendment of that particular treaty provision, albeit a cumbersome and lengthy process. In the meantime, General Comment 1 should be popularised and increasingly utilised by judicial officers in order to safeguard the best interests of the children of incarcerated mothers. However, since the best interests principle is not absolute,<sup>173</sup> it cannot justify the interpretation proposed in General Comment 1, which actually alters the core of article 30(d). Notwithstanding its 'usefulness',<sup>174</sup> soft law is – and should be – subsidiary to hard law, 'a second best alternative to hard law'.<sup>175</sup> Soft law does not stand on an equal footing with hard law and cannot fundamentally alter the intended meaning of a treaty provision.<sup>176</sup>

#### 4 Conclusion and recommendations

Every child and all family settings are unique. Therefore, it becomes evident that the only way in which to determine what is in the best interests of a particular child should be done by assessing the advantages and disadvantages of both co-detention or separation from the incarcerated mother. A plethora of international and regional instruments make reference to alternative, non-custodial measures and their benefits for women offenders and their minor children. Although these measures have been utilised to some extent in selective African countries, challenges remain that limit their widespread implementation. Therefore, a large number of mother offenders are still given custodial sentences, thereby denying them the flexibility available under different forms of alternative measures of punishment.

Article 30(d) demands the separation of children from their imprisoned mothers. Such a rigid provision provides a uniform solution that does not necessarily guarantee the best interests of all the children under consideration. Respect for the law (article 30(d)

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173 J Elster 'Solomonic judgments: Against the best interest of the child' (1987) 54 *University of Chicago Law Review* 26.

174 C Tomuschat *Human rights: Between idealism and realism* (2008) 39.

175 T Meyer 'Soft law as delegation' (2009) 32 *Fordham International Law Journal* 900.

176 Art 31(1) Vienna Convention.

in this case) may in some instances override, the best interests of the children involved. Being separated from their incarcerated mothers could be in the best interests of some children, but for some other children this separation could be synonymous with abandonment, abuse or neglect. Unfortunately, in the absence of reliable alternative care, co-detention for some children of incarcerated mothers represents the only available option. In order to address the rigidity of article 30(d) and to ameliorate the situation of children whose mothers are incarcerated, General Comment 1 provides for an individual assessment in establishing the best interests of the children under consideration and broadens their options. However, although the content of General Comment 1 represents a step forward in achieving better rights for the children of imprisoned mothers, this instrument belongs to the category of soft law. Therefore, its provisions do not have the power to override, in principle, the provisions of article 30(d).

## 4.1 Recommendations

### 4.1.1 *Amendment of article 30(d)*

Due to the multifaceted impact that article 30(d) has on the best interests of the children of incarcerated mothers in contemporary Africa, it is imperative to address its inflexibility. General Comment 1 represents an attempt to solve the rigidity inherent in article 30(d). However, General Comments are mainly interpretative instruments, soft law, unable to alter the core of the treaty provision they are called on to interpret. Ideally, the rigidity of article 30(d) is curable through an amendment, which could be done under article 48 of the African Children's Charter, in order to uphold the best interests of the children under consideration. The amended provision should read: [E]nsure that a mother shall not be imprisoned with her child *unless the circumstances of the child require otherwise*.

Cognisant of the fact that amending a treaty provision is a laborious exercise, the author recommends that, in the meantime, awareness and understanding of General Comment 1 should be advanced among state parties in order to confer a higher level of protection upon the children under consideration.

#### **4.1.2 *Individualised approach in decision making concerning separation or co-detention***

Taking into account the uniqueness of each child and his or her family environment, the uniform prescription of article 30(d), if applied to all minor children of incarcerated mothers, may not ensure the realisation of their best interests. It is recommended that choosing between co-detention and separation of minor dependent children from their incarcerated mothers should be based on an individual analysis of the unique circumstances of each child, in order to safeguard the child's best interests.

#### **4.1.3 *Increased use of alternatives to incarceration for mothers***

Evidence has shown that serving a prison term does not necessarily lead to the reformation, rehabilitation and reintegration of mother offenders in society. In addition, a mother's imprisonment leads to stigmatisation and deeply affects the minor children in her care. Against such a discouraging background, the overuse of custodial sentences remains unjustified. It is recommended that whenever the courts are in a position to choose between sentencing options, a non-custodial sentence should always be considered for primary caregivers, especially mothers. This approach will preserve the family environment and the best interests of the children under consideration.

#### **4.1.4 *Improvement of prison facilities for mothers and children***

Since not all primary caregivers can benefit from the privileges of a non-custodial sentence due to either the severity of the offence committed or to the need to protect society from future harm, it is recommended that when a custodial sentence cannot be avoided, and when co-detention proves to be in the best interests of the child, prison authorities should provide facilities and services (compliant with international and regional standards) that adequately address the needs of dependent minor children with regard to their holistic development.

## ***Res interpretata* principle: Giving domestic effect to the judgments of the African Court on Human and Peoples' Rights**

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**Summary:** *The African Court on Human and Peoples' Rights is beginning to hand down decisions of constitutional salience and positioning itself as a quasi-constitutional court for Africa. However, as is the case with all regional human rights courts, its decisions lack erga omnes effect, and are binding only on the parties to the case. This means that the other members of the African Union are not required by law to implement rulings that were made by the African Court in cases in which they did not participate. While decisions of the African Court are res inter alios in relation to third parties, at least formally, it is argued that the Court may use the principle of res interpretata to ensure the collective enforcement of human rights commitments emanating from the African Charter.*

**Key words:** *judgments; res interpretata principle; erga omnes effect; African Charter on Human and Peoples' Rights; African Court on Human and Peoples' Rights*

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## 1 Introduction

Generally, the relationship between a treaty and third parties is governed by the principle of *pacta tertiis nec nocent nec prosunt*.<sup>1</sup> This fundamental principle forms part of state practice, is foundational to multilateral governance, and has hardly been challenged. It is founded on the principles of sovereignty, independence and equality of states and is reflected under article 34 of the Vienna Convention on the Law of Treaties (Vienna Convention).<sup>2</sup> The essence of this concept is that a treaty or convention may not impose obligations upon or create rights for a state that is not a party thereto. Such instruments create effects for contracting parties alone and may not impose obligations on third parties without their consent.<sup>3</sup> On account of this rule, human rights treaty obligations constitute *pacta tertiis* and are inoperative in relation to third parties.<sup>4</sup>

Similarly, because rulings of interpretive organs or judicial mechanisms of treaties are part of the treaty system, they are *res inter alios acta vis-à-vis* third parties, that is, non-record parties. In terms of article 30 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),<sup>5</sup> read with Rule 72 of the Court's Rules of Procedure,<sup>6</sup> decisions of the African Court on Human and Peoples' Rights (African Court) are only binding *inter partes*. This means that the possibility of the *erga omnes* effect of these decisions is ruled out. Generally, states in respect of which a decision has been given are at liberty to determine the ways and means of giving effect to such decisions. However, they must always strive for *restitutio in integrum*.<sup>7</sup>

The other state parties to the human rights instrument concerned are not legally bound to give any concrete effects to the ruling, even if similar legal or factual situations may exist upon which the

1 M Fitzmaurice 'Third parties and the law of treaties' (2002) 6 *Max Planck United Nations Yearbook* 38.

2 Concluded at Vienna on 23 May 1969, entered into force on 27 January 1980, United Nations, Treaty Series Vol 1155 331.

3 OM Rahim 'International treaties and third parties' (2010) 1 *Opinio Juris* 35.

4 GM Zagel 'International organisations and human rights: The role of the UN Covenants in overcoming the accountability gap' (2018) 36 *Nordic Journal of Human Rights* 74 77.

5 Reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2006) 41.

6 Adopted in 2020, <http://www.african-court.org> (accessed 27 August 2018).

7 J Gerards & J Fleuren 'Comparative analysis' in J Gerards & J Fleuren (eds) *Implementation of the European Convention of Human Rights and of the judgments of the ECtHR in national case law: A comparative analysis* (2014) 333 350. See also F Hoffmeister 'Germany: Status of European Convention on Human Rights in domestic law' (2006) 4 *International Journal of Constitutional Law* 722 725.

treaty-based court may make a comparable finding of violation in a subsequent case brought before it.<sup>8</sup> It is argued that to make the terms of the African Charter on Human and Peoples' Rights (African Charter)<sup>9</sup> effective and prevent future violations and other kindred human rights instruments over which the African Court enjoys jurisdiction, constitutional decisions of the Court must be considered to carry *res interpretata* effects (or interpretive authority).

Accordingly, the generality of the members of the African Union (AU) must take into account or take due notice of the interpretive guidance of judgments and decisions of the African Court, especially judgments of principle, in developing domestic legal policies. It no longer is permissible for states to ignore or fail to take on board the consequences, at the earliest opportunity, of a ruling finding a violation by another state when the same complaint or problem exists in their own system. It is argued that judicial *dicta* containing these *res interpretata* consequences simply are too useful to be neglected, and often are 'beacons of orientation'<sup>10</sup> in the quest for legal clarity and certainty in compliance with international obligations.<sup>11</sup>

## 2 Conceptual foundations of the *res interpretata* principle

By recognising and accepting the jurisdiction of an international court or tribunal, a state incurs a legal obligation to comply with judgments given against it. However, a state does not undertake to be bound by rulings in which it was not a party, nor does it forfeit or waive the right to contend that a new case should be distinguished from materially similar suits involving other states.<sup>12</sup> The authority of such rulings is limited to the primary parties to the case as they constitute *res judicata* and lack *erga omnes* effects, as only states found to have violated the relevant treaty are bound, at least in positive law, by the ruling rendered. Theoretically, owing to a lack of *erga omnes* effect, third party states are not directly concerned with such rulings and are not obliged to comply with them.<sup>13</sup> The limited

8 Gerards & Fleuren (n 7) 350.

9 Reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2006) 2.

10 F Berman 'The ICJ as an "agent" of legal development' in CJ Tams & J Sloan (eds) *The development of international law by the International Court of Justice* (2013) 21.

11 Tams & Sloan (n 10) 3.

12 As above.

13 Speech delivered by former president of the European Court, Dean Spielmann, at a conference 'Application of the European Convention on Human Rights and Fundamental Freedoms on national level and the role of national judges',

binding effect of rulings of international courts and tribunals is an artefact of the principles of sovereignty and independence.<sup>14</sup>

If a contracting state refuses to accept or recognise a decision reached through proceedings to which it was not a party, there are no means of forcing that state to accept such a ruling, even if the decision deals with a problem that exists in that other state as well.<sup>15</sup> The only option is for the individual concerned to launch a fresh proceeding against the offending state for the court to give a new ruling that is binding on such a state.<sup>16</sup> This does not comport with judicial economy since the limited effect of decisions of a court may sometimes result in repetitive litigation where the only significant difference between the cases is the identity of the parties involved in a case.<sup>17</sup>

Where there is a ruling on a particular legal situation of a state, there generally is no need for re-litigation against different states with respect to a similar situation, and new condemnatory verdicts given, before such states can rectify the anomaly in their own legal systems. In such cases, third parties in the same treaty system are indirect addressees of the rulings of the relevant judicial tribunal. Clearly, if the *inter partes* approach were to be slavishly adhered to, international litigation would be highly individualistic, atomistic and inefficient.<sup>18</sup> However – and this is an emerging and growing trend in the European and Inter-American human rights systems – there is nothing that prevents a contracting state from amending its legislation or modifying its conduct, following a finding of a violation against a different state on a similar issue.<sup>19</sup> In line with this thinking, in practice international courts and tribunals consider their decisions to have interpretational value for all states subject to their jurisdiction, and not merely to those states that are party to a case to which the ruling relates.<sup>20</sup>

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[https://www.echr.coe.int/Documents/Speech\\_20141024\\_OV\\_Spielmann\\_ENG.pdf](https://www.echr.coe.int/Documents/Speech_20141024_OV_Spielmann_ENG.pdf), Baku, 24-25 October 2014 (accessed 13 November 2018).

14 LR Helfer 'The effectiveness of international adjudicators' in C Romano et al (eds) *The Oxford handbook of international adjudication* (2014) 465-471.

15 S Beljin 'Germany: *Bundesverfassungsgericht* on the status of the European Convention of Human Rights and ECHR decisions in the German legal order: Decision of 14 October 2004' (2005) 1 *European Constitutional Law Review* 558-559.

16 As above.

17 Helfer (n 14) 471.

18 As above.

19 Speech by Dean Spielmann (n 13).

20 A Huneeus 'Compliance with judgments and decisions' in Romano et al (n 14) 442.

In the *South West Africa* case the International Court of Justice (ICJ), for instance, stated without elaborating that a ruling by an international court may carry with it ‘an effect *erga omnes* as a general judicial settlement binding on all concerned’.<sup>21</sup> This demonstrates that supranational courts commonly expect state parties to adjust their behavioural patterns or conduct and re-orient their legal policies in line with the existing case law even when such states have not been parties to the specific case.<sup>22</sup> The pilot judgment procedure developed by the European Court of Human Rights (European Court) and the practice by the Inter-American Court of Human Rights (Inter-American Court) of alerting state parties to new judgments suggests this practice or trend.<sup>23</sup> Indeed, Rule 66 of the Rules of Procedure of the African Court makes provision for the pilot judgment procedure. However, no judicial practice has yet been developed by the African Court on this procedure.

To place the present discussion into proper perspective, it is important to distinguish the concept of a *res interpretata* effect from the concept of an *erga omnes* effect, with which it cohabits the same doctrinal and conceptual spaces. The former concept describes the normative consequence or implications or ‘force of interpretation’ of a ruling against third party states that were not party to the case on which the ruling in question was made.<sup>24</sup> It means nothing more and nothing less than the duty or obligation on national authorities to take into account a human rights treaty norm as interpreted by the relevant interpretive mechanism even in cases concerning violations that have occurred among other contracting parties. It connotes ‘the idea that the interpretative authority of international judgments reaches beyond the parties to the case’.<sup>25</sup>

On the other hand, the term *erga omnes* means ‘towards all’ or ‘towards everyone’ or ‘flowing to all’, and dates as far back as Roman law.<sup>26</sup> The difference between the two concepts relates to ‘bindingness’ of decisional effects or a lack thereof. While the *res interpretata* principle connotes non-bindingness but interpretational persuasiveness of decisions of courts beyond the record parties, the

21 *South West Africa Cases (Second Phase) Judgment*, 18 July 1966, ICJ Reports (1966) 6 para 70. Similarly, see *Aegean Sea Continental Shelf (Greece v Turkey) Judgment*, 19 December 1978, ICJ Reports (1978) 3 para 39; CJ Tams *Enforcing obligations erga omnes in international law* (2010) 104.

22 Helfer (n 14) 471.

23 ST Eboobrah ‘International human rights courts’ in Romano et al (n 14) 247.

24 Gerards & Fleuren (n 7) 248.

25 OM Arnadóttir ‘*Res interpretata*, *erga omnes* effect and the role of the margin of appreciation in giving domestic effect to the judgments of the European Court of Human Rights’ (2017) 28 *European Journal of International Law* 819 822.

26 A Memeti & B Nuhija ‘The concept of *erga omnes* obligations in international law’ (2013) 14 *New Balkan Politics* 32.

*erga omnes* effects are binding on non-parties.<sup>27</sup> However, when grappling with the terminology suitable to describe the general interpretational authority of the judgments of the European Court, Besson argues that the term *erga omnes* should be used to refer to the *res interpretata* or general 'interpretational' or jurisprudential authority with which the rulings of the European Court are imbued.<sup>28</sup>

Besson distinguishes this from enforceable 'decisional' authority that is binding *inter partes*, rendering the case *res judicata*.<sup>29</sup> Yet, she acknowledges that the use of the concept of *erga omnes* in this way is somewhat problematic in that it does not distinguish between the two related but different elements in a judgment, namely, its operative part or the depositif (comprising the findings and remedies, which are only binding *inter partes*) and its interpretational authority or authoritative effect (giving rise to systemic effects in the treaty system) which has a wider impact than its binding effect.<sup>30</sup> In sum, the two concepts are kept apart by the fact that the *res interpretata* principle creates a legal obligation under international law, albeit of a special kind that only requires states to 'take into account' the interpretive value of the rulings against other states that did not participate in the proceedings, while the *erga omnes* principle, by default, engenders real binding obligations.<sup>31</sup>

The concept of the *erga omnes* effect of a given human rights norm must also not be conflated with the concept of *erga omnes* obligations adumbrated by the ICJ in the *Barcelona Traction* case,<sup>32</sup> namely, obligations that are of concern to the entire mankind or the international community as a whole.<sup>33</sup> The *erga omnes* effect (also referred to as the *erga omnes* binding force) concerns the scope of addressees of a ruling (that is, against whom the ruling can be invoked).<sup>34</sup> In this way, it operates like the *res interpretata* effect principle, except that the latter principle lacks binding force,

27 LR Helfer & E Voeten 'International courts as agents of legal change: Evidence from LGBT rights in Europe' (2014) 68 *International Organisations* 77.

28 S Besson 'The *erga omnes* effect of the European Court of Human Rights: What's in a name?' in S Besson (ed) *The European Court of Human Rights after Protocol 14 – First assessment and perspectives* (2011) 125 132.

29 As above.

30 As above.

31 Arnardóttir (n 25) 826.

32 *Barcelona Traction, Light and Power Company Limited, Second Phase Judgment*, 5 February 1970, ICJ Reports (1970) 3 para 33. See also T Ahmed & I de Jesús Butler 'The European Union and human rights: An international law perspective' (2006) 17 *European Journal of International Law* 771 779.

33 A Gourgourinis 'General/particular international law and primary/secondary rules: Unitary terminology of a fragmented system' (2011) 22 *European Journal of International Law* 993 1011.

34 As above.

as explained above. In this sense, the principle of *res interpretata* may be referred to as the *de facto erga omnes* principle.

The *res interpretata* principle derives from two related notions, namely, the duty of states to comply with obligations that they incurred under international law and the desirability to streamline or align their national laws with international law to avoid possible conflicts.<sup>35</sup> In addition, the *res interpretata* effect is also implicit in the principle of ‘autonomous interpretations’ of human rights texts, in terms of which an interpretation is assigned to a treaty-based term or concept that is transversely applicable to all member countries subscribing to a treaty and does not depend on the meanings of such terms given or developed under national law.<sup>36</sup> In this regard, implicit in the *res interpretata* effect of rulings is that all national authorities, including domestic courts, have a duty to comply with the human rights treaty concerned as clarified in the case law, even if the relevant third party state did not participate in the proceedings in which a certain definition or application was formulated.<sup>37</sup>

When the jurisprudential interpretive authority guides the future interpretation and application of the law by the tribunal itself, it becomes a precedent.<sup>38</sup> It must be noted, however, that international courts and tribunals are not formally bound by their precedents. The principle of *stare decisis* does not form part of international judicial practice.<sup>39</sup> Despite this, if a judicial organ of a treaty regime has pronounced itself on a particular issue, it is expected that such treaty is to be interpreted and applied in the same manner in similar, subsequent cases.<sup>40</sup> The European Court has stated that it usually follows its earlier judgments as precedents in its adjudicatory function, since this engenders certainty, legal security and the orderly creation and development of its case law for application throughout Europe.<sup>41</sup>

The objective of establishing a uniform, basic level of protection of fundamental rights and freedoms in a region can only be achieved if national courts of contracting states are willing and prepared to adopt interpretations rendered by the interpretive supranational

35 D Feldman ‘Monism, dualism and constitutional legitimacy’ (1999) 20 *Australian Yearbook of International Law* 105.

36 J Gerards ‘The European Court of Human Rights and the national courts: Giving shape to the notion of shared responsibility’ in Gerards & Fleuren (n 7) 13 23-24.

37 As above.

38 Besson (n 28) 150.

39 G Guillaume ‘The use of precedent by international judges and arbitrators’ (2011) 2 *Journal of International Dispute Settlement* 5 9.

40 As above.

41 *Cossey v UK* (1990) Series A 184 para 35. See also A von Bogdandy & I Venzke *In whose name? A public law theory of international adjudication* (2014) 70.

body concerned and integrate them into national law.<sup>42</sup> This is because, as stated above, when an international court or tribunal authoritatively determines interpretative questions, its decision is not only binding *inter partes*, but also has general effects across all the contracting parties. Therefore, it may be contended that a disregard for clear legal principles in the relevant case law can be seen as a violation of the state parties' obligations incurred under the relevant human rights text irrespective of against which contracting state the relevant judgment was given.<sup>43</sup> Such disregard in turn would fall foul of the contracting parties' commitment under article 26 of the Vienna Convention to carry out treaty obligations in good faith.<sup>44</sup>

Some authors contend that the principle of *res interpretata* should be considered a general principle of international law that places a duty on states to interpret and apply national law in line with principles of international law.<sup>45</sup> This position finds basis in article 27 of the Vienna Convention, in terms of which a party may not be excused from carrying out the obligations of a treaty on account of its domestic law. The import of this provision is that the legislature cannot be taken to have intended to legislate in breach of rules of international law and comity.

In other words, a deviant legal situation within a state does not release it from its obligations incurred under a treaty.<sup>46</sup> This is what is sometimes described as the rule of presumption.<sup>47</sup> The European Court and the Inter-American Court have developed an extensive interpretive practice of explaining the provisions in their respective treaties autonomously, independent from domestic law.<sup>48</sup> Although the African Court has not posited on this interpretive principle, there is no doubt that it forms part of the African Charter, since it is part of general international human rights law.

Writers have also convincingly argued that the *res interpretata* principle is an important tool for strengthening the principle of subsidiarity undergirding regional human rights protection systems.<sup>49</sup>

42 Gerards (n 36) 23-24.

43 Arnardóttir (n 25) 825.

44 As above.

45 DT Björgvinsson 'The effect of the judgments of the ECtHR before the national courts – A Nordic approach?' (2016) *Nordic Journal of International Law* 303.

46 H Kreiger 'Article 25' in O Dörr & K Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A commentary* (2011) 441 454.

47 Björgvinsson (n 45) 306.

48 M Killander 'Interpreting regional human rights treaties' (2010) 7 *SUR International Journal on Human Rights* 145 148. See also F Vanneste *General international law before human rights courts* (2010) 229.

49 A Bodnar 'Res interpretata: Legal effect of the European Court of Human Rights' judgments for other states than those which were party to the proceedings' in

In terms of the subsidiarity principle, the initial responsibility of securing the rights provided in the African Charter rests with the member states, and the role of the Charter's interpretive organs is limited to ensuring that the relevant local authorities have remained within the strictures of international law.<sup>50</sup> Thus, the principle of subsidiarity is concerned with a power balance between the national authorities of member states and the interpretive supranational organs<sup>51</sup> of the African Charter.

The subsidiarity principle ordinarily limits intervention by an international court in the domestic domain of a state but allows greater intervention where domestic institutions are weak or manipulable.<sup>52</sup> The *res interpretata* principle can operationalise the subsidiarity principle in the African human rights system in two principal ways, namely, (a) if African states heed the jurisprudential guidance of the African Court, they may avoid violations of rights affirmed in the African Charter and other applicable instruments; (b) even where human rights abuses have occurred, domestic courts may draw conclusions from the African Court's case law and sufficiently remedy such human rights abuses at home, thus making it unnecessary for the victim(s) to resort to the African Court for redress.

From the available literature, one is able to deduce two types of *res interpretata* effects: passive and active. The former occurs when a state party is using the whole body of the case of an interpretive judicial mechanism concerned in its legislative, executive and judicial practice.<sup>53</sup> This means that rulings of the court, regardless of the states involved, are used as general normative standards to test the legality or compatibility of legislation or practice with applicable international human rights texts or may be used as reference by domestic courts.<sup>54</sup>

The active effect is more exacting on states. It requires them to actively obtain knowledge on new standards by the court or tribunal, thereafter applying these in the development of domestic laws, policies and practices.<sup>55</sup> This means that states must treat rulings

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- Y Haeck & E Brems (eds) *Human rights and civil liberties in the 21st century* 223.
- 50 Compare J Schokkenbroek 'The basis, nature and application of the margin of appreciation doctrine in the case-law of the European Court of Human Rights' (1998) 19 *Human Rights Law Journal* 30.
- 51 K Hopkins 'The effect of an African Court on the domestic legal orders of African states' (2002) 2 *African Human Rights Law Journal* 234 241; F Viljoen *International human rights law in Africa* (2012) 332.
- 52 Arnardóttir (n 25) 828-829.
- 53 Bodnar (n 49) 256.
- 54 As above.
- 55 As above.

with a *res interpretata* effect as if such rulings were specifically issued against them. If states discover that their legislation or practice falls foul of the relevant human rights treaty standards in the same way that was criticised by the court in a case concerning another state, they should implement the ruling as if it is binding upon them.<sup>56</sup>

Finally, although the *res interpretata* principle remains controversial, from a strictly legal point of view, especially given the sovereignty concerns it raises by affecting domestic legal systems with the relevant states having not participated in the proceeding that yielded the judgment in question, one cannot quarrel with it as a sound policy of supranational adjudication.<sup>57</sup> The development of the *res interpretata* principle once again confirms the daring innovativeness of human rights courts to secure compliance with human rights norms contained in human rights treaties by addressing third party states without regard to their individual and 'egoistic' concerns.

### 3 Basis of the *res interpretata* effect of the judgments of the African Court

According to article 30 of the African Court Protocol, state parties to the Protocol 'undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution'. Similarly, Rule 72 of the Rules of Procedure of the Court empathises that 'the judgment of the Court shall be binding on the parties'.<sup>58</sup> These provisions mean that judgments of the African Court are officially binding on record parties and *a priori* are not capable of giving decisions that bind *erga omnes partes*. This is the case with the majority of international courts, such as the ICJ, the European Court and the Inter-American Court.<sup>59</sup> However, one of the figureheads in this area of the law, the former president of the European Court, Jean-Paul Costa, has argued that the rulings of the

<sup>56</sup> As above.

<sup>57</sup> Björgvinsson (n 45) 98.

<sup>58</sup> See also GJ Naldi 'Observations on the Rules of the African Court on Human and Peoples' Rights' (2014) 14 *African Human Rights Law Journal* 367 385.

<sup>59</sup> Eg, see art 59 of the ICJ Statute ('the decision of the Court has no binding force except between the parties and in respect of that particular case'); art 46 of the European Convention ('the High Contracting Parties undertake to abide by the final judgments of the Court in any case to which they are parties'); art 68 of the Inter-American Convention ('the States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties'). By contrast, the decisions of the European Court of Justice have binding *erga omnes* effects. See JL Murray 'The influence of the European Convention on Fundamental Rights on community law' (2011) 33 *Fordham Journal of International Law* 1388 1391.

European Court should carry *erga omnes* effects.<sup>60</sup> In his view, giving binding effect to the rulings of the European Court in respect of their construction of the European Convention

would strengthen the states' obligation to prevent Convention violations. It is no longer acceptable that states fail to draw the consequences as early as possible of a judgment finding a violation by another state when the same problem exists in their own legal system.<sup>61</sup>

This position has been rejected by European states. The Steering Committee for Human Rights, set up by the Committee of Ministers, and charged with compiling a report on the long-term future of the European Convention, noted that the contracting parties are under no obligation 'to abide by final judgments of the Court in cases to which they are not parties'.<sup>62</sup> Similarly, strictly speaking, if the African Court finds a violation against the impleaded contracting state, the rest of the members of the AU are not required to comply with the ruling, even to familiarise themselves with it.<sup>63</sup> This arises from the plain meaning of article 30 of the African Court Protocol read *in tandem* with Rule 72 of the Court's Rules of Procedure, cited above.

As in the case of the European Convention on Human Rights (European Convention)<sup>64</sup> and the Inter-American Convention of Human Rights (Inter-American Convention)<sup>65</sup> the African Charter makes no provision for the *res interpretata* implications of the judgments of the African Court for other contracting states, which were made without their input. There appears to be no legal norm in international law addressing this issue.<sup>66</sup> This is not surprising as states generally are unwilling to cede their sovereignty to supranational bodies.<sup>67</sup> This argument holds special weight particularly in the

60 Council of Europe 'Memorandum of the president of the European Court of Human Rights to the states with a view to preparing the Interlaken conference' (2009), [https://www.echr.coe.int/Documents/Speech\\_20090703\\_Costa\\_Interlaken\\_ENG.pdf](https://www.echr.coe.int/Documents/Speech_20090703_Costa_Interlaken_ENG.pdf) (accessed 19 November 2020).

61 As above.

62 Council of Europe 'Report of the Steering Committee for Human Rights: The Longer-Term Future of the System of the European Convention on Human Rights', adopted on 11 December 2015, 64, <https://rm.coe.int/the-longer-term-future-of-the-system-of-the-european-convention-on-hum/1680695ad4> (accessed 19 November 2020).

63 Compare Gerards (n 36) 21-22.

64 The Convention was opened for signature on 4 November 1950 in Rome and entered into force on 3 September 1953.

65 Adopted at the Inter-American Specialised Conference on Human Rights, San José, Costa Rica, 22 November 1969.

66 Bodnar (n 49) 226.

67 RJV Cole 'The African Court on Human and Peoples' Rights: Will political stereotypes form an obstacle to the enforcement of its decisions?' (2010) 43 *Comparative and International Law Journal of Southern Africa* 23 39; KO Kufour 'Securing compliance with the judgments of the ECOWAS Court of Justice' (1996) 8 *African Journal of International and Comparative Law* 1 7.

African context where states are still inflexibly wedded to the outdated non-relative Westphalian concept of sovereignty.

Given the fact that no provision in the African Court Protocol deals with the question of the legal value of the judgments of the African Court *vis-à-vis* third-party states, it therefore is necessary to look to the general provisions of the AU Constitutive Act<sup>68</sup> and the African Charter in order to resolve this issue.<sup>69</sup> Article 1 of the African Charter states that member states of the Organisation of African Unity (OAU), now the AU, shall recognise the rights, freedoms and duties contained therein and shall take necessary measures to 'to give effect to them'. In terms of article 3(h) of the AU Constitutive Act, state parties undertook to 'promote and protect human and peoples' rights in accordance with the African Charter'. Having been initially excluded from the African human rights architecture, the African Court is established under article 1 of its separate Protocol – the African Courts Protocol. It is the final interpretive authority of the African Charter and all AU human rights statutes.<sup>70</sup>

The jurisprudence of the African Court constitutes an integral part of the African Charter system.<sup>71</sup> The African Court clarifies and develops the normative content of the African Charter through its jurisprudence. Since the rights and freedoms contained in the African Charter and related instruments cannot be fully understood without regard to the jurisprudence of the African Court, state parties cannot possibly fulfil their treaty commitments without consulting important decisions of the African Court.<sup>72</sup> When a court has elaborated on a treaty norm of constitutional salience, it is taken that the interpretation carries *res interpretata* effect or interpretive force.<sup>73</sup> It is argued that the African Court can assert the *res interpretata* effect of its rulings by giving broad interpretations of the norms, terms and concepts contained in the African Charter and other relevant statutes in order to give effective protection to human and peoples' rights.

Consequently, therefore, contracting states cannot deviate from the imperatives of the African Charter as construed by the African

68 Adopted in 2000 at the Lomé Summit, Togo, and entered into force in 2001.

69 Compare Bodnar (n 49) 226.

70 AO Enabulele 'Incompatibility of national law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say?' (2016) 16 *African Human Rights Law Journal* 14.

71 Compare Bodnar (n 49) 226.

72 F Emmert & CP Caney 'The European Union Charter of Fundamental Rights vs The Council of Europe Convention on Human Rights and Fundamental Freedoms – A comparison' (2017) 40 *Fordham Journal of International Law* 1047 1160.

73 Gerards & Fleuren (n 7) 350.

Court without falling foul of the commitments they incurred thereunder.<sup>74</sup> Indeed, a contrary position will be difficult to reconcile with the African Court's function of developing a pan-African jurisprudence that provides a minimum or floor protection of human rights throughout Africa. It is assumed that the minimum standards of protection of human rights guaranteed under a treaty, as clarified by the relevant court in its case law, have *res interpretata* or *de facto erga omnes* effect.<sup>75</sup> The recognition and acceptance of the *res interpretata* principle in the African human rights system will help to enhance and assert the constitutional importance of the African Court in the reorganisation and judicialisation of African politics and the development of African public order.

Faced with a tidal wave of human rights violations on the African continent, the African Court has become increasingly concerned with the enhancement of the existential conditions of human rights violations in Africa. Indeed, some writers have predicted that the decisions of the African Court may in future have *res interpretata* effects. For instance, in the early years of the Court, Oder expressed the firm belief that '[t]he African Court's judgments will have a wider impact, beyond the country against whom an application has been brought'.<sup>76</sup>

Recently, Enabulele argued that a decision of the African Court on the incompatibility of domestic law, policy, practice or conduct with the African Charter stands on a relatively higher normative pedestal 'and is set on a wider range of application than a decision that simply finds a violation of the right of an individual'.<sup>77</sup> Enabulele correctly argues that such decisions carry implications for all the states over which the Court exercises jurisdiction, including those that are not signatories to the African Court Protocol but nonetheless are parties to the African Charter.<sup>78</sup> This is because, as stated earlier, the function of the African Court is not merely to determine the conflicting claims between the parties but also the development and maintenance of public order, in the same way as its peers in the European and Inter-American systems. According to Enabulele,

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74 As above.

75 D Frost 'The execution of judgments of the European Court of Human Rights: Limits and ways ahead' 42 *ICL Journal*, [http://www.icljournal.com/download/f1527ce403500a9ec58b8269a9a91471/ICL\\_Vol\\_7\\_3\\_13.pdf](http://www.icljournal.com/download/f1527ce403500a9ec58b8269a9a91471/ICL_Vol_7_3_13.pdf) (accessed 31 November 2019).

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

77 Enabulele (n 70) 7.

78 As above.

decisions of the African Court, as a judicial institution of the AU, are able to have implications beyond the states that are directly bound by them, to affect all state parties to the African Charter, whether or not they are also parties to the Protocol of the African Court. It is, therefore, possible for a finding of incompatibility made by the Court to benefit from a wider application as an authoritative interpretation of the Charter.<sup>79</sup>

On every occasion that the Court decides cases, it not merely spells out the rights and obligations of the parties that happen to be involved in that case, but also develops the law. This is critical for the evolution of human rights on the African continent. Despite the fact that the African Court has not yet pronounced itself on the *res interpretata* effect of its decisions, it can hardly be gainsaid that the African Court is required to develop general standards of protection for human rights in Africa. The Court seems to have embraced this function as evidenced by the fact that it habitually starts its judgments by setting out general interpretive and normative principles, specifying their scope and using precedents from peer jurisdictions to establish their trends, and applies them to the merits of the case.<sup>80</sup> Only after laying down the principles on a broad canvass emphasising their applicability in the African setting, will it then apply it to the facts of the case.<sup>81</sup>

It also appears that the African Court has begun to deliver judgments of principle with possible *erga omnes* effects. In *Tanganyika Law Society & Others v United Republic of Tanzania*<sup>82</sup> the African Court found a law that requires aspirants for political office to be affiliated to a political party for eligibility to be voted into office to be incompatible with the African Charter. In *Konaté v Burkina Faso*<sup>83</sup> the Court held, among other things, that a prison sentence and excessive fines are disproportionate punishments for the offence of criminal defamation.

It is argued that all AU members that retain laws similar to those that were found by the African Court to be incompatible with or repugnant to the African Charter and other relevant human rights texts must heed the aforesaid decisions of the Court and scrap such laws from their statute books. It can be predicted that the Court will come to the same conclusion if similar laws are challenged before it

79 Enabulele (n 70) 13.

80 Compare JH Gerards 'Judicial minimalism and "dependency": Interpretation of the European Convention in a pluralist Europe' in MR Malen et al (eds) *Fundamental rights and principles* (2013) 73.

81 As above.

82 Application 11/2011 para 32, Judgment of 14 June 2014.

83 Application 4/2013, Judgment of 5 November 2018.

in future. To do otherwise would replace uniformity, certainty and predictability in the application of the Charter with jurisprudential or interpretational cacophony as each contracting state will adopt its own level of protection in line with their respective domestic laws.<sup>84</sup> Indeed, the Interlaken Declaration,<sup>85</sup> *inter alia*, has called upon state parties to the European Convention to commit themselves to

taking into account the Court's developing case law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another state, where the same problem of principle exists within their own legal system.<sup>86</sup>

The same clarion call should be made with respect to AU member countries with regard to decisions of the African Court. Judgments of African Court must be taken by AU states to have an advisory character and must have a remedial effect across all the contracting states. Naturally, the immediate and strongest impact of the decision will be felt in the respondent state. However, all states in the AU region must stay abreast of developments by beginning to take notice and apply norms and standards developed by the African Court in its judgments handed down with respect to other states.<sup>87</sup>

While formally binding *inter partes*, the case law of international courts and tribunals have a certain 'contagious characteristic' that extends beyond the actual decision in a case.<sup>88</sup> A relatively radical view has also been expressed that a repeated application of the interpretations by a judicial tribunal may ultimately be imbedded into the treaty and bind all contracting parties. In the words of Romano: 'When a dispute settlement organ has been empowered to interpret authoritatively a legal regime and when its judgments become an integral part of that regime ... then its judgments necessarily have an effect *erga omnes partes contractantes*'.<sup>89</sup>

It may be argued, at least theoretically, that the elaboration of human rights norms contained in the African Charter by the African Court necessarily becomes internalised for parties to the African

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

85 The Interlaken Declaration is available at [https://www.echr.coe.int/Documents/2010\\_Interlaken\\_FinalDeclaration\\_ENG.pdf](https://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf) (accessed 19 November 2020).

86 Interlaken Declaration (n 86) para B(4)(c).

87 Compare JG Merrills *The development of international law by the European Court of Human Rights* (1993) 12.

88 Enabulele (n 70) 10.

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

Charter and they acquire a binding force as part of the obligations they assumed to give effect to the rights contained in this instrument.<sup>90</sup>

#### **4 *Res interpretata* principle and access challenges associated with article 34(6) of the African Court Protocol**

The African Court is supposed to be the jewel in the crown of the African human rights system. However, the difficulty in accessing this Court by individuals and non-governmental organisations (NGOs) disqualifies it as a beacon of hope for the majority of disenfranchised African people. Article 34(6) of the African Court Protocol requires a state party to the Court Protocol to submit a special declaration with the Chairperson of the AU Commission accepting the jurisdiction of the Court before individuals and NGOs (enjoying observer status with the African Commission) can bring claims against it before the Court.

Of the 30 countries that have signed and ratified the Court Protocol, only ten countries have deposited the requisite declaration.<sup>91</sup> The difficulty in accessing the Court has effectively turned states, the primary violators of human rights, into gate-keepers of the Court. As stated in the joint dissenting opinion in *Falana v Nigeria*,<sup>92</sup> the ineluctable consequence of the restricted access to the Court has been that the vast majority of the African population who are in desperate need for redress have been barred from accessing the Court since their countries have refused and/or failed or ignored to make the necessary declaration.

The difficulty to access the African Court has led Ssenyonjo to conclude that despite this body being called 'an African Court', in reality it is a court for those few states that have deposited the article 34(6) declaration accepting its competence to determine suits brought by individuals and NGOs against them.<sup>93</sup> Indeed, during the first decade of its existence, the African Court decided a limited number of cases on the merits. This principally is on account of the

<sup>90</sup> Enabulele (n 70) 11.

<sup>91</sup> See the website of the African Court <https://www.african-court.org/en/index.php/basic-documents/declaration-featured-articles-2> (accessed 19 October 2020).

<sup>92</sup> *Falana v African Union* Application 1/2011, Dissenting Opinion (Akuffo VP, Ngoepe, Thompson JJ) 26 June 2012.

<sup>93</sup> M Ssenyonjo 'Direct access to the African Court on Human and Peoples' Rights by individuals and non-governmental organisations: An overview of the emerging jurisprudence of the African Court 2008-2012' (2013) 2 *International Human Rights Law Review* 17 28.

fact that in a majority of petitions the Court found that it lacked jurisdiction. This was mostly due to the fact that the respondent state had not deposited the required declaration.<sup>94</sup> To further limit access, the African Court has held that only NGOs accredited with the AU may request advisory opinions from it.<sup>95</sup> This undermines the Court's ability to utilise the constitutional approach to further its mandate.

To somewhat overcome the access challenges associated with the aforesaid article 34(6), it is argued that the African Court must place a 'constitutional interpretation' technique at the centre of its adjudicative task and proactively develop human rights principles of general application with a view to assert the *res interpretata* effect of its rulings in the AU region. A constitutional interpretation to a human rights treaty is intended to ensure the effectiveness of its terms even against those contracting states that did not participate in a case. It is broadly accepted today that constitutional courts make law. The process of law making by constitutional courts has more in common with law making by regional human rights courts.<sup>96</sup>

As the African Court flexes its law-making muscles and entrenches the *res interpretata* effects of its rulings, its jurisprudence will reverberate even within the territories of all AU states, including those states that have not made the requisite declaration as well as those that have made the declaration but did not participate in the proceeding giving rise to the ruling in question. The gravamen of the argument being maintained is that AU states that have not made the requisite article 34(6) declaration will be required to take into account the interpretive guidance offered by the African Court in cases involving states that have made such declarations. This will pre-empt violations, making it scarcely necessary for individuals in such countries to approach the African Court for redress.

The constitutional approach discussed is important for the long-term future of the African human rights system as a whole in that it will keep the case docket of the African Court manageable in keeping with the principle of subsidiarity explained above. Finally, although the *res interpretata* principle is not the sole and adequate response to the functional deficits suffered by the African Court by virtue of the aforesaid article 34(6), it remains a vital one in that it

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94 F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67 *International and Comparative Law Quarterly* 63 67.

95 App 1/2013 Advisory Opinion on the Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP) (Advisory Opinion).

96 BM Zupančič 'Constitutional law and the jurisprudence of the European Court of Human Rights: An attempt at a synthesis' (2003) 1 *Revus* 57.

is a supplementary tool that seeks to enhance compliance with the African Charter and other related instruments. An effective solution is to delete article 34(6) altogether from the African Court Protocol to allow for free direct access by individuals and NGOs.

## 5 Constitutional versus individual justice before the African Court

The African Court has started ‘issuing strong merits judgments’<sup>97</sup> and this has led some authors to describe it as a ‘constitutional court for Africa’.<sup>98</sup> Even many years before the Court started operating, Mutua argued that the African Court must assert the *de facto erga omnes* effect of its rulings and hear only those cases that have the potential to expound on the African Charter, and create jurisprudence that will guide African states in developing a legal and political culture in which respect for human rights is at the centre of the polity.<sup>99</sup> In the view of this author, this will help the African Court to avoid a docket crisis that is presently facing the European Court.

Mutua contends that the Court should not be concerned with individual claims seeking to correct or punish a past wrong committed by a state to an individual.<sup>100</sup> He reasons that the Court should be forward-looking and develop a corpus of law with precedential value and an interpretation of the substantive provisions of the African Charter and kindred universal human rights texts to guide and direct African states.<sup>101</sup> According to Mutua, such forward-looking decisions would help to deter states from future conduct that is inimical to the African Charter by adjusting their behaviour.<sup>102</sup> In terms of this author’s logic, individual justice would occur as a mere coincidence in the few cases that the Court would hear.<sup>103</sup>

There is no doubt that Mutua’s thinking is heavily influenced by scholarship on the European Court that suggests that the European Court should move away from individual justice towards constitutional justice, in which situation it will deal with only a few

97 TG Daly ‘The alchemists: Courts as democracy-builders in contemporary thought’ (2017) 6 *Global Constitutionalism* 101 103.

98 A Abebe ‘Taming regressive constitutional amendments: The African Court as a continental (super) constitutional court’ (2019) 17 *International Journal of Constitutional Law* 89.

99 M Mutua ‘The African Human Rights Court: A two-legged stool?’ (1999) 21 *Human Rights Quarterly* 342 361.

100 Mutua (n 99) 362.

101 As above.

102 As above.

103 As above.

cases involving structural and systemic violations of the Convention, thereby addressing its docket crises by reducing its case load.<sup>104</sup> While this approach could work with the European Court, it appears ill-suited to the African environment. This is because as against African states, the overwhelming majority of European states have made huge strides in establishing vibrant oversight mechanisms for human rights protection and the consolidation of democracy in their territories. By contrast, many African states still have weak and dysfunctional judiciaries that are unable to provide redress for victims of human rights abuses.

The proposal made in this article is that the main focus of the African Court should be the delivery of individual justice, which is its *raison d'être*, while it keeps in mind its equally important function of formulating general jurisprudential canons underlying its decisions. It has been said that 'the evident result is that a resolution of the tribunal has a double role: *inter partes*, with respect to the facts and their immediate and direct consequences; and *erga omnes*, with respect to the conventional norms and their interpretation in all cases'.<sup>105</sup> In this way, the Court strives at reconciling the truths of individual justice and collective justice. While expressing sympathy for Mutua's logic, it is an idea of which time has not yet arrived in Africa.

## 6 Conclusion

Although article 30 of the African Court Protocol, read with Rule 72 of the Court's Rules of Procedure, excludes *erga omnes* effects from the rulings of the African Court, state parties to the African Charter have a special duty to heed decisions of this body that contain a *res interpretata* element for normative direction and orientation of domestic legal policy in line with the dictates of the African Charter and cognate human rights texts. Some judgments of the African Court bear enormous orientation value to states that were not parties

<sup>104</sup> L Wildhaber 'A constitutional future for the European Court of Human Rights?' (2002) 23 *Human Rights Law Journal* 161 164; L Wildhaber 'Changing ideas about the tasks of the ECtHR' in L Wildhaber (ed) *The ECtHR 1998–2006: History, achievements, reform* (2006) 138, noting: 'The inexorable accumulation of ... both inadmissible and substantial cases will increasingly asphyxiate the system so as to deprive the great majority of ... cases ... of any practical effect.' L Wildhaber 'Rethinking the European Court of Human Rights' in J Christofferson & R Madsen (eds) *The European Court of Human Rights between law and politics* (2011) 224; P Mahoney 'An insider's view of the reform debate (how to maintain the effectiveness of the European Court of Human Rights)' (2004) 29 *Nederlands Tijdschrift voor de Mensenrechten-Bulletin* 170.

<sup>105</sup> MS Abbott 'The Inter-American Court of Human Rights, the control of conventionality doctrine and the national judicial systems of Latin America' (2018) 7 *Ave Maria International Law Journal* 5 18.

to the proceedings, and carry valuable interpretive guidance on how such states may act.

Contracting states have a legal obligation incurred under international law to take into account the jurisprudence of the African Court when carrying out their obligations under the African Charter, irrespective of whether or not they were parties to the case in question in pre-emptive anticipation of possible human rights abuses. For the long-term future of the African human rights system, it is critical that in order to pre-empt violations, the contracting parties should take cognisance of the conclusions contained in decisions of the African Court, given in cases concerning other states, particularly where the same problem of principle obtains in their own legal systems. It has been argued that

judgments are binding upon the parties only cannot be exhaustive of all the uses to which judgments could be put, nor does it block the reformatory power of the reasoning contained in a judgment within the sphere of the jurisdiction of the court that delivered it.<sup>106</sup>

In addition, contracting states are also required, in line with their engagements under the African Charter, to integrate the norms, standards and practices developed by the African Court in its rulings into domestic law.

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<sup>106</sup> Enabulele (n 70) 8.

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## A missed opportunity? Derogation and the African Court case of *APDF and IHRDA v Mali*

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**Summary:** *The permissibility and application of derogation from human rights obligations in the African human rights system are far from clear. Based on the absence of a derogation clause in the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights has interpreted the Charter as prohibiting derogation even in emergency situations. However, this interpretation is inconsistent with the Commission's practice of reviewing states of emergency during state reporting and creates confusion when considered together with the Commission's conflation of derogation and limitation as well as its references to non-derogable rights. The African Court on Human and Peoples' Rights is yet to pronounce itself on this question. Although Mali invoked a force majeure defence in APDF and IHRDA v Republic of Mali, the Court dismissed the defence without elaborating on its reasoning. As such, the article contends that the Court missed an opportunity to develop its jurisprudence on derogation.*

**Key words:** *derogation; force majeure; Mali; African Court; human rights*

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## 1 Introduction

In the case of *Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and The Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali*<sup>1</sup> (*APDF and IHRDA case*) Mali argued that it did not pass a family code complying with its human rights obligations because of *force majeure* – specifically, a series of mass protests in 2009 by Islamic organisations and members of the general public. The case, decided by the African Court on Human and Peoples’ Rights (African Court) in 2018, is significant not only because it found that Mali’s 2011 Code of Persons and the Family<sup>2</sup> (Family Code) violated women’s and children’s human rights in the Court’s first judgment regarding such rights, but also because it concerned an important exception in human rights jurisprudence. Mali contended that its failure to comply with human rights obligations under various instruments was justified because of protests. For Mali, such protests constituted an emergency situation allowing it to derogate from its human rights obligations. Although the African Court dismissed this argument, one will never really know why, since the Court provided little by way of reasoning despite current uncertainties around how derogation applies under the African Charter on Human and Peoples’ Rights (African Charter) which does not contain a derogation clause.

In this article it is argued that, through its silence<sup>3</sup> in response to Mali’s argument in the *APDF and IHRDA* case, the African Court missed an important opportunity to clarify the currently murky jurisprudence on derogation in the African human rights system. Following some background on derogation in the African human rights system, I provide the context of the *APDF and IHRDA* case, consider Mali’s argument and the Court’s silence, and conclude by reflecting on how the case could have advanced our understanding of derogation from human rights norms on the continent.

## 2 Derogation in the African human rights system

McGoldrick writes that ‘[t]he response of a state to a public emergency is an acid test of its commitment to the effective implementation of

1 *APDF & IHRDA v Mali* Application 46/2016 11 May 2018.

2 Loi 2011-087 du 30 Décembre 2011 Portant Code des Personnes et de la Famille.

3 BK Kombo ‘Silences that speak volumes: The significance of the African Court decision in *APDF and IHRDA v Mali* for women’s human rights on the continent’ (2019) 3 *African Human Rights Yearbook* 389.

human rights'.<sup>4</sup> Less committed states might be prone to respond to a public emergency as if it provides *carte blanche* to jettison human rights obligations. Nevertheless, acknowledging that even the most committed states cannot effectively protect all human rights in all situations but that it is best to ensure the maximum human rights protection, derogation allows a state to temporarily limit or suspend certain rights during an emergency.<sup>5</sup> In addition to applying solely in exceptional circumstances, it generally is subject to strict substantive and procedural conditions, including respect for non-derogable rights and adherence to monitoring requirements.<sup>6</sup> As such, Higgins characterises derogation as a 'technique of accommodation' to ensure that a state can 'perform its public duties for the common good' by balancing individual rights and freedoms with those of the community.<sup>7</sup> The understanding is that the encroachment on individual rights that justifies derogation is required to restore normalcy for the benefit of the whole community.

Although derogation clauses are fairly common in international human rights instruments, the African Charter stands out for not containing such a clause. In this section I highlight the challenges this omission raises in the African human rights system.

## 2.1 African exceptionalism

The African Charter's lack<sup>8</sup> of a derogation clause stands in sharp contrast to the International Covenant on Civil and Political Rights (ICCPR), to which the majority of African states are party,<sup>9</sup> as well as two other regional human rights conventions, namely, the American Convention on Human Rights (American Convention) and the European Convention on Human Rights (European Convention). ICCPR and the European and American Conventions all contain derogation clauses using similar language. Article 4(1) of ICCPR

4 D McGoldrick 'The interface between public emergency powers and international law' (2004) 2 *International Journal of Constitutional Law* 388.

5 R Higgins 'Derogations under human rights treaties' (1976) 48 *British Yearbook of International Law* 281; C Binder 'Stability and change in times of fragmentation: The limits of *pacta sunt servanda* revisited' (2012) 25 *Leiden Journal of International Law* 927.

6 Binder (n 5) 930.

7 Higgins (n 5) 281-282.

8 I use language such as 'lack', 'absence' or 'omission' with reference to the derogation clause because of linguistic constraints and also to signal the African Charter's distinctiveness. However, this should not be understood to have a negative connotation, ie suggesting that the Charter is incomplete. Rather, one of my objectives in this article is to interrogate the implications of this characteristic of the Charter.

9 Comoros is an exception, having signed but not ratified ICCPR. United Nations Treaty Collection 'Status of Treaties – International Covenant on Civil and Political Rights' [https://treaties.un.org/Pages/View\\_Details.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/Pages/View_Details.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en) (accessed 5 December 2019).

states:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 15(1) of the European Convention provides:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

Similarly, article 27(1) of the American Convention reads:

In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

Moreover, these three instruments indicate the provisions from which no derogation is allowed<sup>10</sup> and outline procedural requirements, including notifying the relevant organisation's Secretary-General of the provisions being temporarily suspended, the reasons for the suspension, and the anticipated or actual date of termination of

<sup>10</sup> The instruments prohibit derogation as follows: Art 4(2) ICCPR (right to life; prohibition of torture or cruel, inhuman or degrading treatment or punishment; prohibition of slavery and servitude; prohibition of imprisonment for inability to fulfil a contractual obligation; prohibition of prosecutions under *ex post facto* laws and of retrospective criminal penalties; recognition of everyone as a person before the law; and freedom of thought, conscience and religion); art 15(2) European Convention (right to life 'except in respect of deaths resulting from lawful acts of war'; prohibition of torture; prohibition of slavery or servitude; prohibition of punishment without law); art 27(2) American Convention (right to juridical personality; right to life; right to humane treatment; freedom from slavery; freedom from *ex post facto* laws; freedom of conscience and religion; rights of the family; right to a name; rights of the child; right to nationality; and right to participate in government; or 'the judicial guarantees essential for the protection of such rights').

these emergency measures.<sup>11</sup>

Taken together, ICCPR and the European and American Conventions constitute a human rights derogation regime in which, as Sermet explains, derogation must comply with ‘the following four conditions: necessity, proportionality, inviolability and temporality’.<sup>12</sup> In other words, derogation can only be undertaken when a state can justify it as *necessary* in order to address ‘exceptional circumstances’.<sup>13</sup> Additionally, the ‘measures [undertaken] must be *proportionate* to the danger’<sup>14</sup> and must uphold certain *inviolable* rights from which derogation is prohibited.<sup>15</sup> Under all three instruments, states are forbidden from derogating from provisions recognising the right to life as well as prohibitions on torture, slavery, and retrospective criminal penalties.<sup>16</sup> States also must not derogate from peremptory norms of international law or *jus cogens*. Finally, derogation must be *temporary*, meaning that it must end once the emergency is over.<sup>17</sup>

Two other requirements could be added to Sermet’s list. First, ICCPR and the European and American Conventions require that derogation be consistent with the state’s other international law obligations.<sup>18</sup> This poses a challenge for African states given the radically different approaches to derogation in ICCPR and the African Charter. Second, under both ICCPR and the American Convention, derogating states must adhere to the principle of non-discrimination, meaning that measures undertaken should not discriminate against people based on race, sex and other categories unless such action ‘pursue[s] a legitimate aim and [is] proportionate to/reasonable in terms of that legitimate aim’.<sup>19</sup>

One might rather compare the African Charter to the Universal Declaration of Human Rights (Universal Declaration) or the International Covenant on Economic, Social and Cultural Rights

11 See art 4(3) ICCPR; art 15(3) European Convention; and art 27(3) American Convention.

12 L Sermet ‘The absence of a derogation clause from the African Charter on Human and Peoples’ Rights: A critical discussion’ (2007) 7 *African Human Rights Law Journal* 150.

13 As above.

14 N Questiaux Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, Commission on Human Rights (27 July 1982) UN Doc E/CN.4/Sub.2/1982/15 (1982) para 60 (my emphasis).

15 Questiaux (n 14) para 67; Office of the High Commissioner for Human Rights (OHCHR) and International Bar Association (IBA) *Professional Training Series 9: Human rights in the administration of justice: A manual on human rights for judges, prosecutors and lawyers* (2003) 831-832; Sermet (n 12) 150.

16 Questiaux (n 14) para 67.

17 Sermet (n 12) 150-151.

18 OHCHR & IBA (n 15) 877.

19 OHCHR & IBA (n 15) 879 (emphasis in original).

(ICESCR), both of which lack derogation clauses, but contain general limitation clauses. Article 29(2) of the Universal Declaration, for example, provides:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 4 of ICESCR enables states to impose ‘limitations’ on rights ‘only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’. Although the African Charter may arguably lack an explicit general limitations clause, article 27(2) often is interpreted as such.<sup>20</sup> This provision stipulates that ‘[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest’. Although limitation clauses allude to public order, welfare or security, they differ from derogation clauses.

Highlighting the differences between the two types of clauses, Müller proposes that while derogation is unwelcome, ‘reasonable limitations are part of the “oil” of the human rights system allowing states to flexibly regulate various conflicts of interest which occur within (democratic) societies’.<sup>21</sup> Not only are limitation clauses aimed at balancing individual rights and community interests, but they also apply to all rights enshrined in a particular instrument and facilitate balancing between different rights.<sup>22</sup> Unlike the derogation clauses described above, general limitation clauses have general applicability as well as more flexible temporality, since they are not limited to emergency situations. More broadly, they do not enumerate strict procedural and substantive safeguards in the same way as derogation clauses. Nevertheless, such limitation is not uncontrolled. Perhaps one of the most important requirements is that it should not excessively interfere with rights.<sup>23</sup> In *Constitutional Rights Project & Others v Nigeria*<sup>24</sup> (*Constitutional Rights Project*) the African Commission on Human and Peoples’ Rights (African Commission), for example, stated that ‘[t]he justification of limitations must be strictly proportionate

20 Sermet (n 12) 146; B Manby ‘Civil and political rights in the African Charter on Human and Peoples’ Rights: Articles 1-7’ in M Evans & R Murray (eds) *The African Charter on Human and Peoples’ Rights: The system in practice, 1986-2006* (2008) 177; F Viljoen *International human rights law in Africa* (2012) 329.

21 A Müller ‘Limitations to and derogations from economic, social and cultural rights’ (2009) 9 *Human Rights Law Review*.

22 Müller (n 21) 559-560.

23 Müller (n 21) 561.

24 (2000) AHRLR 227 (ACHPR 1999) para 42.

with and absolutely necessary for the advantages which follow. Most important, a limitation may not erode a right such that the right itself becomes illusory.'

Caution is required since even oil can clog up a system. As such, limitations are subject to various requirements in the different human rights systems, such as proportionality. The African Commission further requires that states demonstrate that their interest is legitimate and that the limitations are necessary.<sup>25</sup>

How then, if at all, does the African Charter fit into the derogation regime? At first glance it might seem as though the Charter qualifies as a significant aberration and does not fit at all. However, as I argue below, the meaning and implications of the Charter's absent derogation clause are far from clear.

## 2.2 Murky terrain: Interpreting derogation under the African Charter

Several scholars<sup>26</sup> have extensively explored derogation in the African Charter even prior to the *APDF and IHRDA* case. As such, this part of the article provides only an overview as context for the subsequent analysis. This section considers the jurisprudence of the African Commission and African Court as well as scholarship in the field.

### 2.2.1 *The African Commission's position(s)*

The African Commission has construed the African Charter as not permitting derogation from human rights obligations even in contexts of 'civil war',<sup>27</sup> 'prolonged military rule',<sup>28</sup> *coups d'état*<sup>29</sup> and other emergencies. Beginning with *Commission Nationale des Droits de l'Homme et des Libertés v Chad (Commission Nationale)* in 1995, the Commission has occasionally but forcefully reiterated this

25 A.J. Ali 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights' (2013) 17 *Law, Democracy and Development* 93.

26 See eg R. Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667; F. Ougouergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* trans H. Sutcliffe (2003); Sermet (n 12); C. Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155; Viljoen (n 20); Ali (n 25); M.A. Tolera 'Absence of a derogation clause under the African Charter and the position of the African Commission' (2014) 4 *Bahir Dar University Journal of Law* 229; R. Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019).  
27 *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995).

28 *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000) para 73.

29 *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999).

position. In *Commission Nationale* the Commission concluded that '[t]he African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.'<sup>30</sup>

Again, in *Constitutional Rights Project*<sup>31</sup> the Commission stated that '[t]he African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.' Other communications advancing this position include *Media Rights Agenda v Nigeria*;<sup>32</sup> *Amnesty International & Others v Sudan*<sup>33</sup> (*Amnesty International*); *Article 19 v Eritrea*<sup>34</sup> (*Article 19*); and *Sudan Human Rights Organisation & Another v Sudan*.<sup>35</sup>

Despite its repeated articulation of the prohibition of derogation, the African Commission's individual communications have introduced uncertainty regarding non-derogable rights and the relationship between derogation and limitation. The Commission's references to non-derogable rights seem to entertain the possibility of derogation and to take steps towards identifying non-derogable rights in the African context. For example, aware that its position on derogation diverges from that taken by other human rights bodies, the Commission stated in *Article 19* – where Eritrea argued that it acted 'against a backdrop of war when the very existence of the nation was threatened'<sup>36</sup> – that

[e]ven if it is assumed that the restriction placed by the Charter on the ability to derogate goes against international principles, there are certain rights such as the right to life, the right to a fair trial, and the right to freedom from torture and cruel, inhuman and degrading treatment, that cannot be derogated from for any reason, in whatever circumstances.<sup>37</sup>

Another example is *Amnesty International*, where the Commission reiterated that 'the Charter does not contain a general provision permitting states to derogate from their responsibilities in times of emergency, especially for what is generally referred to as non-derogable rights'.<sup>38</sup> On the one hand, the African Commission's

30 *Commission Nationale* (n 27) para 21.

31 *Constitutional Rights Project* (n 24) para 41.

32 *Media Rights Agenda* (n 28) para 73.

33 *Amnesty International* (n 29) para 42.

34 (2007) AHRLR 73 (ACHPR 2007) para 87.

35 (2009) AHRLR 153 (ACHPR 2009) paras 165 & 167.

36 *Article19* (n 34) para 87.

37 *Article19* (n 34) para 98.

38 *Amnesty International* (n 29) para 42.

jurisprudence seems to render all rights under the African Charter *jus cogens*, as Viljoen contends.<sup>39</sup> On the other, it considers the possibility that derogation from certain core rights is never permitted. This ambiguity calls into question the Commission's interpretation of derogation under the Charter.

A second area of uncertainty emerges from the Commission's perspective on derogation and limitation. In addition to article 27(2) – which, as described above, is treated as a general limitation clause – the African Charter contains multiple 'open-ended'<sup>40</sup> claw-back clauses in articles 6 and 8 to 14 that 'permit[], in normal circumstances, breach of an obligation for a specified number of public reasons'<sup>41</sup> and 'to the extent permitted by domestic law'.<sup>42</sup> For example, article 6 of the Charter on liberty and security provides that '[n]o one may be deprived of his freedom except for reasons and conditions previously laid down by law'. Along similar lines, article 11 guaranteeing freedom of assembly stipulates that '[t]he exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedom of others'.

Drawing from Higgins's example,<sup>43</sup> claw-back clauses should be considered along with derogation as some of them pertain to security, democracy and other public welfare concerns. The African Commission has made it clear that such clauses cannot easily provide a basis to justify human rights violations, stating in *Amnesty International*:<sup>44</sup>

The Commission is of the view that the 'claw-back' clauses must not be interpreted against the principles of the Charter. Recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter ... It is important for the Commission to caution against a too easy resort to the limitation clauses in the African Charter. The onus is on the state to prove that it is justified to resort to the limitation clause.

Moreover, in *Media Rights Agenda & Others v Nigeria* the Commission emphasised:<sup>45</sup>

To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must

39 Viljoen (n 20) 334.

40 Tolera (n 26) 239.

41 Higgins (n 5) 281.

42 Gittleman (n 26) 691.

43 Higgins (n 5) 282.

44 *Amnesty International* (n 29) para 42.

45 (2000) AHRLR 325 (ACHPR 1999) para 66.

always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.

Through its 'restrictive interpretation'<sup>46</sup> of claw-black clauses, the African Commission has reduced their power.

However, the Commission's treatment of article 27(2) has not been so apparent. In *Constitutional Rights Project*,<sup>47</sup> in addition to the language cited above, the Commission was of the view that '[t]he only legitimate reasons for limitations on the rights and freedoms of the African Charter are found in article 27(2)'. This problematically conflates derogation and limitation despite the distinct differences between the two, as highlighted above, including temporal distinctions as well as distinctions in procedural and substantive safeguards. This potentially creates a situation where derogation is permissible as long as it meets certain requirements. To use Viljoen's words

[i]f such derogation is proportionate and necessary to achieve the protection of the rights of others, collective security, morality, or common interest, and does not erode the right to render it illusory, it may be Charter-compliant.<sup>48</sup>

Thus, derogation that is only meant to apply during emergencies and must meet various strict conditions is merged with the broader features and purposes of limitation.

In addition to these inconsistencies in the African Commission's jurisprudence, Tolera points to another area of ambiguity based on his analysis of state reports and attendant oral examinations and Concluding Observations.<sup>49</sup> He contends that the Commission's position differs from that in its individual communications.<sup>50</sup> Tolera posits that here the Commission does not remind states of the prohibition on derogation, but rather 'seeks to monitor the conduct of member states in taking measures which relieve state parties from honouring some of their obligation[s] under the [Charter]'.<sup>51</sup>

### 2.2.2 *African Court's silence*

Unlike the African Commission, the African Court has not extensively pronounced itself on the question of derogation in the African human

46 Viljoen (n 20) 329; Ali (n 25) 92.

47 *Constitutional Rights Project* (n 24) para 41.

48 Viljoen (n 20) 334.

49 Tolera (n 26).

50 Tolera 258-261.

51 Tolera 260.

rights system. In fact, the Court's silence on this issue is notable. In *African Commission on Human and Peoples' Rights v Libya*<sup>52</sup> the Court made a 'preliminary remark' alluding to derogation under ICCPR without mentioning the same with regard to the African Charter. Recognising the non-derogable nature of articles 6 and 7 of ICCPR (on the right to life and freedom from torture or cruel, inhuman and degrading punishment or treatment), which rights are also largely guaranteed in articles 6 and 7 of the Charter, the Court held that

[d]espite the exceptional political and security situation prevailing in Libya since 2011, the Libyan state is internationally responsible for ensuring compliance with and guaranteeing the human rights enshrined in articles 6 and 7 of the Charter.<sup>53</sup>

Unfortunately, the African Court did not elaborate on derogation under the African Charter or explain its focus on ICCPR. Such silence amplifies the potential significance of the *APDF and IHRDA* case, which is analysed below.

### 2.2.3 *Perspectives from human rights and legal scholars*

Despite the vigorous debate within academia on the significance of the absent derogation clause in the African Charter, many scholars recognise both the positive and negative aspects of this absence. It might be most helpful to view the different perspectives as a continuum. At one extreme is the view that the omission of such a clause is a 'normative innovation'<sup>54</sup> or 'positive development'<sup>55</sup> on the continent. At the other extreme is the view that the omission is 'a defect'<sup>56</sup> or 'deficiency' that should be corrected.<sup>57</sup> The majority of scholars, even most of those from whom the language of the previous two sentences was borrowed, tend to fall somewhere in between. Rather than reiterate arguments that scholars have more eloquently presented in various texts, this part of the article briefly considers some of the arguments supporting and opposing the omission of the derogation clause.

The lack of a derogation clause could be regarded as helping to fulfil the African Charter's objective of responding to African

52 Application 2/2013 (3 June 2016).

53 *Libya* (n 51) para 77.

54 Viljoen (n 20) 334.

55 Ali (n 25) 79.

56 Tolera (n 26) 250.

57 Sermet (n 12) 153.

realities. Given that African countries tend not to follow ICCPR requirements when derogating from provisions under that instrument<sup>58</sup> and that they also violate article 23 of the Vienna Convention on the Law of Treaties by using domestic law to justify non-performance of certain human rights obligations during emergencies,<sup>59</sup> a derogation clause in the African Charter would have been prone to abuse. Thus, its exclusion is a demonstration of 'political expediency'.<sup>60</sup> Other arguments for maintaining the Charter as it is include the following: (i) the Charter follows 'trends of expanding non-derogable rights in human rights instruments';<sup>61</sup> (ii) derogation clauses create a binary framework of derogable and non-derogable human rights despite the general consensus on the inalienability, indivisibility, interdependence and interrelatedness of human rights;<sup>62</sup> and, (iii) because the Charter like ICESCR contains economic, social and cultural rights, there is no need for a derogation clause as derogation from these rights is not necessary in order for a state to quell an emergency – the general limitation clause is sufficient.<sup>63</sup>

However, the omission of a derogation clause could also be regarded as hindering the protection of human rights. This omission, as interpreted by the African Commission, imposes an impossibly high standard where states must protect all rights as *jus cogens*. Murray proposes an alternative perspective as it 'may actually provide states with more discretion by failing to set any standards at all, allowing states to act as they please'.<sup>64</sup> Moreover, the contradictions between the African Charter and ICCPR as well as most national constitutions<sup>65</sup> make it more difficult to govern state action during emergencies.

### 2.3 Recourse to general international law

Although the debate on derogation is far from settled, the African Commission's position has meant that African states determined to legally derogate from human rights obligations would need to seek recourse in general international law or, as Ouguergouz specifies, 'in this instance the law of treaties and/or the law of international

58 Viljoen (n 20) 334.

59 As above; Ali (n 25) 103.

60 Sermet (n 12) 161.

61 Ali (n 25) 84.

62 Sermet (n 12) 160-161; Ali (n 25) 87.

63 Ali (n 25) 86.

64 R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 123.

65 Sermet (n 12) 143; Viljoen (n 20) 333; Tolera (n 26) 230.

responsibility of states'.<sup>66</sup> Such a move actualises the fear of some scholars that states would use and 'abuse'<sup>67</sup> customary law defences. Even in the absence of abuse, Tolera points out that such defences 'lack the necessary power-limiting requirements'<sup>68</sup> that derogation clauses provide.

However, could such a move successfully justify the suspension of human rights obligations? During a 1989 seminar Judge Theodor Meron raised this issue.<sup>69</sup> He asked:<sup>70</sup>

What, then, is the continuing relevance and the scope of applicability of customary law exceptions, such as state of necessity and of *force majeure*? ... Do they apply to human rights treaties that are silent as regards states of emergency? An example would be the African Charter on Human and Peoples' Rights, which does not contain provisions relating to derogations. Can an African state invoke these customary law exceptions to justify derogations of the norms stated in that Charter?

Judge Meron astutely foresaw a situation that crystallised almost three decades later when the *APDF and IHRDA* application was filed.

### 3 *APDF and IHRDA v Mali*

*APDF and IHRDA v Mali* is the African Court's first judgment interpreting the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) and the African Charter on the Rights and Welfare of the Child (African Children's Charter). In this judgment the Court held that Mali had violated the African Women's Protocol, the African Children's Charter and the Convention on the Elimination of All Forms of Violence Against Women (CEDAW) by adopting a family code which violated girls' and women's minimum age of marriage and right to consent to marriage; the right to inheritance for women and children born to unmarried parents – or 'natural' children – as well as the obligation to eliminate traditional practices that are harmful to women and children. The 2011 Code was adopted after violent protests organised by Islamic organisations had followed Mali's National Assembly's passage of a previous Bill on 3 August 2009 which sought to harmonise Malian legislation with its international human rights obligations.<sup>71</sup> As such,

66 Ouguergouz (n 26) 437.

67 Tolera (n 26) 257.

68 Tolera 282.

69 'State responsibility for violations of human rights' (1989) 83 *Proceedings of the Annual Meeting American Society of International Law* 373.

70 As above.

71 *APDF and IHRDA v Mali* (n 1) paras 63-65.

one of Mali's defences in the case was a plea of force majeure.<sup>72</sup> In this part I consider Mali's argument and how the Court missed an opportunity to expand its jurisprudence on derogation in the African human rights system through its dismissal of this argument only by implication and without providing its reasoning.

### 3.1 Brief background to the case

In the late 1990s Mali began to develop a Family Code in order to update the 1962 *Code du Mariage et de la Tutelle*<sup>73</sup> (Marriage and Guardianship Code) and other legislation governing the family that largely stemmed from the Napoleonic Code of 1804. As articulated by the government of then President Alpha Oumar Konaré, the reform project sought to ensure that such legislation reflected Mali's adherence to its international human rights obligations.<sup>74</sup> The government worked closely with international donors and non-governmental organisations (NGOs) to organise public discussions and debates, but Islamic organisations largely criticised the process as Western donor-driven and failing to take Islamic and other Malian socio-cultural norms and practices into account.<sup>75</sup> By 2009 a Family Code Bill was prepared – now under the leadership of President Amadou Toumani Touré – which recognised solely secular and not Islamic marriage, increased the minimum marriage age to 18 for girls, removed a clause requiring women to obey their husbands, guaranteed equal inheritance by men and women, and granted inheritance rights to natural children, among other significant changes.<sup>76</sup> Although the National Assembly passed the Bill by a large majority, Islamic organisations considered it contrary to Islamic and, hence, Malian norms and ideals and consequently voiced their displeasure through protests that mobilised massive segments of the population across the country.<sup>77</sup> Hundreds of Muslim clergy

72 *APDF and IHRDA v Mali* (n 1) para 63; Mali, Defence on the Merits, *APDF & IHRDA* (24 November 2016) Folio page 541 at 537.

73 Loi 62-17 AN-RM du 3 Février 1962 portant Code du mariage et de la tutelle.

74 DE Schulz 'Political factions, ideological fictions: The controversy over family law reform in democratic Mali' (2003) 10 *Islamic Law and Society* 133; R de Jorio 'Between dialogue and contestation: Gender, Islam, and the challenges of a Malian public sphere' (2009) 15 *The Journal of the Royal Anthropological Institute* S98; B Soares 'Family law reform in Mali: Contentious debates and elusive outcomes' in M Badran (ed) *Gender and Islam in Africa: Rights, sexuality, and law* (2011) 275-277; E Burrill 'Legislating marriage in postcolonial Mali: A history of the present' in L Boyd & E Burrill (eds) *Legislating gender and sexuality in Africa* (2020) 29.

75 Schulz (n 74) 133-142; De Jorio (n 74) S98-S99; Soares (n 74) 275-276; O Koné 'La controverse autour du code des personnes et de la famille au Mali: Enjeux et stratégies des acteurs' unpublished PhD thesis, Université de Montréal, 2015 2.

76 Defence on the Merits (n 72) 538.

77 'Threats of violence greet new family code' *The New Humanitarian* 11 August 2009, <http://www.thenewhumanitarian.org/report/85676/mali-threats-violence-greet-new-family-code> (accessed 8 December 2019); 'Code de la

and village leaders came together on 9 August 2009 to protest at Bamako's largest mosque.<sup>78</sup> On 22 August approximately 50 000 opponents of the 2009 draft Bill gathered in a Bamako stadium.<sup>79</sup> Many protesters undoubtedly agreed with the Secretary of Mali's High Islamic Council who characterised the Code as 'a shame, treason'<sup>80</sup> for Muslims, and further stated: 'We are not against the spirit of the code, but we want a code appropriate for Mali that is adapted to its societal values. We will fight with all our resources so that this code is not promulgated or enacted.'<sup>81</sup> Consequently, President Touré sent the Bill back for a second reading, with Islamic organisations playing a more central role in this round of reform.<sup>82</sup>

The Code, ultimately promulgated on 30 December 2011, was reminiscent of previous legislation.<sup>83</sup> Seeking to challenge it on human rights grounds, the APDF and IHRDA filed an application with the African Court in July 2016. The African Court not only held that Mali had violated human rights, as recounted above, but also ordered Mali to 'amend its legislation to bring it in line with the relevant provisions of the applicable international instruments'.<sup>84</sup> Mali is yet to amend the Code. However, the on-going intercommunal and jihadist violence<sup>85</sup> that Mali has faced since a *coup* in March 2012 make it unlikely that such amendments will be made in the near future.

### 3.2 Mali's *force majeure* argument and the Court's silence

Mali invoked the customary law defence of *force majeure* to justify its non-performance of human rights obligations under the African Women's Protocol, the African Children's Charter and CEDAW. A principle of international law codified in the International Law Commission's 2001 Articles on Responsibility of States for

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famille contesté au Mali: le Président débute des consultations' *Islam Pluriel* 26 August 2009, <http://islam-pluriel.net/code-de-la-famille-conteste-au-mali-le-president-debute-des-consultations/> (accessed 8 December 2019); Koné (n 73) 36.

78 *The New Humanitarian* (n 77).

79 *Islam Pluriel* (n 76).

80 *The New Humanitarian* (n 77).

81 As above.

82 A Thurston 'Towards an Islamic Republic of Mali' (2013) 37 *Fletcher Forum of World Affairs* 52-53; Koné (n 75) 196-197.

83 ST Diarra 'Women's rights in Mali "set back 50 years" by new "Family Code" law' *The Guardian* 1 May 2012, <https://www.theguardian.com/global-development/2012/may/01/womens-rights-mali-50-years> (accessed 8 December 2019).

84 *APDF v Mali* (n 1) para 130.

85 International Crisis Group 'Speaking with the "bad guys": Toward dialogue with Central Mali's Jihadists' 28 May 2019, <https://www.crisisgroup.org/africa/sahel/mali/276-speaking-bad-guys-toward-dialogue-central-malis-jihadists> (accessed 11 December 2019).

Internationally Wrongful Acts<sup>86</sup> (ILC Articles), *force majeure* 'is based on the principle that possibility is the limit of all obligation (*ad impossibilia nemo tenetur*). No one is expected to perform the impossible.'<sup>87</sup> Under article 23 of the ILC Articles,

- (1) The wrongfulness of an act of a state not in conformity with an international obligation of that state is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the state, making it materially impossible in the circumstances to perform the obligation.
- (2) Paragraph 1 does not apply if:
  - (a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the state invoking it; or
  - (b) the State has assumed the risk of that situation occurring.

Article 26 further stipulates that *force majeure* also cannot apply where this would violate *jus cogens*. Thus, under international customary law, *force majeure* operates as a 'circumstance precluding wrongfulness' or, in other words, serves as a justification for what would otherwise be considered a wrongful act.<sup>88</sup>

Unfortunately, Mali did not present a detailed argument seeking to establish that it met all the elements of *force majeure* because of these protests. The state simply invoked the defence, emphasised the intensity of the protests, and indicated that based on the overwhelming events in the country, it did not violate human rights but, rather, 'in order to safeguard peace and *social cohesion and avoid unnecessary "problems", the government made amendments [to the 2009 text] in order to achieve consensus*'.<sup>89</sup> Claiming that it was unable to adopt the more human rights-compliant 2009 Family Code Bill because of the highly-disruptive protests, Mali asserted that

*a massive protest movement from Islamist circles against the Code halted the process .... But it is not just the pressure from Islamic organisations. Mali was faced with serious threat of social divide, the nation being torn apart and outbreak of violence, the outcome of which could be fatal for peace, harmony and social cohesion. The mobilisation of religious forces reached such a level that no act of resistance could contain it.*<sup>90</sup>

86 Responsibility of States for Internationally Wrongful Acts, General Assembly (28 January 2002) UN Doc A/RES/56/83 (2002).

87 '*Force majeure* and "fortuitous event" as circumstances precluding wrongfulness: Survey of state practice, international judicial decisions and doctrine' International Law Commission Secretariat (27 June 1977) UN Doc A/CN.4/315 (1977) 69.

88 Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) *Yearbook of the International Law Commission* UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) 71.

89 Defence on the Merits (n 72) 537 (emphasis in original).

90 As above (emphasis in original).

Mali was characterising the protests as ‘an irresistible force’ or ‘unforeseen event’ ‘beyond [its] control’ that made it ‘materially impossible’ to comply with its human rights obligations.

Mali does not elaborate on its argument and neither does the Court. Rather, the Court only alludes to *force majeure* as follows: ‘The Respondent State implicitly admits that the present Family Code, adopted in a situation of *force majeure*, is not consistent with the requirements of international law.’<sup>91</sup> The Court also references the applicants’ contention that the ‘threats’ posed by the protests did not justify Mali’s derogation from its human rights obligations.<sup>92</sup> Interestingly, the Court does not mention the applicants’ reliance on *Commission Nationale*<sup>93</sup> and *Amnesty International*<sup>94</sup> to support this argument.<sup>95</sup>

Given its ultimate finding supporting the violations alleged by the applicants, the African Court can only be assumed to have dismissed Mali’s argument. This dismissal supports the African Commission’s jurisprudence. Elsewhere I argue that the Court correctly decided the case in light of the high burden of proof and the general reluctance of international courts and tribunals to accept a plea of *force majeure*.<sup>96</sup> By way of summary, even if derogation were taken as permissible in the African human rights system, Mali would have faced difficulties in making a successful *force majeure* plea. Although Mali did not violate a peremptory norm, thereby foreclosing a plea of *force majeure*, it would have struggled to prove most of the elements of the plea, namely, that the protests constituted an ‘irresistible force’ or ‘unforeseen event’; that they made performance of its human rights obligations materially impossible; that the protests were not attributable to Mali’s conduct; and that the plea was timely.<sup>97</sup> Mali would have faced difficulties primarily because of the temporal requirement. Article 27(a) of the ILC Articles provides that *force majeure* is temporary. The plea cannot be invoked once the exceptional circumstance ends. For example, in *European Commission v Italian Republic* the European Court of Justice rejected Italy’s *force majeure* plea, finding that

where it is possible to attribute an act to *force majeure*, the effects of that attribution can only last a certain time, namely the time which is in fact needed in order for an administration exercising a normal

91 *APDF and IHRDA* (n 1) para 76.

92 *APDF and IHRDA* para 68.

93 *Commission Nationale* (n 27).

94 *Amnesty International* (n 29).

95 *APDF & IHRDA*, Réplique à la réponse de la République du Mali (1 February 2017) 508.

96 *Kombo* (n 3) 402-405.

97 *As above*.

degree of diligence to put an end to the crisis which has arisen for reasons outside its control.<sup>98</sup>

No doubt Mali would also be unlikely to succeed arguing, in response to an application filed in 2016, that protests in 2009 still constituted *force majeure*. Even if Mali were to overcome this challenge, showing material impossibility would present another obstacle. The ILC Articles emphasise that '[f]orce majeure does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis'.<sup>99</sup> Along the same lines, in the *Rainbow Warrior* affair the tribunal held as follows: 'The test of [*force majeure*'s] applicability is of absolute and material impossibility, and ... a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.<sup>100</sup> Thus, Mali would be swimming against the current since, as Paddeu contends, 'a plea of *force majeure* will be upheld only very rarely'.<sup>101</sup> This is the case even without taking into account the particularities of derogation in the African human rights system.<sup>102</sup>

### 3.3 Unrealised potential of *APDF v Mali*

While the African Court arguably correctly decided *APDF v Mali*, its decision would have enriched jurisprudence if it had weighed in on the particularities of derogation from human rights in the regional system. Although the case was also decided based on CEDAW which, like the African Charter does not have a derogation clause,<sup>103</sup> the focus here is on the African human rights instruments, and particularly the African Women's Protocol, which is a Protocol to the African Charter. It should be noted that this Protocol and the African Children's Charter similarly lack derogation clauses.

The African Court has jurisdiction to interpret derogation under the Charter and other instruments. Under its contentious jurisdiction as provided in article 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol), the Court has broad jurisdiction to hear 'all cases and disputes submitted to it concerning the interpretation and application of the Charter, this

98 ECJ (4 March 2010) ECR 2009 1-03491 para 48.

99 Draft Articles (n 88) 76.

100 (30 April 1990) RIAA Vol XX 215 para 77.

101 F Paddeu 'A genealogy of *force majeure* in international law' (2012) 82 *British Handbook of International Law* 494.

102 See Kombo (n 3).

103 In fact, General Recommendation 28 of CEDAW provides that '[t]he obligations of states parties do not cease in periods of armed conflict or in states of emergency resulting from political events or natural disasters' (para 11).

Protocol and any other relevant human rights instrument ratified by the states concerned'. The Preamble to the African Court Protocol provides that the Court's mandate is to 'complement and reinforce' that of the African Commission. Nevertheless, as a judicial organ as opposed to the Commission's quasi-judicial status, the Court's decisions are binding.<sup>104</sup> Thus, in a case where it formulates an interpretation of the Charter which differs from that of the Commission, the Court's interpretation would take precedence.<sup>105</sup> This means that the African Court could make a different determination regarding derogation than that of the African Commission. However, such a step seems untenable as it would conflict with the Court's mandate to 'complement' the Commission and would create significant confusion.

The *APDF and IHRDA* case provided an opportunity for the Court to respond to the question Judge Meron posed years ago, namely, 'can an African state invoke customary law exceptions to justify derogations of the norms stated in th[e African] Charter?'<sup>106</sup> Specifically, can a state invoke *force majeure* in order to do so? Although one might wonder why the Court did not directly answer this question, rather embarking on a futile mind-reading attempt, I think it is useful to reflect on the questions that the Court might have addressed in order to more clearly identify existing gaps and ambiguities in African human rights jurisprudence. However, this should not be taken to attribute omnipotence to the African Court and the law. Critical legal studies and legal anthropology have demonstrated that the law inherently is indeterminate and often masks the political and ethical choices behind its decisions.<sup>107</sup> Going behind the mask to uncover some of these choices is essential to understanding how the law works and whether and to what extent it can be rendered a tool for the fulfilment of human rights and for justice more broadly.

The main question that the African Court could have addressed is the one posed by Judge Meron above. Answering this question

104 Art 28(2) African Court Protocol.

105 GJ Naldi 'The African Union and the regional human rights system' in Evans & Murray (n 20) 20.

106 Seminar (n 69) 373.

107 SF Moore *Law as process: An anthropological approach* (1978); D Kennedy 'The structure of Blackstone's commentaries' (1979) 28 *Buffalo Law Review* 205; JL Comaroff & S Roberts *Rules and processes: The cultural logic of dispute in an African context* (1981); RM Unger 'The Critical Legal Studies movement' (1983) 96 *Harvard Law Review* 561; F Olsen 'The myth of state intervention in the family' (1985) 18 *University of Michigan Journal of Law Reform* 835; K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146; J Comaroff "'Does anthropology matter to law?" Reflections, inflections, deflections' (2018) 2 *Journal of Legal Anthropology* 12.

would have required not only establishing the permissibility of a *force majeure* plea and the derogation it entailed, but consideration of the elements of such a plea as outlined above, namely, whether Mali made the necessary evidentiary showing, and ultimately whether the plea would be upheld. In so doing, the Court would have had to grapple with the African Commission's derogation jurisprudence and could also have drawn on the jurisprudence of other international human rights bodies.

Nevertheless, the Court would have needed to address *jus cogens* as a preliminary question. Given that derogation from such norms is not permitted, the Court would have needed to consider whether any of the alleged violations constituted violations of *jus cogens*. One of the issues at the heart of the case was discrimination on the basis of sex, which is prohibited both under article 2 of the African Charter and article 2 of the African Women's Protocol. In *Zimbabwe Human Rights NGO Forum v Zimbabwe* the African Commission noted that '[t]ogether with equality before the law and equal protection of the law, the principle of non-discrimination provided under article 2 of the Charter provides the foundation for the enjoyment of all human rights'.<sup>108</sup>

However, the African Commission did not go as far as the Inter-American Court of Human Rights (Inter-American Court) which recognised the principles of equality and equal protection before the law as well as non-discrimination as *jus cogens* in its *Advisory Opinion on the Juridical Condition and the Rights of the Undocumented Migrants*.<sup>109</sup> As Contreras-Garduño and Alvarez-Rio contend, the Inter-American Court has gone further than any other regional or international court or tribunal in 'expand[ing] the content of *jus cogens*'.<sup>110</sup> This expansion challenges what might otherwise be considered an essentially Eurocentric concept.<sup>111</sup> Nevertheless, it raises questions about the competence of regional courts to elaborate global norms.<sup>112</sup>

Would the African Court go as far as the Inter-American Court and further than the African Commission by expanding *jus cogens* to include the principle of non-discrimination? In *APDF and IHRDA*

108 (2006) AHRLR 128 (ACHPR 2006) para 169.

109 IACHR (17 September 2003) ser A 18 para 101.

110 D Contreras-Garduño & I Alvarez-Rio 'A barren effort? The jurisprudence of the Inter-American Court of Human Rights on *jus cogens*' (2014) 14 *Revista do Instituto Brasileiro de Direitos Humanos* 113.

111 T de AFR Cardoso Squeff & M de Almeida Rosa '*Jus cogens*: A European concept? An emancipatory conceptual review from the Inter-American system of human rights' (2018) 15 *Revista de Direito Internacional* 130.

112 Contreras-Garduño and Alvarez-Rio (n 110) 124.

this move immediately would have invalidated Mali's *force majeure* plea because the state would have been found to have violated a peremptory norm by passing the 2011 Family Code. Along the same lines, through this case the Court would also have determined whether there are other women's and children's rights norms with peremptory status. Perhaps another case will provide such clarification.

#### 4 Conclusion

*APDF and IHRDA* is a landmark African Court decision that seeks to protect women's and children's human rights in the family, an arena that has often been viewed as private and sacrosanct. The decision nevertheless fell short of its potential to address a thorny issue in African human rights jurisprudence, namely, the issue of derogation and, specifically, whether states can resort to defences such as *force majeure* to justify the temporary suspension of human rights obligations. Mali characterised as *force majeure* the large-scale protests that erupted after its National Assembly had passed a more gender-egalitarian Family Code Bill in 2009 than the Bill ultimately signed into law in 2011. While the Court rejected this argument, it did so without elaboration.

Almost two decades ago and before the African Court had even come into being, Heyns suggested a range of options to address what he outlined as problems created by the African Charter's omitted derogation clause.<sup>113</sup> Among the most drastic possibilities was an amendment of the Charter.<sup>114</sup> Heyns wrote that '[u]ntil such time, a ruling from the Commission (or in future the Court) setting out the conditions for legitimate derogation, is called for'.<sup>115</sup> The *APDF and IHRDA* case could have been such a ruling or, alternatively, could have reinforced existing jurisprudence of the African Commission. Regardless of whether one views the absent derogation clause positively or negatively, additional clarity on its significance could only strengthen the regional human rights system. As the Court recently missed this opportunity, one can only wait to see through what other avenues such clarity might emerge.

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113 Heyns (n 26) 160-162.

114 Heyns 162.

115 As above.

## Vulnerability as a human rights variable: African and European developments

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**Summary:** *In human rights law the concept of vulnerability is increasingly being used to attract attention to the fact that people are differently resilient and that some are more prone to harm than others. Its use as a legal concept, however, is still embryotic and opens up to several questions. By scrutinising how the judicial bodies within two regional human rights systems – the African and the European – have referred to and used the concept, the article discusses the nature and function of vulnerability in interpreting rights. Discussing the function and the conceptualisation of vulnerability in such practice, it argues that although the idea of special protection implicit in the vulnerability thinking is not revolutionary as such, vulnerability argumentation may be*

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*seen as a supplementary safety mechanism, which can be used to widen and deepen the scope of measures of protection in cases where 'regular' protection is not enough to ensure the effective realisation of rights. At the same time, the article cautions against taking the neutrality of the vulnerability concept for given, as the use of the vulnerability reasoning may also lend itself to the selective protection of rights.*

**Key words:** *vulnerable; vulnerability; special protection; positive obligations; regional human rights protection*

## 1 Introduction

The concept of vulnerability has lately become an increasingly used notion in human rights law and policy. For example, in the 2011 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights adopted by the African Commission on Human and Peoples' Rights (African Commission), special emphasis is placed on the protection of 'vulnerable and disadvantaged groups'. Vulnerability and human rights appear to be inherently intertwined, as the human susceptibility to be harmed – often in the hands of the state – is the starting point of the whole human rights movement. Vulnerability thus is essentially an ontological human condition that affects all human beings.<sup>1</sup> In human rights law the concept of vulnerability, however, is often used in another sense, to pinpoint that some people are more prone to harm than others, and therefore measures of special protection are necessary to ensure the realisation of their human rights. For example, in the African Commission Principles and Guidelines, the concept of vulnerable and disadvantaged groups is used to refer to groups 'who have faced and/or continue to face significant impediments to their enjoyment of ... rights', such as women and children.<sup>2</sup>

While it may be argued that special protection in fact simply is a tool for realising the universality of human rights, the increased use of the concept of vulnerability makes it necessary to take a closer look at the vulnerability reasoning in human rights law. To what does the concept of vulnerability exactly refer and what does it do

1 C Mackenzie 'The importance of relational autonomy and capabilities for an ethics of vulnerability' in C Mackenzie, W Rogers & S Dodds (eds) *Vulnerability: New essays in ethics and feminist philosophy* (2014) 33. Also see M Albertson Fineman 'The vulnerable subject: Anchoring equality in the human condition' (2008) 20 *Yale Journal of Law and Feminism* 1.

2 African Commission Principles and Guidelines para 1(e).

in human rights law? The article answers to this call by scrutinising how some regional human rights treaty bodies have referred to and used the concept. The praxis by the European and African human rights systems, which both provide interesting usages of vulnerability reasoning, has been chosen as the focus for this article.<sup>3</sup> As no explicit references to vulnerability are to be found in any of the core regional human rights treaties, legal practice forms the main subject of study given its central role in how vulnerability over the years has turned into a question of legal concern.<sup>4</sup> More specifically, the analysed materials include decisions containing the search term 'vulnerability' or 'vulnerable' up to November 2019 by the African Court on Human and Peoples' Rights (African Court), the African Commission and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and the European Committee of Social Rights (European Social Committee).<sup>5</sup> Furthermore, using both the existing doctrine and case law analysis, the article scrutinises the comprehensive vulnerability case law of the European Court of Human Rights (European Court).<sup>6</sup>

In looking into practices of interpreting rights in light of vulnerability, attention will first be given to how vulnerability reasoning has entered the work of the selected human rights bodies, whereafter a closer look is taken at the understandings of the notion of vulnerability and its different functions in the interpretation of rights. The case law has been analysed with the help of the normative legal method focusing

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- 3 It should be noted that similar developments have also taken place on the global plane, eg in relation to the UN Committee on Economic, Social, and Cultural Rights (ESCR Committee). Also in the Inter-American human rights system, the concept of vulnerability has been referred to. See further I Nifosi-Sutton *The protection of vulnerable groups under international human rights law* (2017); N Zimmermann 'Legislating for the vulnerable: Special duties under the European Convention on Human Rights' (2015) 25 *Swiss Review of International and European Law* 541-542. In Europe, besides the Council of Europe human rights system there is also another important rights system stemming from the European Union. In light of limitations of scope, the case law of the Court of the European Union regarding vulnerability will not be addressed here.
- 4 Today, references to vulnerability, however, are common in certain other types of instruments such as soft law resolutions and General Comments adopted by treaty bodies. See eg Nifosi-Sutton (n 3). The use of the vulnerability concept in such instruments is beyond the scope of this article.
- 5 For the European Court and the European Social Committee, the search was carried out using the search functions of the HUDOC database. For the African decisions, a keyword search was performed with the help of word search in pdf documents, where possible. Where the decisions were available only in a non-searchable format, the search was done by reading the decisions. In addition to the search terms 'vulnerable' and 'vulnerability', also 'special protection', 'marginalised' and 'disadvantaged', which sometimes appear to be used interchangeably with the notion of vulnerability, were included in the search to allow a comparison between cases where the notion of vulnerability is used and possibly similar cases where the treaty bodies have not used it.
- 6 Eg Nifosi-Sutton (n 3); L Peroni & A Timmer 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11 *International Journal of Constitutional Law* 1056; Zimmermann (n 3).

on identifying and systematising the law as it stands, complemented with tools of discourse analysis to understand the different purposes and meanings of the language selected by the treaty bodies.<sup>7</sup> Furthermore, the article draws on insights from key theorisations of substantive equality<sup>8</sup> and vulnerability<sup>9</sup> to anchor the findings in the many dimensions of the vulnerabilisation development. The central claim made in the article is that while the concept of vulnerability is used as an important safety mechanism in the protection of rights, the open-endedness of the concept as well as the selectivity of its use opens up for questions that should not be neglected in developing the vulnerability reasoning further.

## 2 Generally on vulnerability reasoning in the European and African human rights systems

While it is difficult to say exactly when vulnerability entered the praxis of the regional adjudicatory organs, the judgment by the European Court – the court supervising the European Convention of Human Rights and Fundamental Freedoms (European Convention) and its additional protocols – in *Chapman v the United Kingdom* (2001) is often regarded as a landmark case in the European context.<sup>10</sup> In *Chapman* the European Court emphasised the vulnerable position of the Roma and held that special consideration had to be paid to their needs and lifestyle.<sup>11</sup> Even though the European Convention does not contain an explicit reference to vulnerability, the European Court since *Chapman* has recognised several other groups as vulnerable and further elaborated the legal relevance of such findings. As an indication of the growing legal relevance of vulnerability reasoning in the European Court, it may be noted that as many as over one thousand of its judgments include the notions of vulnerable or vulnerability.<sup>12</sup> Many of these judgments date back from the past ten years, and some scholars talk about a ‘vulnerabilisation’ of the

7 On the use of discourse analysis, see, eg J Niemi-Kiesiläinen, P Honkatukia & M Ruuskanen ‘Legal texts as discourses’ in Å Gunnarsson, E-M Svensson & M Davies (eds) *Exploiting the limits of law: Swedish feminism and the challenge to pessimism* (2007) 69.

8 Eg S Fredman ‘Substantive equality revisited’ (2016) 14 *International Journal of Constitutional Law* 712.

9 Eg Fineman (n 1); C Mackenzie, W Rogers & S Dodds ‘Introduction: What is vulnerability, and why does it matter for moral theory?’ in Mackenzie, Rogers & Dodds (n 1) 1.

10 Peroni & Timmer (n 6) 1063.

11 *Chapman v the United Kingdom* ECHR (18 January 2001) App 27238/95 para 96.

12 As of 19 November 2019, 1 394 hits for ‘vulnerable’ and 484 hits for ‘vulnerability’ in the HUDOC database. This includes hits for the whole judgments, ie including the reasoning by the applicants and the respondents, and also hits where vulnerability does not refer to human vulnerability, but eg vulnerable states.

law or a quiet vulnerability 'revolution'.<sup>13</sup> While the approach of the European Court may not be sufficiently coherent or purposeful to speak of a revolution as such,<sup>14</sup> it cannot be denied that vulnerability clearly in the course of the 2000s has become a concept that is often referred to. A comparable development may be identified in the praxis of the European Social Committee, the collective complaints procedure in relation to the European Social Charter (1961, revised 1996), the central treaty guaranteeing social and economic rights in Europe.<sup>15</sup>

As in the case of the European instruments, the main African human rights treaties do not explicitly refer to vulnerability. Yet, the notion figures also in the praxis of the African human rights supervisory organs, while not in similar numbers as in the European praxis, as would be expected given the lower overall number of cases decided upon owing to the younger age of the African human rights system.<sup>16</sup> Adopted in 1981, the African Charter on Human and Peoples' Rights (African Charter) entered into force in 1986. Today, the Charter is supervised by the African Court adopting binding judgments, and the African Commission, a so-called quasi-judicial mechanism, with complementary mandates. Since the start of its operations in 2006, the African Court has out of its roughly 50 judgments made use of the concept of vulnerability once, in 2017, in a judgment concerning the rights of an indigenous minority in Kenya.<sup>17</sup> As regards the African Commission, the concept of vulnerability appears from time to time in some 100 communications on which the Commission has given a decision since its establishment in 1987, with some early references found as early as in 1999 to 2003.<sup>18</sup> From

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- 13 A Timmer 'A quiet revolution: Vulnerability in the European Court of Human Rights' in M Albertson Fineman & A Gear (eds) *Vulnerability: Reflections on a new ethical foundation for law and politics* (2013) 147; F Ippolito & S Iglesias Sánchez 'Introduction' in F Ippolito & S Iglesias Sánchez (eds) *Protecting vulnerable groups: The European human rights framework* (2015) 5.
- 14 M O'Boyle 'The notion of "vulnerable groups" in the case law of the European Court of Human Rights' Report presented at the Conference on the Constitutional Protection of Vulnerable Groups: A Judicial Dialogue organised 4-5 December 2015 in Santiago, Chile, 2.
- 15 Out of the around 700 decisions by the European Social Committee, 96 decisions include the word 'vulnerable' and 38 'vulnerability' as of 19 November 2019 (ESC HUDOC database).
- 16 It should, however, be noted that considering the considerably lower number of decisions overall as compared to the European human rights system, the relative frequency of referrals to vulnerability is actually not lower in the African system. Out of the over 60 000 judgments of the European Court, roughly 3% contain the words 'vulnerable' or 'vulnerability'. The corresponding figure for the African Court and the Commission is roughly the same or even somewhat higher.
- 17 *African Commission on Human and Peoples Rights v Republic of Kenya* AfCHPR (26 May 2017) App 6/2012.
- 18 *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 50; *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999) para 33; *Social and Economic Rights Action Centre (SERAC) & Another v*

a special protection perspective, it is worth noting that the African Charter has been complemented by protocols on the rights of older persons, persons with disabilities and women.<sup>19</sup> Unlike the European system, the African human rights architecture also includes a specific instrument on children's rights, the African Charter on the Rights and Welfare of the Child (African Children's Charter) (1990), which is supervised by the (quasi-judicial) African Children's Committee. This Committee has since its first decision handed down in 2005 referred to vulnerability in most of its decisions taken on merits.<sup>20</sup>

### 3 What makes one vulnerable in the eyes of the treaty bodies?

#### 3.1 Group-based approaches to vulnerability

Characteristic for both the European and African human rights bodies is that they often approach vulnerability in a primarily group-based – or identity-based<sup>21</sup> – manner. That is, even though the individual vulnerability of the applicants in the end is assessed, the evaluation often starts from the fact that the person is a member of a particular group, such as the Roma.<sup>22</sup> For example, the European Court has besides the Roma identified as vulnerable persons children;<sup>23</sup> victims

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*Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 56; *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Uganda, Rwanda, Tanzania, Zaire and Zambia* (2003) AHRLR 111 (ACHPR 2003) para 75; *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) paras 50 & 52. Even before that, the African Commission had made use of the notion of vulnerability in a resolution on the situation of human rights in Africa. African Commission Resolution on the Situation of Human Rights in Africa, November 1994, ACHPR/Res14(XVI)94.

19 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (2016) (not in force); and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018) (not in force).

20 Communication 1/Com/001/2005, *Michelo Hansungule & Others (on Behalf of Children in Northern Uganda) v Uganda*, ACERWC (2013) para 63; *IHRDA & Another v Kenya* (2011) AHRLR 181 (ACERWC 2011) para 46; Communication 6/Com/002/2015 *The Institute for Human Rights and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v The Government of Republic of Cameroon*, ACERWC (2018) paras 47 and 73; Communication 10/Com/003/2016, *Etoungou Nko'o on behalf of Mr and Mrs Elogo Menye and Rev Daniel Ezo'o Ayo v the Government of Cameroon*, ACERWC (2018) para 47; and Communication 3/Com/001/2012, *The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v Senegal* ACERWC (2014) para 75.

21 Cf Fineman (n 1).

22 Eg Chapman (n 11).

23 Eg *Popov v France* ECHR (19 January 2012) App 39472/07 & 39474/07 para 91.

of crime;<sup>24</sup> persons with disabilities or mental illnesses;<sup>25</sup> persons belonging to sexual minorities;<sup>26</sup> the HIV positive;<sup>27</sup> asylum seekers;<sup>28</sup> and irregular migrants.<sup>29</sup> The approach of the European Social Committee in many respects is similar. It has referred to the Roma/Sinti;<sup>30</sup> women and women with children;<sup>31</sup> homeless children;<sup>32</sup> pensioners;<sup>33</sup> migrant children unlawfully present in a country;<sup>34</sup> children seeking asylum;<sup>35</sup> and minority children<sup>36</sup> as vulnerable groups. Much in the same line of reasoning, the African human rights bodies have explicitly identified as vulnerable refugees;<sup>37</sup> indigenous peoples;<sup>38</sup> women, children and asylum seekers;<sup>39</sup> stateless children;<sup>40</sup> mental health patients;<sup>41</sup> and civilians in areas of strife.<sup>42</sup>

Notably, many of the groups acknowledged as vulnerable in the case law of the European and African bodies are also groups that are given special protection in treaty law through special human rights conventions, such as the Convention on the Rights of the Child (1989) (CRC), the Convention on the Rights of Persons with Disabilities (2006) (CRPD), and the protocols to the African Charter. However, through their case law the supervisory bodies at times have

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- 24 Eg *Aksoy v Turkey* ECHR (18 December 1996) App 21987/93 para 98 (torture); *Gisayev v Russia* ECHR (20 January 2011) App 14811/04 para 116 (torture and ill-treatment); *Bevacqua and S v Bulgaria* ECHR (12 June 2008) App 71127/01 para 65 (domestic violence); *Breukhoven v the Czech Republic* ECHR (21 July 2011) App 44438/06 para 56 (victims of trafficking).
- 25 Eg *Alajos Kiss v Hungary* ECHR (20 May 2010) App 38832/06 para 42; *Zehentner v Austria* ECHR (16 July 2009) App 20082/02 para 63.
- 26 *OM v Hungary* ECHR (5 July 2016) App 9912/15 para 53.
- 27 Eg *Kiyutin v Russia* ECHR (10 March 2011) App 2700/10 para 64.
- 28 Eg *MSS v Belgium and Greece* ECHR (21 January 2011) App 30696/09 para 251.
- 29 Eg *Aden Ahmed v Malta* ECHR (23 July 2013) App 55352/12 para 97.
- 30 Eg Complaint 46/2007, *European Roma Rights Centre (ERRC) v Bulgaria*, ECSR (3 December 2008) paras 45-51; Complaint 58/2009, *Centre on Housing Rights and Evictions (COHRE) v Italy*, ECSR (25 June 2010) paras 28-30, 39-40.
- 31 Complaint 86/2012, *European Federation of National Organisations Working with the Homeless (FEANTSA) v The Netherlands*, ECSR (2 July 2014) para 130.
- 32 Complaint 47/2008, *Defence for Children International (DCI) v The Netherlands*, ECSR (20 October 2009) paras 47 & 61.
- 33 Complaint 76/2012, *Federation of Employed Pensioners of Greece (IKA-ETAM) v Greece*, ECSR (7 December 2012) para 81; Complaint 78/2012, *Pensioners' Union of the Athens-Piraeus Electric Railways (ISAP) v Greece*, ECSR (7 December 2012) paras 75-77.
- 34 Complaint 69/2011, *Defence for Children International (DCI) v Belgium*, ECSR (23 October 2012) para 37.
- 35 Complaint 114/2015, *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v France*, ECSR (24 January 2018) para 123.
- 36 *EUROCEF v France* (n 35) para 123.
- 37 *Doebbler v Sudan* (2009) AHRLR 208 (ACHPR 2009) para 116.
- 38 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) paras 148 & 204; *African Commission on Human and Peoples Rights v Kenya* (n 17).
- 39 *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) para 87.
- 40 *IHRDA & Another v Kenya* (n 20) para 46.
- 41 *Purohit & Another v The Gambia* (n 18) para 52.
- 42 *Amnesty International & Others v Sudan* (n 18) para 50.

extended the special consideration also to other groups, such as the HIV positive, that face challenges in having their rights realised.<sup>43</sup> These group-based vulnerability recognitions that extend special protection to groups not covered by special treaties, however, remain somewhat unpredictable, and it is not always altogether clear why some groups are identified as vulnerable while others are not. It has, for example, been pointed out that whereas the European Court in some cases involving irregular migrants refers to vulnerability,<sup>44</sup> in several other cases involving such migrants the Court has chosen not to engage in outspoken vulnerability reasoning.<sup>45</sup> This incoherence can perhaps be due to the fact that it sometimes may be politically (or culturally) sensitive for human rights-monitoring bodies to explicitly acknowledge certain types of vulnerabilities, and that the monitoring bodies therefore choose other lines of argumentation. Differences and *lacunae* in the case law may, however, also simply arise from the fact that certain types of cases have not entered the monitoring systems and that the organs for this reason have not had the opportunity to pronounce on them. Questions of standing, such as the possibility to submit collective complaints or hurdles for individuals and non-governmental organisations (NGOs) to present complaints, may play a role in this regard.<sup>46</sup>

### 3.2 Pointers of vulnerability

While no established or clear-cut definition exists of vulnerable groups or individuals in the regional case law, certain patterns, however, can be discerned with regard to how the monitoring bodies understand vulnerability (pointers or determinants of vulnerability)<sup>47</sup> and what kind of language they use when categorising someone as vulnerable. To begin with, it is possible to make a distinction between cases where the treaty bodies characterise *certain persons*

43 In many of these cases, however, it is possible to find soft law human rights instruments acknowledging special protection needs. Eg UN General Assembly, Declaration of Commitment on HIV/AIDS, 27 June 2001, UN Doc A/RES/S-26/2.

44 *Aden Ahmed v Malta* (n 29) para 97; *Chowdury & Others v Greece* ECHR (30 March 2017) App 21884/15 para 97.

45 E Nieminen 'Maassa luvattomasti oleskelevien haavoittuvuus Euroopan ihmisoikeustuomioistuimen ratkaisukäytännössä' (2019) 48 *Oikeus* 127.

46 Eg, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art 5. See further C Nchekwube Ezennia 'Access to justice mechanisms for individuals and groups under the African regional human rights system: An appraisal' (2015) *African Journal of Legal Studies* 127; A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 22-25.

47 Y Al Tamimi 'The protection of vulnerable groups and individuals by the European Court of Human Rights' (2015) 6, <http://njb.nl/Uploads/2015/9/Thesis-The-protection-of-vulnerable-groups-and-individuals-by-the-European-Court-of-Human-Rights.pdf> (accessed 25 February 2020).

or groups *as vulnerable* ('vulnerable subjects'),<sup>48</sup> indicating, in other words, that a person or group of persons *is* vulnerable, and cases where they hold that individuals or groups *find themselves in vulnerable situations or positions*,<sup>49</sup> without characterising the person or group as vulnerable *per se*. The use of language referring to vulnerabilising situations seems to be somewhat more common in the praxis of the European human rights bodies than in that of their African counterparts<sup>50</sup> which, apart from the African Children's Committee,<sup>51</sup> often approach vulnerability as something inherent or static, referring to 'vulnerable groups' or 'vulnerable groups of persons',<sup>52</sup> 'vulnerable populations',<sup>53</sup> or the vulnerability of individuals or groups of individuals.<sup>54</sup> One cannot, however, speak of an established or settled usage of the terminologies in the praxis of any of the treaty bodies, which would allow drawing conclusions on any systematic distinction between the two terminologies. It also is not clear whether the choice between the two terminologies always reflects a conscious semantic choice.

Having said that, it should be noted that being labelled as a vulnerable subject may be seen as stigmatising and disempowering, which in some cases may explain the use of the notion of situational vulnerability.<sup>55</sup> This applies not only to the individual vulnerable subjects but also to the group/identity-based approach to vulnerability, when individuals belonging to certain groups by default are characterised as vulnerable.<sup>56</sup> The risk of stereotyping may be the reason, for example, for why the European Court avoids referring to women and the elderly as vulnerable groups in its majority judgment

48 Eg *Rooman v Belgium* ECHR (31 January 2019) App 18052/11 para 164.

49 Eg *Kanciat v Poland* ECHR (23 May 2019) App 37023/13 para 74.

50 See, however, reference to children in a 'disadvantaged and vulnerable situation' in *Hansungule & Others v Uganda* (n 20) para 63.

51 See eg *Hansungule & Others v Uganda* (n 20) para 63.

52 *Centre for Minority Rights Development* (n 38) para 148; *Purohit & Another v The Gambia* (n 18) para 52.

53 *Association pour la Sauvegarde de la Paix au Burundi* (n 18) para 75.

54 *Doebbler v Sudan* (n 37) para 116; *Institute for Human Rights and Development in Africa v Angola* (n 39) para 87; *Amnesty International* (n 18) para 50; *Constitutional Rights Project* (n 18) para 33; *African Commission on Human and Peoples Rights v Kenya* (n 17) para 180.

55 Cf Sandberg who notes that the Committee on the Rights of the Child has changed its wording from 'vulnerable groups of children' to 'children in vulnerable situations' in order to avoid labelling the child. K Sandberg 'The Convention on the Rights of the Child and the vulnerability of children' (2015) 84 *Nordic Journal of International Law* 236.

56 Eg C de la Cruz-Ayuso 'Human rights and vulnerable groups in the EU's Policy on the Fight Against Poverty and Social Exclusion (2016) *European yearbook on human rights* 176-177; C Heri 'Between a rock and a hard place: The Court's difficult choice in *Khamtokhu and Aksenchik v Russia*' *Strasbourg Observer* 17 March 2017, <https://strasbourgobservers.com/2017/03/17/between-a-rock-and-a-hard-place-the-courts-difficult-choice-in-khamtokhu-and-aksenchik-v-russia/> (accessed 25 February 2020).

in *Khamtokhu and Aksenchik v Russia*, despite extensive vulnerability argumentation by the parties in the case.<sup>57</sup> In some situations, vulnerability terminology may also be avoided due to unwelcome connotations. For example, in relation to disability, the concept of vulnerability is sometimes avoided due to associations that its use has with problematic practices such as large-scale institutionalisation of persons with disabilities.<sup>58</sup> The static language characterising someone or a group of individuals as vulnerable may, moreover, be regarded as insufficiently reflecting the many sources to vulnerability that often interact. In particular, the role of societal structures in the creation and aggravation of vulnerabilities may be hidden by group-based approaches to vulnerability.

As regards such different sources of vulnerability, the treaty body praxis may be roughly said to distinguish between (a) *inherent vulnerability* that refers to ‘sources of vulnerability intrinsic to the human condition’ (for example, age and health); and (b) *situational vulnerability* that denotes vulnerability arising of the societal context.<sup>59</sup> The former often comes up in the context of, for example, children, who by their age and developing capabilities are typically seen as vulnerable by default.<sup>60</sup> Situational vulnerability, on the other hand, is more often brought up in the context of, for example, questions of status, deprivation or dependence. As will be discussed further in part 3.3., the intersections between the two types of vulnerability also find recognition in the decisions by the treaty bodies, some of which highlight the *increased* or *particular* vulnerability of individuals due to the combined vulnerabilities arising from both inherent and situational vulnerability. In the praxis of the European Social Committee, for example, it is possible to find cases where the inherent vulnerable ‘condition’ of all children is emphasised,<sup>61</sup>

57 *Khamtokhu and Aksenchik v Russia* ECHR (24 January 2017) App 60367/08 & 961/11 paras 35, 39-40, 47 & 53 ff. The question of whether women are a vulnerable group was also addressed by the European Court in *Valiulienė v Lithuania*, in which the Court put forward that women do not by default fall into the category of vulnerable persons. *Valiulienė v Lithuania* ECHR (26 March 2013) App 33234/07 para 69. That said, the European Court has recognised the special vulnerability of women in some situations, as in the *Opuz v Turkey* case where the Court took notice of the vulnerable situation of women in South-East Turkey in relation to domestic violence. *Opuz v Turkey* ECHR (9 June 2009) App 33401/02 para 160.

58 B Clough ‘Disability and vulnerability: Challenging the capacity/incapacity binary’ (2017) 16 *Social Policy and Society* 474-475.

59 Mackenzie, Rogers & Dodds (n 9) 7.

60 *Eg Popov v France* (n 23) para 91. Cf, however, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* ECHR (12 October 2006) App 13178/03 para 55 (‘applicant’s position was characterised by her very young age’ which was one of the factors that put her in ‘an extremely vulnerable situation’).

61 *EUROCEF v France* (n 35) para 56 (‘this is due to their condition as “children” and to their specific situation as “unlawful” migrants, combining vulnerability and limited autonomy’).

and cases where a reference is made to the vulnerable 'situation' of children to highlight the particular vulnerability in which some children find themselves, due to the fact they, for example, are 'unlawfully present' in a territory.<sup>62</sup> The European Court has also highlighted that the protection of vulnerable individuals should not be based only on their 'formal group classification' but should build on an individualised assessment of the 'cumulative effect' of contextual factors and the inherent vulnerability of individuals.<sup>63</sup>

While the vulnerability semantics in the two regional systems is not altogether systematic as regards the recognition of the different sources to vulnerability, it is evident that situational vulnerability as a phenomenon is recognised in both systems. This means that besides inherent pointers of vulnerability, 'social, historical, and institutional forces' are also recognised as sources (or generators) of vulnerability, and as such vulnerability is not seen as merely an individual characteristic but also as something that arises from the societal context and circumstances. This is clearly visible in how *social exclusion resulting from stigma or discrimination* is an indicator that has 'crucially informed the [European] Court's assessment of group vulnerability', as Peroni and Timmer point out.<sup>64</sup> This emphasis on 'historical patterns of stigma or discrimination' has, for example, been clearly visible in many European cases involving the Roma.<sup>65</sup> One such case is *DH & Others v the Czech Republic* where the European Court holds the vulnerability of the Roma to arise from 'their turbulent history and constant uprooting'.<sup>66</sup> Similarly, the European Court on several occasions has emphasised that the HIV positive are a vulnerable group 'with a history of prejudice and stigmatisation'.<sup>67</sup>

The vulnerabilising effect of exclusionary policies has also been emphasised by the African Court which in *African Commission on Human and Peoples Rights v Republic of Kenya* identified an indigenous people, the Ogieks, as vulnerable.<sup>68</sup> In this context, the Court refers to the fact that indigenous populations have 'often been affected by economic activities of other dominant groups and large-scale

62 Eg *DCI v The Netherlands* (n 32) paras 25, 38 & 64.

63 *Tomov & Others v Russia* ECHR (9 April 2019) App 18255/10 and 5 Others para 189.

64 Peroni & Timmer (n 6) 1065.

65 O'Boyle (n 14) 2. See also Zimmermann (n 3) 540-541.

66 *DH & Others v the Czech Republic* ECHR (13 November 2007) App 57325/00 para 182. Also eg *Chapman v the UK* (n 11) para 96; *Oršuš & Others v Croatia* ECHR (16 March 2010) App 15766/03 para 147.

67 Eg *Kiyutin v Russia* (n 27) para 64.

68 *African Commission on Human and Peoples' Rights v Kenya* (n 17) para 112.

developmental programmes'.<sup>69</sup> Due to their vulnerability they have 'at times, been the subject and easy target of deliberate policies of exclusion, exploitation, forced assimilation, discrimination and other forms of persecution, whereas some have encountered extinction of their cultural distinctiveness and continuity as a distinct group'.<sup>70</sup> While the African Court does not explicitly state this, the logic behind its reasoning appears to be that such contextual factors vulnerabilise – or sustain the vulnerability of – the indigenous populations. Exclusionary policies and discrimination as well as stigma that prevent individuals from accessing their rights are correspondingly referred to by the African Commission among the root causes of vulnerability. The Commission notes in *Open Society Justice Initiative v Côte d'Ivoire* that the failure by the respondent state to grant legal status to a part of the population based on ethnic grounds prevented this group from accessing their right to work and violated their right to dignity, thereby vulnerabilising them.<sup>71</sup> The African Commission further attaches significance to the stigma arising from the status as undocumented which, according to the Commission, compromises 'the very existence of the victim', robbing the individual of his or her subjecthood before law and social recognition within communities.<sup>72</sup> A similar line of reasoning is found in *Centre for Minority Rights Development*, in which the African Commission points to the marginalisation of certain societal groups due to having been 'victimised by mainstream development policies and thinking' and having had 'their basic human rights violated'.<sup>73</sup>

Besides historical and rooted patterns of discrimination, an individual's *dependency* on a state or authorities is an important pointer of situational vulnerability recognised by both the European and African bodies.<sup>74</sup> This is evident, for example, in the many European

<sup>69</sup> *African Commission on Human and Peoples' Rights v Kenya* (n 17) para 180.

<sup>70</sup> As above.

<sup>71</sup> Communication 318/06, *Open Society Justice Initiative v Côte d'Ivoire*, ACHPR (27 May 2016) paras 140-141. Also see Communication 317/2006, *The Nubian Community in Kenya v Kenya*, ACHPR (30 May 2016) paras 131, 133 & 149.

<sup>72</sup> *Open Society Justice Initiative v Côte d'Ivoire* (n 71) para 141.

<sup>73</sup> *Centre for Minority Rights Development* (n 38) para 148.

<sup>74</sup> Dependency may be due to both situational factors (eg detention) and inherent factors (eg age); Zimmermann (n 3) 541. In the European context, the *MSS* judgment is significant in the sense that it opened up the interpretation of the European Court to a wider understanding of vulnerability, extending the pointers of vulnerability beyond those of historical stigma and discrimination. Such an interpretation, however, was not welcomed by all. In his partly dissenting opinion, Sajó J argued that '[a]lthough many asylum-seekers are vulnerable persons, they cannot be unconditionally considered as a particularly vulnerable group ... where all members of the group, due to their adverse social categorisation, deserve special protection' as asylum-seekers are 'not a group historically subject to prejudice with lasting consequences, resulting in their social exclusion'. See *MSS v Belgium and Greece* (n 28) partly concurring and partly dissenting opinion of Sajó J. The successive case law of the European

Court cases emphasising the vulnerable position in which detained persons find themselves, especially detained persons with further 'vulnerabilising features' such as mental disabilities or detainees who do not speak the language of the detaining authorities.<sup>75</sup> Interestingly, the European Court moreover has occasionally placed the emphasis on *material deprivation* as a factor of vulnerability in the form of, for example, poverty,<sup>76</sup> or being 'wholly dependent on State support' in terms of catering for one's 'most basic needs'.<sup>77</sup> Factors of dependency, and the *insecurity* arising from such dependency, have regularly been brought up also in relation to refugees and asylum seekers. For example, the dependence of unaccompanied migrant children on state support, and the insecurity arising from uncertain status determination proceedings, are noted as factors of vulnerability by the European Social Committee.<sup>78</sup> Similarly, the European Court has characterised irregular migrants as vulnerable persons due to the dependence and insecurity that they face due to their status.<sup>79</sup> Comparably, in the African human rights system, the African Commission in *Doebbler v Sudan* found refugees in Sudan to be extremely vulnerable given their 'state of deprivation, their fear of being deported and their lack of adequate means to seek legal representation'.<sup>80</sup> In a similar vein, the African Children's Committee points to the right to nationality as essential for children's access to rights and protections and that statelessness exposes children to a 'legal limbo' vulnerabilising them to expulsion.<sup>81</sup> Dependence and insecurity, in other words, are sometimes seen as arising from *lacking access to rights*, a further pointer of vulnerability. The African Commission, for example, explicitly refers to the lack of access to land as a source of vulnerability to 'further violations/dispossession' for indigenous populations,<sup>82</sup> and notes that '[c]itizens who cannot have recourse to the courts of their country are highly vulnerable to violation of their rights'.<sup>83</sup>

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Court, however, indicates that it does not limit its findings of vulnerability to historical prejudice.

- 75 Eg *TW v Malta* ECHR (29 April 1999) App 25644/94 para 43; *Rooman v Belgium* (n 48) para 145.
- 76 Peroni & Timmer (n 6) 1065-1068.
- 77 *MSS v Belgium and Greece* (n 28) paras 253-254.
- 78 *EUROCEF v France* (n 35) para 56.
- 79 *Chowdury* (n 44) para 97.
- 80 *Doebbler v Sudan* (n 37) para 116.
- 81 *IHRDA* (n 20) para 46.
- 82 *Centre for Minority Rights* (n 38) para 204. A similar reference is made by the African Commission in another case, in which the Commission refers to the African people as vulnerable to foreign misappropriation due to the history of colonial exploitation; *SERAC* (n 18) para 56.
- 83 *Constitutional Rights Project* (n 18) para 33.

### 3.3 Degrees of vulnerability

As mentioned above, it is also evident from the case law that the treaty bodies regard some groups and individuals as more vulnerable than others. This is the case especially in situations where more than one pointer of vulnerability intersect. For example, the African Children's Committee has characterised certain groups of children as especially vulnerable 'because they experience, or are at risk of experiencing, violations of the rights ... to a greater extent than other children in comparable situations'.<sup>84</sup> Such a finding is implicit, for example, in the *Nubian case*, in which the Committee points to the difficult conditions of stateless children in Kenya affecting their position in relation to the exercise and enjoyment of their rights, with statelessness making them 'vulnerable to expulsion from their home country' and constituting an 'antithesis to the best interests of children'.<sup>85</sup> Similarly, the European Court has recognised the 'extreme vulnerability' of, for example, asylum-seeking children.<sup>86</sup> Sometimes, however, only one pointer of vulnerability is sufficient to entail that a person belongs to the 'the most vulnerable'.<sup>87</sup> The European Social Committee, for example, in relation to persons with autism has referred to special 'heightened vulnerabilities'.<sup>88</sup> As regards degrees of vulnerability, it is also worth noting that there are some cases where the European Court has held that it does *not* regard particular individuals or groups to be persons with enhanced vulnerability, indicating that a certain level of vulnerability is 'normal' in certain situations and does not as such give rise to enhanced obligations on the part of the state.<sup>89</sup>

While it not possible to elicit a clear 'vulnerability hierarchy' from the analysed regional praxis, it appears that where vulnerability is given particular legal relevance, the vulnerability is specified with words such as 'particular', 'extreme' or the 'the most'. Arguably, this is something that can be taken to indicate that in human rights law there is a need for variables that function as particularising elements in the interpretation of human rights obligations. In this

84 Nifosi-Sutton (n 3) 179.

85 *IHRDA* (n 20) para 46.

86 Eg *Tarakhel v Switzerland* ECHR (4 November 2014) App 29217/12 para 99.

87 The concept of 'the most vulnerable' is used in eg Complaint 39/2006, *European Federation of National Organisations Working with the Homeless (FEANTSA) v France*, ECSR (5 December 2007) para 54. See also *Association pour la Sauvegarde de la Paix au Burundi* (n 18) para 75, which refers to the 'most vulnerable populations'.

88 Complaint 13/2002, *Autism-Europe v France*, ECSR (4 November 2003) para 53.

89 Eg *Beuze v Belgium* ECHR (9 November 2018) App 71409/10 para 168 ('no other particular circumstance can be noted which would indicate that the applicant was in a greater state of vulnerability than that in which persons interviewed by investigators would generally find themselves').

light, it is necessary to take a step back and to *unpack* the notion of vulnerability as a structural element in the interpretative praxis of the organs. What is the notion of vulnerability, an interpretative principle or something else?

#### 4 Vulnerability in legal reasoning

The exact role played by vulnerability reasoning for the outcomes of cases sometimes is difficult to discern, as judgments are often written so that the decisive legal considerations are not expressly pinpointed. However, there are several judgments, especially in the European system, where vulnerability explicitly is mentioned as 'the decisive factor'<sup>90</sup> or as a factor to which the court 'attaches considerable importance'.<sup>91</sup> The fact that the monitoring bodies refer to earlier vulnerability case law, also indicates that the references to vulnerability are not mere *dicta*. Below, the ways and contexts in which the adjudicative bodies have used vulnerability reasoning will be considered further to understand how a finding of vulnerability can affect outcomes and the reading of states' obligations.

To begin with, it should be noted that while it is generally held that special vulnerability does not create new human rights,<sup>92</sup> a finding of vulnerability is something that can affect the interpretation of the existing rights and the state obligations arising therefrom. In practice, vulnerability often is seen as something that increases the likelihood for human rights violations and as a factor that enhances the effect of such violations.<sup>93</sup>

In many vulnerability cases, a central question has been *whether the state has done enough to ensure that substantive equality is achieved*. While not expressly referring to vulnerability, this is explicitly stated, for example, by the African Commission, according to which 'real or substantive equality requires that groups who have suffered previous disadvantages or continue to suffer disadvantages within a state are entitled to some advantageous treatment'.<sup>94</sup> Often states are expected to have taken measures for special protection to enable

90 *Tarakhel v Switzerland* (n 86) para 99.

91 *MSS v Belgium and Greece* (n 28) para 251.

92 Eg U Brandl & P Czech 'General and specific vulnerability of protection-seekers in the EU: Is there an adequate response to their needs?' in Ippolito & Iglesias (n 13) 253.

93 Cf AR Chapman & B Carbonetti 'Human rights protections for vulnerable and disadvantaged groups: The contributions of the UN Committee on Economic, Social and Cultural Rights' (2011) 33 *Human Rights Quarterly* 724 ('when is vulnerability a cause and when it is an effect?').

94 Communication 328/06, *Front for the Liberation of the State of Cabinda v Republic of Angola*, ACHPR (5 November 2013) para 117.

the effective realisation of rights for the vulnerable individuals. For example, in *Doebbler v Sudan* the African Commission refers to the practical hurdles for refugees in Sudan to seize the available domestic remedies when deciding on the admissibility of the communication, and implies that special consideration is to be taken of the situation of such individuals.<sup>95</sup> Likewise, the African Court has submitted that indigenous peoples deserve special protection due to their vulnerability.<sup>96</sup> Special protection measures for vulnerable children, through integrated programmes, for example, are likewise highlighted by the African Children's Committee, noting, for example, that there is a 'more urgent responsibility to plan and provide for basic health service programmes' in relation to the 'most vulnerable' children who face a 'heightened risk' to their enjoyment of health due to the living conditions in informal settlements and slum areas.<sup>97</sup> In Europe, both the European Court and the European Social Committee have held that special measures for the benefit of members of a vulnerable group sometimes are necessary to ensure equal access to rights.<sup>98</sup> The European Court has referred to the need to attach 'special consideration' or to give 'special protection' to those identified as vulnerable.<sup>99</sup> The European Social Committee, on its behalf, has emphasised 'the imperative of achieving equal treatment by taking differences between individuals into account', that is, that special consideration should be given to the needs of vulnerable groups.<sup>100</sup> Regarding the severity of violations, the Social Committee has even found in *Centre on Housing Rights and Evictions (COHRE) v Italy* that vulnerability has an effect on establishing an aggravated violation where measures violating human rights are specifically targeting and affecting vulnerable groups, and where public authorities not only remain passive in ending such violence but also contribute to it.<sup>101</sup>

In practice, substantive equality is in the treaty praxis often pursued through identifying (*enhanced*) *positive state obligations*.<sup>102</sup> As Zimmerman notes, such positive obligations can be 'of both

95 *Doebbler v Sudan* (n 37) paras 116-117.

96 *African Commission on Human and Peoples Rights v Kenya* (n 17).

97 *IHRDA* (n 20) para 61. The Committee also states that '[i]n all the 10 occasions where the word "special" is used in the African Children's Charter, it is in the context of children who find themselves in disadvantaged and vulnerable situations'. See *Hansungule* (n 20) para 63.

98 Eg *Complaint 67/2011, Médecins du Monde – International v France*, ECSR (11 September 2012) para 132.

99 Eg *Chapman v the UK* (n 11) para 96; *MSS v Belgium and Greece* (n 28) para 251.

100 *Médecins du Monde* (n 98) para 40.

101 *COHRE v Italy* (n 30) para 76.

102 Eg *X and Y v The Netherlands* ECHR (26 March 1985) Ser A 91 paras 23-24 & 27; *Bevacqua and S v Bulgaria* (n 24) para 64. See further Peroni & Timmer (n 6) 1076-1079. On substantive equality, see further Fredman (n 8).

procedural and substantive nature, and include obligations to protect and fulfil', and may include administrative, factual or legislative measures to be taken.<sup>103</sup> For example, in a case involving domestic violence, the European Court has emphasised that '[c]hildren and other vulnerable individuals, in particular, are entitled to effective protection' and that 'the particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection' may entail positive obligations for states to protect individuals against violence from other private individuals.<sup>104</sup> Enhanced positive obligations incumbent on states in relation to safeguarding the rights of vulnerable individuals so that such rights are effectively and *de facto* available and accessible to them are raised also in the *MSS* case regarding asylum seekers. In this case the European Court considered that

the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs.<sup>105</sup>

Similarly, the European Social Committee has emphasised states' positive obligations to ensure effective exercise of rights to vulnerable groups, for example, in relation to the right to health<sup>106</sup> and housing or shelter.<sup>107</sup> The African Commission has also called for positive measures in the form of special treatment to enable mental health patients to 'not only attain but also sustain their optimum level of independence' and to enable them through positive measures to avail of their right to access to legal procedures.<sup>108</sup>

In certain cases the supervisory organs have explicitly held that states have positive obligations to take *legislative measures*, such as the adoption of criminalisation, to protect vulnerable groups.<sup>109</sup>

103 Zimmermann (n 3) 553. See also C Heri 'The responsiveness of a positive state – Vulnerability and positive obligations under the ECHR' *Strasbourg Observer* 13 October 2016, <https://strasbourgoobservers.com/2016/10/13/blog-seminar-on-positive-obligations-4-the-responsiveness-of-a-positive-state-vulnerability-and-positive-obligations-under-the-echr/> (accessed 25 February 2020).

104 *Bevacqua and S v Bulgaria* (n 24) paras 64-65.

105 *MSS v Belgium and Greece* (n 28) para 263.

106 *ERRC v Bulgaria* (n 30) para 45. See also Complaint 110/2014, *International Federation for Human Rights (FIDH) v Ireland*, ECSR (12 May 2017) para 140.

107 *FEANTSA v The Netherlands* (n 31) para 135. See also *EUROCEF v France* (n 35) paras 56-57.

108 *Purohit* (n 18) paras 52 & 81.

109 *Eg A and B v Croatia* ECHR (20 June 2019) App 7144/15 paras 111-112 ('the Court reiterates that in cases of sexual abuse children are particularly vulnerable ... In view of the above, the Court considers that States are required ... to enact provisions criminalising the sexual abuse of children and to apply them in

However, markedly, in some cases it is explicitly stated that legislative measures alone are not sufficient to address the situation of vulnerable individuals. The African Children's Committee, for example, notes in relation to sale, trafficking and abduction, and using children in the form of begging, that besides legislative measures, 'the State Party should also take *administrative and other appropriate measures* to ensure that children are not subjected to begging or trafficking', also with regard to protecting them from the acts of private individuals or non-state actors.<sup>110</sup> When a state is expected to adopt different types of measures or, otherwise, does so, it is significant that the European Court in several cases has underlined that a finding of particular vulnerability may narrow states' margin of appreciation, that is, their leeway in interpreting their obligations arising under the European Convention.<sup>111</sup> This has been the case especially in relation to cases involving discrimination of particularly vulnerable groups, such as the HIV positive. For example, in *Novruk & Others v Russia* the European Court stressed that '[i]f a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered significant discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for imposing the restrictions in question'.<sup>112</sup>

A finding of vulnerability may also give rise to special state obligations to carry out *impact assessments*. To this end, the African Children's Committee notes that '[i]n order to prevent violation of human rights, States must identify vulnerable groups prone to abuse and take special measures to prevent violence from occurring'.<sup>113</sup> The European Social Committee has also in a number of cases emphasised the special obligations incumbent on states to investigate the effects of planned or adopted state measures, for example, in relation to housing<sup>114</sup> and austerity measures,<sup>115</sup> on the 'most vulnerable'. In this regard, it has stressed that 'the rights recognised in the Charter must take a concrete and effective, rather than purely theoretical, form',

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practice through effective investigation and prosecution'); *Zehentner v Austria* (n 25) para 63.

110 *Centre for Human Rights* (n 20) para 80 (our emphasis).

111 *Peroni & Timmer* (n 6) 1080.

112 *Novruk & Others v Russia* ECHR (15 March 2016) App 31039/11 para 100.

113 *Institute for Human Rights and Development in Africa* (n 20) para 47. Also see para 73.

114 Eg Complaint 33/2006, *International Movement ATD Fourth World v France*, ECSR (5 December 2007) paras 60 & 67; *FEANTSA v The Netherlands* (n 31) para 111; Complaint 100/2013, *European Roma Rights Centre (ERRC) v Ireland*, ECSR (1 December 2015) para 59.

115 *IKA-ETAM v Greece* (n 33) para 79. Similarly, *ISAP v Greece* (n 33) para 74; Complaint 79/2012, *Panhellenic Federation of pensioners of the Public Electricity Corporation (POS-DEI) v Greece*, ECSR (7 December 2012) paras 76-77; Complaint 111/2014, *Greek General Confederation of Labour (GSEE) v Greece*, ECSR (23 March 2017) para 90.

which, among other thing, means that the state parties must 'pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable'.<sup>116</sup> Relatedly, with a view to an obligation on states to conduct impact assessment on the effect of policies on vulnerable individuals, the African Commission notes with regard to sanctions that the legitimacy of such action depends on 'whether such action as has been determined is excessive and disproportionate, is indiscriminate and seeks to achieve ends beyond the legitimate purpose'. This is why the effects of sanctions 'must be carefully monitored' and the 'measures must be adopted to meet the basic needs of the most vulnerable populations'.<sup>117</sup> Noticeably, in assessing such impact, hearing the affected vulnerable individuals can be essential, as the European Court notes in *Stanev v Bulgaria*: 'Failure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of vulnerable persons. Therefore, any measure taken without prior consultation of the interested person will as a rule require careful scrutiny'.<sup>118</sup> In assessing risks and to prevent the abuse of rights, to thereby effectively address vulnerabilities, the identification of vulnerable individuals, of course, is key, as the African Children's Committee has repeatedly noted.<sup>119</sup>

## 5 Concluding remarks

Above it was outlined how the concept of vulnerability has been used in regional human rights reasoning and how a finding of vulnerability in different ways can affect the outcome of cases. Whether the increased use of vulnerability reasoning in case law signifies a 'revolution',<sup>120</sup> a 'paradigm'<sup>121</sup> or, for example, a novel 'doctrine', as suggested by some authors, especially when discussing the European developments, however, is questionable.<sup>122</sup> One should bear in mind that the adoption of special measures of protection and/or of affirmative action to ensure substantive equality is not new to human rights law – the various special or thematic human rights conventions testify to this.<sup>123</sup> Furthermore, as noted above in relation

116 *FEANTSA v France* (n 87) para 54; Complaint 104/2014, *European Roma and Travellers Forum (ERTF) v the Czech Republic*, ECSR (17 May 2016) para 72.

117 *Association pour la Sauvegarde de la Paix au Burundi* (n 18) para 75.

118 *Stanev v Bulgaria* ECHR (17 January 2012) App 36760/06 para 153.

119 Eg *Institute for Human Rights and Development in Africa* (n 20) para 47; *Nko'o v Cameroon* (n 20) para 47.

120 A Timmer 'A quiet revolution: Vulnerability in the European Court of Human Rights' in Albertson Fineman & Grear (n 13) 147.

121 Nifosi-Sutton (n 3) 243.

122 Cf O'Boyle who finds it inaccurate to speak of a vulnerability doctrine (n 14) 2.

123 Eg Convention on the Elimination of All Forms of Discrimination Against Women (1979); Convention on the Rights of the Child (1989); and Convention on the

to the European Court, there are cases where vulnerability reasoning has not been used by the Court despite a close similarity to cases where such reasoning has played a major role. A corresponding overall finding of a sporadic usage of the vulnerability reasoning also holds true for the African human rights bodies.<sup>124</sup> The reasons for not engaging in vulnerability reasoning are not known but may vary from political sensitivity to more practical issues, such as that the parties to the case have not advanced vulnerability arguments. It may also very well be that the monitoring bodies are still searching for the proper role that vulnerability should have in their reasoning. As such, it seems too early to speak of a full vulnerability doctrine that would coherently inform the interpretation of rights by the supervisory organs.<sup>125</sup> This finding finds a basis also in the fact that the uses of the vulnerability argumentation within and across the treaty body organs still appears characterised by a certain level of inconsistency, both in terms of definitions and functions.

That being said, the amount of cases in which vulnerability reasoning has been used is significant enough to merit attention and to discern certain patterns. Generally, it appears that where a finding of vulnerability is made, such a finding often has legal implications. As such, it may be argued that vulnerability today is a factor that can affect outcomes of decisions by treaty-monitoring bodies and which can be used to widen and deepen the scope of measures of special protection. To further understand the role of vulnerability as a factor in the interpretation of rights, one needs to go back to the definitions of vulnerability in the treaty body praxis. From the above analysis, it is evident that the investigated supervisory organs operate with different degrees of vulnerability often based on a sliding scale assessment of the different degrees of 'enhanced' or 'particular' vulnerabilities arising from both inherent and situational sources that may fluctuate over time and between different contexts, and which often have an impact on the level and scope of states' obligations. In this sense, vulnerability may be seen as a *variable*, a factor that is liable to vary and change, and which affects the interpretation of the different legal doctrines, such as the state's margin of appreciation and the rule of effectiveness, in each specific context. Based on the analysed treaty body praxis, it is clear that the vulnerability considerations do not outplay, or in any way replace,

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Rights of Persons with Disabilities (2006).

124 Eg Nifosi-Sutton (n 3) 174 176 182.

125 It should, however, be noted that also established doctrines, such as the doctrine of the margin of appreciation before the European Court, have been criticised for being incoherently applied. Eg J Gerhards 'Margin of appreciation and incrementalism in the case law of the European Court of Human Rights' (2018) 18 *Human Rights Law Review* 501 ff.

such established doctrines and principles,<sup>126</sup> rather informing their interpretation often with the explicit aim of ensuring the effective realisation of rights. This can happen through, for example, limiting the leeway available to the states under their margin of appreciation, as seen above, or through highlighting a certain positive obligation that is seen as instrumental for the effective realisation of the object and purpose of a human rights treaty in a given context.

The variability inherent in the use of the vulnerability concept, coupled with the fact that the vulnerability reasoning lacks an explicit basis in regional treaty law, is not necessarily entirely unproblematic. When developing the vulnerability reasoning further, certain drawbacks of the vulnerability language should, therefore, not be overlooked. As noted, vulnerability as a concept comes with a risk of stigmatisation of those characterised as vulnerable, and of their agency and individual circumstances being overlooked. In addition, it is important to recognise that while such argumentation so far appears to have been used to ensure *enhanced* protection of universal rights for vulnerable individuals, it can also work as a particularising tool in another way. The ‘potential to prioritize’<sup>127</sup> that accompanies the concept of vulnerability may be used for different purposes, as a tool for *selective* protection, for example, in situations where the general level of human rights protection is cut down. Is there a risk that one in the future needs to be recognised as ‘extremely’ vulnerable in order to receive full human rights protection?<sup>128</sup> This is a valid question to ask, given that the case law of the two regional human rights systems indicates that vulnerability functions on a sort of a sliding scale basis, with extreme or particular vulnerability giving rise to a more stringent level of enhanced obligations. It should, therefore, be acknowledged that instead of functioning as a ‘magnifying glass’<sup>129</sup> drawing our attention to the specific positive measures that need to be taken for all individuals to be able to enjoy their human rights at an equal level, the concept may also lend itself to be used as a ‘spotlight’ that directs the attention to certain types of vulnerabilities or violations only. A certain level of caution not

126 Among the vulnerability cases, there are also cases that have been decided against the applicants who have been identified as vulnerable. In this regard O’Boyle has pointed out that ‘[t]he mere fact of belonging to a vulnerable group does not necessarily trump other important factors in a case such as the requirements to exhaust remedies or other admissibility rules or the margin of appreciation’. O’Boyle (n 14) 9.

127 A Timmer ‘A quiet revolution: Vulnerability in the European Court of Human Rights’ in Albertson Fineman & Gear (n 13) 163.

128 Cf Tazzioli who argues that in the context of migration one can discern a trend of ‘governance through vulnerability’, where protection presupposes a vulnerability finding. M Tazzioli *The making of migration: The biopolitics of mobility at Europe’s borders* (2020) 52-53.

129 Peroni & Timmer (n 6) 1079.

to take the objectivity of the concept of vulnerability at face value, therefore, may be necessary in assessing vulnerability as a variable in the interpretation of human rights.

That having been said, the open-endedness of vulnerability as a variable may at the same time be one of its strengths.<sup>130</sup> As an additional tool for special protection, the notion of vulnerability allows the treaty body organs the possibility to 'show particular vigilance' when assessing the interests and needs of individuals, whose situation requires such special consideration,<sup>131</sup> sometimes beyond the scope of the special protection regimes. As such, vulnerability reasoning may be seen as an important yardstick against which to assess and measure the effectiveness and proportionality of different measures and policies from the perspective of the realisation of human rights for all.

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<sup>130</sup> However, as noted by Spielmann regarding the margin of appreciation, judge-made doctrines can only be 'predictable to a certain degree' and that is 'the nature of the beast' to have a certain vagueness that allows sensitivity to the 'legal and factual context of each case'. D Spielmann 'Whither the margin of appreciation' UCL – Current Legal Problems lecture 20 March 2014 6, [https://www.echr.coe.int/Documents/Speech\\_20140320\\_London\\_ENG.pdf](https://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf) (accessed 25 February 2020). See also O'Boyle (n 14) 2 10.

<sup>131</sup> Cf *VD & Others v Russia* ECHR (9 April 2019) App 72931/10 para 115.

## Standing to litigate in the public interest in Lesotho: The case for a liberal approach

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**Summary:** *In Lesotho, standing to litigate is still based on the private law doctrine of locus standi in judicio. This doctrine requires the person who institutes an action in a court of law, regardless of whether it is in the private or public interest, to satisfy the court that he or she is directly and substantially interested in the outcome of the decision. Section 22(1) of the Constitution of Lesotho provides that any person who alleges that the Bill of Rights in the Constitution has been violated 'in relation to him' may approach the court of law for redress. Although the Constitution is silent about the enforcement of the other non-Bill of Rights parts of the Constitution, the courts have readily invoked section 22(1) to exclude litigants who are not 'directly and substantially' interested in the outcome of the case. This restrictive approach notwithstanding, a more liberal approach has been adopted in pockets of public law decisions of the superior courts in Lesotho. The purpose of this article is to amplify this liberal approach. The article argues that constitutional democracy in Lesotho will benefit from a liberal approach as opposed to a restrictive approach to standing. This is supported by a discernible movement in modern-day public law towards a more liberal approach to standing.*

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## 1 Introduction

In 1993 Lesotho adopted a new Constitution and ushered in a new constitutional order, thereby supposedly breaking the chain of authoritarian rule and military juntas that had characterised Lesotho's constitutional development since the constitutional breakdown of 1970.<sup>1</sup> Given the history of constitutionalism in the country – which is peppered with constitutional breakdowns, violations of human rights and persistent political instability – the new constitutional dispensation was expected to be more liberal and more tolerant of diversity.<sup>2</sup> In other words, in 1993 the Lesotho judiciary was expected to move with 'a rapid oscillation'<sup>3</sup> from the old traditions to its new judicial role and approach that would involve recognising and applying constitutional values in all litigation.<sup>4</sup> On the contrary, for nearly three decades since 1993 Lesotho's superior courts have 'stood in trial' over the standing of individuals or voluntary organisations seeking to litigate in the public interest, in general, and on constitutional questions, in particular,<sup>5</sup> the courts have unconscionably preferred the restrictive approach to standing. To a great extent, and much to the chagrin of modern-day constitutionalism, this restrictive approach to standing is inspired by the Constitution itself. Section 22(1) of the Constitution provides that any person who alleges that the Bill of Rights in the Constitution

1 See M Khaketla *Lesotho 1970: An African coup under the microscope* (1972); WJA Macartney 'The Lesotho general election of 1970' (1973) 8 *Government and Opposition* 485; TH Mothibe 'Lesotho: The rise and fall of military-monarchy power-sharing 1986-1990' (1990) 20 *Africa Insight* 242.

2 V Shale 'Political parties and instability in Lesotho' in M Thabane (ed) *Towards an anatomy of political instability in Lesotho 1966-2016* (2017); K Matlosa & NW Pule 'The military in Lesotho' (2001) 10 *African Security Review* 62-74; H Nyane 'Development of constitutional democracy: 20 years of the Constitution of Lesotho' (2014) 21 *Lesotho Law Journal* 59.

3 *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (B) 243-245; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 2000 (2) SA 1 (CC) para 82; E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

4 M Cappelletti *The judicial process in comparative perspective* (1989) 236.

5 For the notion of how a court sitting at trial is also standing trial, see A Barak 'Justice Matthew O Tobriner memorial lecture: The role of a Supreme Court in a democracy' (2001-2002) 53 *Hastings Law Journal* 1216. He states: 'I see my role as a judge as a mission. Judging is not merely a job. It is a way of life. An old Jewish Talmudic saying regarding judges is the following: "You would think that I am granting you power? It is slavery that I am imposing upon you." But it is an odd sort of slavery, where the purpose is to serve liberty, dignity and justice. Liberty to the spirit of the human being; dignity and equality to everyone; justice to the individual and to the community. This is the promise which accompanies me to the courtroom daily. As I sit at trial, I stand on trial.'

has been violated 'in relation to him' may approach a court of law for redress.<sup>6</sup> Although the Constitution is silent about standing in the enforcement of other parts of the Constitution,<sup>7</sup> the courts have readily invoked section 22(1) to exclude litigants who are not 'directly and substantially' affected by the case being brought before the court.<sup>8</sup> This restrictive approach notwithstanding, a fairly liberal approach has been preferred in pockets of public law decisions of the Lesotho courts.<sup>9</sup>

Section 22(1) of the Constitution codifies the common law normative position on the rules of standing.<sup>10</sup> Ironically, this has made it possible for an individual in his or her private capacity – who under common law was limited to raising private law-based questions regarding the violation of his or her private law rights or interests – to bring public law issues (constitutional questions) before a court of law. The enforcement of the Constitution, in general, and the Bill of Rights, in particular, is a matter for public law since it

6 See sec 22(1) of the Constitution of Lesotho 1993.

7 In other parts of the Constitution it can be inferred that the Constitution is wedded to the restrictive approach to standing. Eg, sec 45(5) provides that '[w]here any person has been designated to succeed to the office of King in pursuance of subsection (1) or (2), any other person who claims that, under the customary law of Lesotho, he should have been so designated in place of that person may, by application made to the High Court within a period of six months commencing with the day on which the designation was published in the Gazette, apply to have the designation varied by the substitution of his own name for that of the first mentioned person, but, save as provided in this Chapter, the designation of any person for the purposes of this section shall not otherwise be called in question in any court on the ground that, under the customary law of Lesotho, the person designated was not entitled to be so designated' (our emphasis).

8 *Mosito v Letsika* (C OF A (CIV) 9/2018) [2018] LSCA 1 (26 October 2018). See also *Justice Maseshophe Hlajoane v Letsika* (C OF A (CIV) 66/2018) [2019] LSCA 27 (1 February 2019) para 57, where the Court stated: 'The law on *locus standi* in this country does not permit any constitutional litigation outside section 22(1) of the Constitution. In this case the respondent had no sufficient interest to pursue litigation pursuant to section 125 of the Constitution.'

9 *Lesotho Police Staff Association (LEPOSA) v Commissioner of Police* [2018] LSHC 13 (15 March 2018); *Mokhothu v Speaker of the National Assembly* (Constitutional Case 20/2017) 2017 LHC 20 (21 February 2018). In some instances the courts have proceeded to hear the merits of the case of an applicant who would ordinarily not have standing to litigate. See, eg, *Khathang Tema Baitsukuli v Maseru City Council* (C OF A (CIV) 4/2005); *Mofomobe & Another v Minister of Finance & Another*; *Phoofolo KC & Another v The RT Hon Prime Minister & Others* (C OF A (CIV) 15/2017 CONST./7/2017 C OF A (CIV) 17/2017) [2017] LSCA 8 (12 May 2017).

10 L Chiduzwa & PN Makiwane 'Strengthening *locus standi* in human rights litigation in Zimbabwe: An analysis of the provisions in the new Zimbabwean Constitution' (2016) 19 *Potchefstroomse Elektroniese Regsblad* 1. Referring to the same provision under the 1980 Constitution of Zimbabwe, the authors correctly observe that 'the *Lancaster House Constitution* adopted the traditional common law approach to standing. Under this approach it was required that an individual must have a "personal, direct or substantial interest" in a matter in order to have standing' (2).

affects the public interest or collective interest of a large number of persons.<sup>11</sup>

The purpose of this article is to amplify the liberal approach that is already being preferred in some decisions of superior courts in Lesotho. The article contends that constitutional democracy in Lesotho will benefit from a liberal approach as opposed to a restrictive approach to standing. Modern-day public law has moved towards a more liberal approach to standing. As the Trinidad and Tobago Court of Appeal stated in *Dumas v Attorney General of Trinidad and Tobago*:<sup>12</sup>

[T]he issue of standing in relation to the vindication of the rule of law, where there is alleged constitutional default, assumes great significance given the constitutional ethic of civic republicanism – that emphasises the responsibility, even duty, of citizens to participate in creating and sustaining a vibrant democracy and in particular in upholding the rule of law.

The Court asked the pertinent question, which this article seeks to investigate further in relation to Lesotho, whether it is right that

a person with an otherwise meritorious challenge to the validity or *vires* of the exercise of a constitutional power [can] ... be turned away by the gatekeepers of the courts on the basis that his rights or interests are not sufficiently and directly affected by the impugned decision.<sup>13</sup>

The article comprises three parts. The first revisits the evolution of the doctrine of *locus standi* and its application in Lesotho. The second discusses the emergence of a liberal approach to standing in public law litigation and faint signs of this approach in Lesotho. The third examines the benefits of a liberal approach to standing and how it can be applied in Lesotho under the current constitutional framework. The article concludes by recommending both interpretive and reformist changes in Lesotho.

11 P Bowal 'Speaking up for others: *Locus standi* and representative bodies' (1994) 35 *Les Cahiers de Droit* 908.

12 *Dumas v Attorney-General of Trinidad and Tobago* Civil Appeal P 218 of 2014 para 43 (*Dumas*) Trinidad and Tobago Court of Appeal decision (22 December 2014), [http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2014/jamadar/CvA\\_14\\_P218DD22dec2014.pdf](http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2014/jamadar/CvA_14_P218DD22dec2014.pdf) (accessed 10 April 2020) (confirmed by the Privy Council in *Attorney General v Dumas* [2017] UKPC 12).

13 In attempting to answer this question, the Court stated at para 48: 'To answer this question affirmatively, would be to assume that the primary function of the public law court's jurisdiction is to redress individual or specific grievances, and not general grievances concerned with the maintenance of the rule of law in a democracy. And also, that the primary focus of public law is to address individual rights and not public wrongs arising out of constitutional duty and responsibility.'

## 2 Evolution of the common-law doctrine of *locus standi*

The doctrine of *locus standi* is central to litigation in general. It relates to whether a person has capacity or standing to launch legal proceedings.<sup>14</sup> It often is differentiated from the claim or the right to be adjudicated upon. Questions related to *locus standi* often are procedural and preliminary: They are determined before the claims or the rights in question.<sup>15</sup> *Locus standi* is a doctrine of great antiquity the genesis of which may be traced back to the 'common law of the *laissez faire* dominated England',<sup>16</sup> during an era 'when private law dominated the legal scene and public law had not yet been born'.<sup>17</sup> At the time, the king exercised the legislative, executive and judicial functions of the state, and the king's subjects were left free to conduct all their activities, provided they obeyed the law. Any disputes between subjects were based on private law and to a large degree were regulated by 'privity of contract'. The *laissez faire* principle was inviolable and the king interfered in the private space only in extremely limited circumstances. To have access to the king's court, it was necessary for a private actor to establish an injury or threat of injury to his body, mind, property or reputation arising from the violation of these legally-protected interests,<sup>18</sup> and to show that he qualified as a 'person aggrieved'.<sup>19</sup> As access to court was conditional on a violation of or threat to personal rights and interests, the judicial remedy, in turn, was predicated on the proof of the violation of or threat to those rights and interests; hence the phrase *ubi jus ibi remedium*.<sup>20</sup> In terms of this corrective justice paradigm, the courts' intervention on behalf of a plaintiff was predicated on the wrongdoer-victim and wrong-relief correlativity. The courts' focus, on this baseline, was on the immediate relationships of the parties as

14 Herbstein & Van Winsen *The civil practice of the Supreme Court of South Africa* (1997); *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council* 2002 (6) SA 66 (T).

15 In *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 3 BCLR 251 (CC) para 34 the Constitutional Court of South Africa said the following about standing: '[A]n own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge: A successful challenge to a public decision can be brought only if "the right remedy is sought by the right person in the right proceedings"'.<sup>19</sup>

16 KS Mohan 'Public interest litigation and *locus standi*' (1984) *Cochin University Law Review* 527.

17 *SP Gupta v Union of India* 1982 AIR 149 para 18.

18 *Gupta* (n 17) para 14.

19 *Re Sidebotham, Ex parte Sidebotham* 28 WR 715 (CA); *In re Reed, Bowen & Co Ex parte Official Receiver* 19 QBD 174.

20 Literally, where there is a right, there is a remedy. See TA Thomas 'Ubi jus ibi remedium: The fundamental right to a remedy under due process' (2004) 41 *San Diego Law Review* 1633.

opposed to the parties' relationship in the wider context of society and the factoring of the societal concerns and considerations in the decision itself.<sup>21</sup>

With the advent of democratic governance and the growing welfare state, state power began to shift from the king to representatives of the electorate and to institutions of governance exercising statutory powers.<sup>22</sup> Public law space also developed but was separated from the already-existing private space by the classical liberal theory of the public-private distinction,<sup>23</sup> thus creating a public-private dichotomy – 'a separation between the state area where political prerogatives prevail, and the private sphere where autonomous persons interact according to their own preferences'.<sup>24</sup>

In this setting, the private rights and interests of the citizens nonetheless were infringed by the state actors, posing a challenge as to who may question the legality or otherwise thereof before the court. As the exercise of statutory authority clearly was within the public space based on the traditional public-private categorisation, the common law courts had to create a window for private actors to meet the challenge, in the interests of justice and in order to place the state functionaries within the limits set by law. The courts, therefore, granted standing only to persons adversely affected by wrongful and unlawful state-backed law or conduct (aggrieved persons)<sup>25</sup> to mount such a challenge.<sup>26</sup> Yet another challenge arose where state action affected the general public interest with no clear private actor personally adversely affected. In these cases, only the Attorney-General had the legal authority and standing to protect

21 D Nolan & A Robertson 'Rights and private law' in D Nolan & A Robertson (eds) *Rights and private law* (2012) 23-24. Cane states that according to corrective justice, private law is concerned with the protection and promotion of the value of human autonomy rather than other human values such as community and solidarity. See P Cane 'Rights in private law' in D Nolan & A Robertson (eds) *Rights and Private Law* (2012) 56. See also *Ferreira v Levin* 1996 (1) SA 984 (CC) para 229: '[A]s a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous.'

22 Mohan (n 16) 527.

23 ST Maqakachane 'Horizontal application of the Bill of Rights: Comparative perspective' (2018) 26 *Lesotho Law Journal* 1.

24 N Reich 'The public/private divide in European law' in HW Micklitz & F Cafagis (eds) *European private law after the common frame of reference* (2010) 56.

25 *Re Sidebotham* (n 19); *In re Reed* (n 19).

26 Mohan (n 16) 527.

and enforce public rights (public interest).<sup>27</sup> Consequently, the Court held that

private rights can be asserted by individuals but ... public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the crown and the Attorney-General enforces them as an officer of the crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights so in general no private person has the right of representing the public in the assertion of public rights.<sup>28</sup>

From the above it is clear that the rules of standing, as Bowal puts it, are 'a common law construct'<sup>29</sup> as they have been developed by the judiciary itself to meet the particular circumstances. The purpose of creating and developing rules of standing by the common law courts was 'to limit access to the courts in public law matters'.<sup>30</sup> The rules are employed by the courts as time-management tools to maximise the judiciary's limited resources, a self-defence mechanism designed to preserve and maintain the legitimacy of the courts as an apolitical professional institution<sup>31</sup> and a self-restraint measure.<sup>32</sup> The courts recognise that 'limitations on standing are necessary; not everyone who may want to litigate an issue, regardless of whether it affects them or not, should be entitled to do so'.<sup>33</sup>

The rationale for these limitations on standing include judicial concern about the proliferation of marginal or redundant suits, called 'opening the floodgates of litigation', which overburden limited judicial resources; judicial concern about excluding 'busybodies' and meddlesome interlopers so that only litigants with a personal stake in the outcome of the case get priority in the allocation of judicial resources; and the need for courts, in an adversarial system of adjudication, to have the benefit of contending points of view of the

27 *Gouriet v Union of Post Office Workers* [1978] AC 435; *Attorney-General Ex re McWhirter v Independent Broadcasting Authority* [1973] QB 629; *Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] QB 118; T Longwill 'Standing in environmental interest suits' (1987) *Queensland Institute of Technology Law Journal* 77.

28 *Gouriet* (n 27) 477-478.

29 Bowal (n 11) 908.

30 R Weill 'The strategic common law court of Aharon Barak and its aftermath: On judicially-led constitutional revolutions and democratic backsliding' (2020) 12, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3296578](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3296578) (accessed 8 April 2020).

31 NW Barber 'Self-defence for institutions' (2013) 72 *Cambridge Law Journal* 558-577. See also Weill (n 30) 12.

32 DL Haskett '*Locus standi* and the public interest' (1981) 4 *Canada-United States Law Journal* 40.

33 *Attorney-General v Downtown Eastside Sex Workers United Against Violence Society* [2012] 2 SCR 524 para 23 (*Downtown*).

persons most directly affected by the issue (concrete adversaries).<sup>34</sup> To different degrees across the common law jurisdictions, however, the common law family courts had to grapple with these limitations in an effort to strike a delicate balance between allowing access to justice and scarce judicial resources,<sup>35</sup> taking into account the circumstances peculiar to their specific jurisdictions. The basic premise underlying the rules of standing running through these jurisdictions was the need to balance two conflicting public interests, namely, 'the desirability of encouraging individual citizens to participate actively in the enforcement of the law and the undesirability to discourage the professional litigant and the meddlesome interloper to invoke the jurisdiction of the court in matters that do not concern them'.<sup>36</sup>

Lesotho is no exception in having to deal with this dilemma. The next part analyses how the judiciary in Lesotho is addressing the issue.

### 3 Constitutional framework and judicial approach in Lesotho

The Constitution of Lesotho has no express provisions on standing to litigate on constitutional questions that do not fall within the Bill of Rights. It provides, instead, in section 22(1):

If any person alleges that any of the provisions of sections 4 to 21 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

This section is based on the common law position on standing. Under Roman-Dutch law, on which the common law of Lesotho is based,<sup>37</sup> a private actor must establish a substantial legal interest which is being or is likely to be violated, except in cases where a person was detained, in which case a relative or friend would be granted standing to apply or institute the claim on the latter's

34 *Downtown* (n 33) paras 25-29. See also *Finlay v Canada (Minister of Finance)* [1986] 2 SCR 607 631-634 (*Finlay*).

35 *Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 236 243 252 (*Canadian Council of Churches*).

36 H Woolf et al *De Smith's judicial review* (2007) 69-70. See also *Downtown* (n 33) para 23.

37 JE Beardsley 'The common law in Lesotho' (1970) 14 *Journal of African Law* 198; SM Poulter 'The judicial system of Lesotho' (1970) 3 *Comparative and International Law Journal of Southern Africa* 63; S Poulter 'The common law in Lesotho' (1969) 13 *Journal of African Law* 127.

behalf.<sup>38</sup> It is clear that this is ‘personal injury, or personal damage standing’ accorded to the persons personally affected by the impugned measure. The test for standing under the common law clearly is pedantic and restrictive in its formulation and application. This common law position on personal injury standing became part of the common law of Lesotho.<sup>39</sup>

The Lesotho courts generally are loath to liberalise rules of standing in public law.<sup>40</sup> This trajectory started with *Lesotho Human Rights Alert Group*.<sup>41</sup> In this case a voluntary association sought the release of certain prisoners who, it was alleged, had been unlawfully detained. Both the High Court and the Court of Appeal agreed that the applicant organisation lacked standing. In delivering the unanimous judgment of the Court of Appeal, Tebbutt AJA stated:

To extend to a body such as the applicant, the right to bring actions on behalf of persons unconnected with it and who have no link direct or indirect with it would, however, in my view, in law be extending the exceptional relaxation of the general rule to the liberty of an individual beyond what was intended in regard to such matters in *Wood’s* case. It would be akin to a revival of the ‘*actio popularis*’ which, as I have said, has been no part of our law for over four centuries.

However, the Court of Appeal, despite it adopting a restrictive approach to standing, reaffirmed that there are certain exceptions to the *locus standi* doctrine in Roman Dutch law. The Court held that standing may be granted to a private litigant who is not personally affected, in an *interdictum de libero homine exhibendo*.<sup>42</sup> This is an application for the release of another person who has been

38 Woolf et al (n 36) 69-70.

39 *Lesotho Human Rights Alert Group v Minister of Justice and Human Rights* LAC (1990-1994) 652.

40 In *Hlajoane v Letsika* (n 8) para 33 the Court of Appeal reaffirmed its stern approach that opposes the liberalising stand, which has been repeated in successive cases thus: ‘In my view, the issue of *locus standi* was put to bed and it need not be repeated. The view that I take is that following our decisions in *Mofomobe* and *Mosito*, the respondents had no *locus standi* and the Court below ought not to have entertained the application. Technically, that disposes of the second ground of appeal.’

41 *Lesotho Human Rights Alert Group* (n 39).

42 As above. The Court held: ‘In an application *de libero homine exhibendo*, however, which is part of the Roman-Dutch Law, the South African courts have held that, where the liberty of a person is at stake, the *locus standi* of a person who brings an application or action on behalf of a detained person should not be narrowly construed but, on the contrary, should be widely construed because the illegal deprivation of liberty is a threat to the very foundation of a society based on law and order (see *Wood v Odangwa Tribal Authority* 1975 (2) SA 294 (AD) 310F-G)). Persons other than the detainee could thus bring an action for his release on the detainee’s behalf.’

unjustly detained.<sup>43</sup> Standing could also be granted in exceptional circumstances justified by humanitarian considerations.<sup>44</sup>

The superior courts exhibited their restrictive approach to standing in public law in *Khauoe v Attorney-General*.<sup>45</sup> In this case an individual attorney challenged an irregular succession to the office of King.<sup>46</sup> Although the Court accepted that the question he was raising was 'paramount', it dismissed the case on the basis that he had no *locus standi*. The Court reasoned that '[a] person who wants to institute an action must only sue on his own behalf. The right or interest which he seeks to enforce or to protect must be available to him personally'.<sup>47</sup> The Court of Appeal has maintained its restrictive approach in later cases.<sup>48</sup> Its most recent decision on standing, *Hlajoane v Letsika*,<sup>49</sup> may be regarded as the current position of the courts on standing in public law.

Despite the narrow approach of the Court of Appeal, the High Court in a number of cases has adopted a liberal approach to standing.<sup>50</sup> In *Development for Peace Education v Speaker of the National Assembly*<sup>51</sup> two non-governmental organisations (NGOs) challenged the validity of an Act of Parliament on the ground, among others, that they were denied participation in the enactment process, which contravened section 20 of the Constitution. The Court agreed that, in terms of section 20, every citizen has a right to participate in government,<sup>52</sup> which includes the right to vindicate this right in the courts of law,

43 Wood (n 42). This action was comparable to the English *habeas corpus*. See JA van der Vyver 'Actiones populares and the problem of standing under Roman, Roman-Dutch, South African and American law' (1978) *Acta Juridica* 193.

44 Van der Vyver (n 43) 197.

45 *Khauoe v Attorney-General* (CIV/APN/53/95) [1995] LSHC 100 (12 September 1995), <https://lesotholii.org/ls/judgment/high-court/1995/100> (accessed 10 April 2020).

46 The applicant, Khauoe, applied to the High Court for a declaration of invalidity of the Office of the King (Reinstatement of Former King) Act 1994. The Act sought to reinstate King Moshoeshoe II who, in 1992, had been dethroned and exiled by the Military Council, and at the same time to enthrone his son, Mohato Seeiso, who became King Letsie III, in the former's absence.

47 *Khauoe* (n 45).

48 *Hlajoane v Letsika* (n 8); *Mosito v Letsika* (n 8); *Mofomobe* (n 9).

49 *Hlajoane v Letsika* (n 8).

50 In terms of the Constitution of Lesotho, the Court of Appeal is the apex court while the High Court is the second highest court in the court structure. See sec 118 of the Constitution of Lesotho 1993.

51 *Development for Peace Education v Speaker of the National Assembly Constitutional Case 5/2016* (unreported).

52 Sec 20 of the Constitution of Lesotho provides: '(1) Every citizen of Lesotho shall enjoy the right – (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote or to stand for election at periodic elections under this Constitution under a system of universal and equal suffrage and secret ballot; (c) to have access, on general terms of equality, to the public service. (2) The rights referred to in subsection (1) shall be subject to the other provisions of this Constitution.'

both individually and collectively. The High Court, sitting as the Constitutional Court, agreed and reasoned that

for purposes of this judgment, we assume that the applicants truly have *locus standi* not so much as juristic persons but ‘as a collective or associations of citizens of Lesotho’ whose principal aim is to ensure peace, human rights and democratic governance, and that every citizen, either individually or collectively, has a fundamental right under *section 20* of the Constitution of Lesotho to take part in the conduct of public affairs of Lesotho.<sup>53</sup>

In *Lesotho Police Staff Association (LEPOSA) v Commissioner of Police*<sup>54</sup> the High Court permitted the police association to litigate in a case where it was challenging promotions in the police service that allegedly were unlawful. The Court rejected the procedural point of the association’s lack of *locus standi* on the basis of the principle of legality.<sup>55</sup> In *Mokhothu v Speaker of National Assembly*<sup>56</sup> two opposition political parties in Parliament – the Democratic Congress (DC) and the Popular Front for Democracy (PFD) – had joined an application by the first applicant, the official leader of the opposition. They were challenging the decision of the Speaker of the National Assembly to deprive the first applicant of his status and benefits as the official leader of the opposition. The standing of the two political parties was challenged. The High Court, sitting as the Constitutional Court, dismissed the challenge to the standing of the political parties on the basis that ‘political parties are not just vehicles for electioneering and conveyor belts to parliament. They are legal *personae* with rights and responsibilities in the constitutional and statutory scheme of things’.<sup>57</sup>

In its most recent decision in *All Basotho Convention v The Prime Minister*<sup>58</sup> the High Court prevaricated on the question of standing. In this case the All Basotho Convention (ABC) and the Basotho National Party (BNP), the two political parties in the governing coalition, and

53 *Development for Peace Education* (n 51) para 39 (emphasis in original).

54 *Lesotho Police Staff Association* (n 9).

55 H Nyane ‘The state of administrative justice in Lesotho’ in H Corder & J Mavedzenge (eds) *Pursuing good governance: Administrative justice in common law Africa* (2019) 1.

56 *Mokhothu* (n 9).

57 *Mokhothu* para 20. The approach of treating a juristic person as having standing to litigate on public law, in general, and human rights law, in particular, was settled by the South African Constitutional Court in *Certification of the Constitution of the Republic of South Africa 1996* (4) SA 744 (CC) para 57 as follows: ‘It was argued that “everyone” in CP II refers only to natural persons, and that, by extending the rights to juristic persons, the rights of natural persons are thereby diminished. We cannot accept the premise: Many “universally accepted fundamental rights” will be fully recognised only if afforded to juristic persons as well as natural persons.’

58 Constitutional Case 6 of 2020 (not yet reported).

the Democratic Congress (DC), which is an official opposition party in Parliament, challenged the unilateral prorogation of Parliament by the Prime Minister. The standing of the three political parties was challenged on the basis that their interest was 'political rather than legal'. The Court, rather strangely, accepted the capacity of the two political parties in government and rejected that of the party in opposition.<sup>59</sup> The Court justified its seemingly selective approach to standing by stating that the coalition agreement, in terms of which the government had been formed, placed an obligation on the Prime Minister to consult coalition partners. The Court stated:<sup>60</sup>

The Court is of the view that construed this way, the cause of action raises a novel but important constitutional complaint. The complaint is not of mere academic interest. Viewed objectively, it has implications for the stability and smooth operation of coalition governments which voters have a huge interest in. For this reason, the Court accepts that the political parties have *locus standi*.

As indicated earlier, these decisions are faint signs of the High Court, both in its ordinary jurisdiction and constitutional jurisdiction, trying to adopt a more liberal approach to standing. However, pockets of decisions from the High Court remain that still demonstrate that the High Court is not completely out of the entrapment of the restrictive approach to standing. For instance, in the case of *David Mochochoko v The Prime Minister & Others*<sup>61</sup> the High Court denied a taxpayer standing to challenge a glaring illegality in the use of public funds. The background is as follows: In response to the global Coronavirus pandemic, the government of Lesotho established a temporary structure to deal with the virus. The structure was called the National Emergency Command Centre (NECC). Despite its noble intentions, the structure was not established by law and yet it was managing large sums of public funds in its work. This was contrary to section 111 of the Constitution.<sup>62</sup> The applicant sought to challenge this

59 *All Basotho Convention* (n 58) para 12, where the Court unconvincingly reasoned that '[t]he respondents' objection to the *locus standi* of the ABC and the BNP is, therefore, dismissed. As regards the DC, it is not a signatory to any coalition agreement. Its leader is the shadow Prime Minister functioning in opposition to the coalition government of which the ABC and BNP are a part. Thus, its interest in these proceedings is political and not legal. It does then not have *locus standi*.' The view of the Court is overly selective. An official party in Parliament certainly has an interest in the legality of the prorogation of Parliament.

60 *All Basotho Convention* (n 58) para 11.

61 CIV/APN/141/2020 (unreported).

62 Sec 111 Constitution of Lesotho: '(1) No moneys shall be withdrawn from the Consolidated Fund except – (a) to meet expenditure that is charged upon the Fund by this Constitution or by any Act of Parliament; or (b) where the issue of those monies has been authorised by an Appropriation Act or by an Act made in pursuance of section 113 of this Constitution. (2) Where any monies are charged by this Constitution or any Act of Parliament upon the Consolidated Fund or any other public fund, they shall be paid out of that fund by the Government of Lesotho to the person or authority to whom payment is due. (3) No money shall

illegality in his capacity as a taxpayer. The High Court denied him standing. The basis for the Court's decision was that

[t]he applicant is suing the Executive Government (*sic*) as a citizen of this country to compel it to act in accordance with the Act is not enough to satisfy the requirement that he must have a direct and substantial interest in the outcome of this case. *It is true that the government acted outside the boundaries of the Act, but that does not entitle him to sue to compel government to act within it. Parliament should have acted and exercised its oversight powers, not the applicant.*<sup>63</sup>

The Court stated that '[e]ven if monies are being spent wastefully or illegally at the NECC, that does not entitle the taxpayer to sue'.<sup>64</sup>

In a similar manner, in *Seq International (Pty) Ltd v Lesotho Millennium Development Agency*,<sup>65</sup> the High Court denied standing to a company that was alleging discrimination in the procurement policy of a statutory body. Surprisingly, the applicant company was alleging that it had been prevented from bidding by an allegedly discriminatory policy. The Court ruled that since the company had not applied for consideration, it did not have the standing to challenge the procurement policy in question.

It would seem that in both *Mochochoko* and *Seq International* a restrictive approach to standing was used by the court as a technique for merit avoidance. The merit avoidance technique is an approach the courts use to avoid the merits of the case for several reasons. It may be that the question to be decided is not justiciable or that a decision on the merits may have far-reaching consequences either for the court or for society as a whole. In most cases courts use this technique to avoid politically-contentious questions on the merits; in keeping with the 'political question' doctrine.<sup>66</sup> The courts, therefore, use *ex ante* techniques such as lack of jurisdiction, lack of standing or non-justiciability as a strategy to decline to decide on the merits.<sup>67</sup> As Fouchard contends, '[m]erits-avoidance techniques concern the question of whether the Court proceeds to a review of

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be withdrawn from any public fund other than the Consolidated Fund unless the issue of those monies has been authorised by or under any law.'

63 *Mochochoko* (n 61) para 8 (our emphasis).

64 As above. The Court relied on the old decision of *Dalrymple & Others v Colonial Treasurer* 1910 TS 372. On how the principles governing standing have drastically changed since the *Dalrymple* case, see C Plasket 'The globalisation of class actions' (2009) 622 *The Annals of the American Academy of Political and Social Science* 256.

65 Const/04/2020 (unreported).

66 J Odermatt 'Patterns of avoidance: Political questions before international courts' (2018) 14 *International Journal of Law in Context* 221; FW Scharpf 'Judicial review and the political question: A functional analysis' (1966) 75 *Yale Law Journal* 517.

67 EF Delaney 'Analysing avoidance: Judicial strategy in comparative perspective' (2016) 66 *Duke Law Journal* 1.

the merits at all, and tend to follow a binary, black-or-white logic'.<sup>68</sup> The merit-avoidance strategy was more pronounced in *Mochochoko* where a decision on the merits would mean that the government's creation of the National Emergency Command Centre to combat the Coronavirus and the large sums of money already spent by the government on an 'illegal' institution would be a nullity. The Court denied the applicant standing despite its own admission that '[i]t is true that the government acted outside the boundaries of the Act'.<sup>69</sup>

The *Mochochoko* and *Seq International* cases notwithstanding, there are glimmers of a more liberal approach to standing in the High Court, as epitomised by cases such as *Lesotho Police Staff Association, Development for Peace Education, Mokhothu* and *All Basotho Convention* discussed above. However, because of the doctrine of judicial precedent,<sup>70</sup> decisions of the higher court – which is the Court of Appeal in Lesotho – still take precedence.<sup>71</sup> Hence, the prevailing judicial attitude towards standing in public law cases in Lesotho is the one held by the Court of Appeal. Nevertheless, as is argued here, the High Court's approach is more in keeping with contemporary trends in public law litigation.<sup>72</sup> As will be demonstrated below, contemporary theories of constitutionalism favour a liberal approach to standing, as opposed to a restrictive approach.

#### 4 Theoretical justifications for a liberal approach to standing

Both the constitutional frameworks and judicial approaches of many common law countries, to varying degrees, have liberalised standing rules.<sup>73</sup> Many artefacts of modern-day constitutionalism account for this trend but two theories reign supreme: the theory of the role of the court in modern democracy and the theory of the supremacy of the constitution. These theories, as will be demonstrated, both

68 F Fouchard 'Allowing "leeway to expediency, without abandoning principle"? The International Court of Justice's use of avoidance techniques' (2020) 33 *Leiden Journal of International Law* 767-771.

69 *Mochochoko* (n 61) para 8.

70 JW Salmond 'Theory of judicial precedents' (1900) 16 *Law Quarterly Review* 376.

71 Sec 123(1) of the Constitution provides: 'There shall be for Lesotho a Court of Appeal which shall have such jurisdiction and powers as may be conferred on it by this Constitution or any other law.' For the application of the doctrine of judicial precedent in Lesotho, see *Lepule v Lepule & Others* (C of A (CIV) 34/2014) [2015] LSCA 29 (22 September 2015).

72 AK Abebe 'Towards more liberal standing rules to enforce constitutional rights in Ethiopia' (2010) 10 *African Human Rights Law Journal* 407; GR Nichol 'Justice Scalia, standing, and public law litigation' (1992) 42 *Duke Law Journal* 1141; C Harlow 'Public law and popular justice' (2002) 65 *Modern Law Review* 1; CR Sunstein 'Standing and the privatisation of public law' (1988) 88 *Columbia Law Review* 1432.

73 *Canadian Council of Churches* (n 35) 243-252.

apply to public law in Lesotho. The Lesotho judiciary can readily invoke these to join the wave of other common law countries that are liberalising their legal regimes on standing.

#### 4.1 Theory of the role of a court in modern democracy

The modern-day court is starkly different from the court in the past. The emergence of new devices of constitutionalism, such as the rule of law, separation of powers and independence, has given the judiciary greater powers. This is in contradistinction to the old judiciary that operated in the shadow of the supremacy of parliament. The theory on the judicial role in modern democracies – to protect and defend the constitution and democracy itself – is considered the crucible and mainstay for the development of liberal rules of standing in contemporary civil procedure law. Traditionally, courts conceptualised their roles in the administration of justice as limited to the adjudication and resolution of disputes between adversarial parties in which the parties claim that their private rights have been violated or are at risk of violation.<sup>74</sup> The courts also viewed their role as a narrow one: to search for and implement the intention of parliament in every case in which they were called to adjudicate on public affairs.<sup>75</sup>

In a modern democratic society founded on, among other precepts, participatory democracy, every citizen has a legitimate interest in upholding the constitution and the rule of law.<sup>76</sup> The courts, in turn, as guardians of the constitution, have the duty and responsibility to ensure that the constitution and the rule of law are upheld.<sup>77</sup> As McKechnie J correctly observed in *Digital Rights*

74 Haskett (n 32) 41; A Barak 'A judge on judging: The role of a supreme court in a democracy' (2002-2003) 116 *Harvard Law Review* 108.

75 The Court adopted a trailblazing approach in *British Railways Board v Pickin* [1974] 1 All ER 609 622 where it held: 'It must surely be for Parliament to lay down the procedures which are to be followed before a bill can become an Act ... It would be impracticable and undesirable for the High Court of Justice to embark on an enquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an enquiry whether in any particular case those procedures were effectively followed.'

76 *Dumas* (n 12) para 103. See also SP Sathe 'Public participation in judicial process: New trends in law of *locus standi* with special reference to administrative law' (1984) 26 *Journal of the Indian Law Institute* 1. The South African Constitutional Court regularly permits associations standing to assert participation in public affairs. See *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2006 5 BCLR 622(CC); *Doctors for Life International v Speaker of the National Assembly & Others* 2006 12 BCLR 1399(CC); *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 10 BCLR 968 (CC).

77 *Dumas* (n 12) paras 103 & 128; *Bobb v Manning* [2006] UKPC 22 paras 13 & 14; *Yehuda Ressler v Minister of Defence* HCJ 910/86 para 23 (12 June 1988),

*Ireland*,<sup>78</sup> the courts have a constitutional 'duty to prevent the unconstitutional abuse of public power, be it through legislation or otherwise', especially where 'it is clear that a particular public act could adversely affect the constitutional ... rights of the plaintiff, or indeed society as a whole'.<sup>79</sup> In a constitutional democracy, and in keeping with this constitutional duty, the courts' new-found role goes beyond the traditional adjudication and resolution of disputes. Their new judicial role includes upholding constitutional integrity and defending democracy, the rule of law and legality, thus bridging the gap between law and society.<sup>80</sup> In order for the courts to fulfil these functions, the liberalisation of standing is unavoidable.<sup>81</sup> In dealing with the theory of the new role of the court and its implications for standing, the Indian Supreme Court in *SP Gupta v Union of India*<sup>82</sup> stated:<sup>83</sup>

The courts cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened ... The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busybody or a meddling interloper but who has sufficient interest in the proceeding.

In *Ferreira v Levin*<sup>84</sup> the South African Constitutional Court described the courts' 'new' role in a constitutional democracy as requiring that access to courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. O'Regan J noted that it was particularly important that not only those with vested interests should be afforded standing in constitutional challenges where remedies might have a wide impact.<sup>85</sup> According to Cappelletti, 'the old, formalistic bodies and techniques' that are

<https://versa.cardozo.yu.edu/opinions/ressler-v-minister-defence> (accessed 10 April 2020) (Ressler).

78 *Digital Rights Ireland v Minister for Communication, Marine and Natural Resources* [2010] 3 IR 251.

79 *Digital Rights Ireland* (n 78) para 49.

80 Barak (n 74) 28 36.

81 Mohan captures this shift much more pointedly as follows: 'This new trend drives away the past evils of legal technicality and procedural rigidity. Liberalisation of the need to prove *locus standi* for invoking the jurisdiction of the court is the most notable phenomenon of this change.' See Mohan (n 16) 523.

82 *Gupta* (n 17).

83 *Gupta* para 18.

84 *Ferreira* (n 21).

85 *Ferreira* para 230. There the Court said: '[A]ccess to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact.'

'frequently unsuitable for the new role must change, and the courts' must contribute to mould[ing] the law to society's novel needs and aspirations'.<sup>86</sup> In *Downtown* the Canadian Supreme Court indicated that the increase in governmental regulation and the coming into force of the Charter have resulted in the courts moving away from a purely private law conception of their role and this is reflected in some relaxation of the traditional private law rules relating to standing to sue.<sup>87</sup>

As a result of the new role of the judiciary, maintenance of the rule of law and legality<sup>88</sup> takes centre stage while the identity and 'rights' of the applicant no longer are all-important criteria. In *Digital Rights Ireland* McKechnie J correlated the constitutional duty of courts to prevent the abuse of public power with the need to liberalise rules on standing, and held that such a duty called for 'a more relaxed approach to standing ... in order for the Court to uphold that duty, and vindicate' personal and public rights and interests.<sup>89</sup>

The liberal rules of standing thus are closely connected to the rule of law, which the courts are obliged to uphold. According to Barak, closing the doors of the court to an applicant who cannot establish a legal right in the matter but who warns of a public body's unlawful action means giving that public body a free hand to act without fear of judicial review.<sup>90</sup> The result, Barak continues, is the creation of 'dead areas' in which a legal norm exists, but the public body is left free to violate the norm without the possibility of judicial review.<sup>91</sup> Such a situation, Barak concludes, 'may lead in the end to a violation of the legal norm, undermining the rule of law and undermining democracy'.<sup>92</sup>

The same sentiments were echoed, albeit in different terms, by the Trinidad and Tobago Court of Appeal, which stated that a court that denies access to *bona fide* and legitimate public interest actions for constitutional review, even in non-Bill of Rights challenges, because it is not expressly provided for, fails in its duty and denies its role as the guardian of the constitution.<sup>93</sup> In abdicating this responsibility to uphold the constitution where unconstitutional

86 Cappelletti (n 4) 236.

87 *Downtown* (n 33).

88 This concept means that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action. See *Downtown* (n 33) para 31.

89 *Digital Rights Ireland* (n 69) para 49.

90 Barak (n 74) 109.

91 As above.

92 As above.

93 *Dumas* (n 12) para 131.

action has occurred, such a court betrays the trust of the people and participates in undermining the rule of law. All these consequences are the antitheses of the role and function of a constitutional court in a democratic society.<sup>94</sup> Ultimately, the Court of Appeal concluded that

[the] issue of standing in relation to the vindication of the rule of law, where there is alleged constitutional default, assumes great significance given the constitutional ethic of civic republicanism – that emphasizes the responsibility, even duty, of citizens to participate in creating and sustaining a vibrant democracy and in particular in upholding the rule of law.<sup>95</sup>

Without a public interest litigant, public wrongs or injuries cannot be made the subject of litigation, which would be inimical to democracy itself.<sup>96</sup> Only by liberating the rules of standing, thereby allowing public interest standing, will the courts be able to shepherd the corridors of power.<sup>97</sup> Barak sums up the connection between the role of the judiciary in a democracy and public interest standing as follows:<sup>98</sup>

How a judge applies the rules of standing is a litmus test for determining his approach to his judicial role. A judge who regards his role as deciding a dispute between persons with rights – and no more – will tend to emphasize the need for an injury in fact. By contrast, a judge who regards his judicial role as bridging the gap between law and society and protecting (formal and substantive) democracy will tend to expand the rules of standing.

In Lesotho there are some signs that the courts are trying to subscribe to this theory. In *LEPOSA* the court allowed a police association standing on the basis of legality.<sup>99</sup> In *Development for Peace Education* the court allowed standing on the basis of public participation enshrined in section 20 of the Constitution. Likewise, in *Mokhothu* the court allowed standing to political parties on the basis of the broader role of political parties in a constitutional democracy.

## 4.2 Theory of the supremacy of the Constitution

The Constitution of Lesotho is similar to many modern constitutions in that it is undergirded, among other liberal devices, by the

94 *Dumas* (n 12) para 131.

95 *Dumas* para 46.

96 *Thorson v Attorney-General of Canada* [1975] 1 SCR 138 145 (*Thorson*).

97 *Gupta* (n 17) para 18.

98 Barak (n 74) 107.

99 *Lesotho Police Staff Association* (n 9).

notion of constitutional supremacy.<sup>100</sup> As Linington points out, 'the concept of constitutional supremacy necessarily implies the existence of a right to challenge the constitutionality of laws before the courts'.<sup>101</sup> This constitutional right has been described, in the context of examining the unconstitutionality of Parliament, as 'the right of the citizenry to constitutional behaviour of Parliament'.<sup>102</sup> In *Thorson v Attorney-General of Canada*,<sup>103</sup> suing as a taxpayer in a class action, the applicant claimed that the Official Languages Act and the Appropriation Act implementing the Official Languages Act were unconstitutional. This occurred in circumstances where the Attorney-General had refused to mount a constitutional challenge, and where it was clear that without the constitutional challenge instituted by the applicant, the conduct of Parliament would be immune from constitutional review. The issue of the applicant's *locus standi* to raise the constitutionality of the Acts was raised as a threshold question in the court of first instance and was dismissed on appeal. On further appeal to the Canadian Supreme Court, the Court held that

[i]t is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour of Parliament where the issue in such behaviour is justiciable as a legal question. In the present case, I would, as a matter of discretion, hold that the applicant should be allowed to have his suit determined in the merits.<sup>104</sup>

The Court thus held that the applicant had standing to raise constitutional questions against the impugned Acts, despite the applicant being a general member of the public, having no special or direct interest in the matter at issue as understood in the traditional sense. There is no reason why the same principle should not apply to the other branches of state: the judiciary, the executive and the administration.<sup>105</sup> In principle, a citizen in a constitutional democracy based on a supreme constitution has a right to constitutional behaviour by all public authorities or bodies. The exercise of this

100 Sec 2 of the Constitution of Lesotho provides: 'This Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.'

101 G Linington 'Reflections on the significance of constitutions and constitutionalism for Zimbabwe' in EV Masunungure & JM Shumba (eds) *Zimbabwe: Mired in transition* (2012) 71.

102 *Thorson* (n 96) 138; *Law Society of Lesotho v Minister of Defence and Internal Security & Another* (CIV/APN/111/86) [1988], <https://lesotholii.org/ls/judgment/court-appeal/1988/66> (accessed 10 April 2020).

103 *Thorson* (n 96).

104 *Thorson* 163.

105 On the constitutionality of private power and behaviour, see *Crevier v AG (Québec) & Others* [1981] 2 SCR 220; *Koro-Koro Constituency v National Executive Working Committee, All Basotho Convention* (C of A (CIV) 10/2019) [2019] LSCA 3 (1 February 2019), <https://lesotholii.org/ls/judgment/court-appeal> (accessed 11 April 2020).

right is a means of ensuring that all public bodies are responsible in the exercise of their constitutional powers.<sup>106</sup> Breaches of the provisions of a supreme constitution that are not addressed, revealed and remedied are likely to debase the constitution and erode public trust and confidence in constitutional democracy.<sup>107</sup> Denying the citizenry this right, the authorities exercising public power would be able to act in an unconstitutional fashion with impunity.<sup>108</sup> As Weiler puts it, the citizenry must have the vehicle of 'public action' brought by an individual to enforce their right to constitutional behaviour.<sup>109</sup>

Therefore it is clear that the supremacy clause is not only remedial<sup>110</sup> and jurisdictional,<sup>111</sup> it is also a source of liberal public interest standing.<sup>112</sup> Public interest litigants may therefore seek to challenge any law or conduct on constitutional grounds not only in their own interests but also where the rights of other persons or the public interest are infringed or threatened.<sup>113</sup> The court's central concern is to uphold the supremacy of the constitution and the rule of law, rather than being concerned with the identity of the applicant and his or her rights in the matter.<sup>114</sup> Commenting on public interest standing under section 52(1) of the Canadian Constitution (the supremacy clause, as opposed to section 24(1) of the Canadian Bill of Rights Charter, the Bill of Rights enforcement section) Roach points out that

[a] public interest litigant should not be precluded simply because some more directly affected person could possibly contest the constitutionality of legislation. The rationale for such discretionary public interest standing is the public interest in having constitutional laws. A subsection 52(1) declaration changes the law for all whereas a subsection 24(1) remedy is designed to provide an appropriate and just remedy for a person whose rights have been violated.<sup>115</sup>

In the context of Lesotho, while *locus standi* under section 22(1) of the Constitution (Bill of Rights enforcement) is restricted to claims for

<sup>106</sup> *Dumas* (n 12) para 118.

<sup>107</sup> *Dumas* para 115.

<sup>108</sup> AF Bayesfky 'International human rights law in Canadian courts' in W Kaplan & D McRae (eds) *Law, Policy and International Justice* (1993) 307.

<sup>109</sup> PC Weiler 'Of judges and scholars: Reflections in a centennial year' (1975) *Canadian Bar Review* 572.

<sup>110</sup> *R v Conway* [2010] 1 SCR 765 773; *Nova Scotia v Martin* [2003] 2 SCR 504 529.

<sup>111</sup> *Cuddy Chicks v CRTO* [1991] 2 SCR 13-14. Also see *Cooper v Canada* [1996] 3 SCR 887.

<sup>112</sup> Regarding threshold issues of *locus standi* under the supremacy clause, see *R v Big M Drug Mart* [1985] 1 SCR 295; *R v Ferguson* [2008] 1 SCR 96 paras 45, 58 & 59; K Roach 'Enforcement of the Charter: Subsections 24(1) and 52(1)' (2013) 62 *Supreme Court Law Review* 491-492.

<sup>113</sup> See *Ferreira* (n 21) paras 167, 227 & 229.

<sup>114</sup> *Kingstreet Investments Ltd v New Brunswick (Finance)* [2007] 1 SCR 3 paras 14 & 15.

<sup>115</sup> Roach (n 112) 491.

personal relief, section 2 of the Constitution (the supremacy clause) lays down liberal rules of standing for private or other litigants to raise constitutional questions of incompatibility of any law or conduct with the Constitution, for either private or public reasons.<sup>116</sup> In this regard Linington correctly states that

constitutional challenges framed on the basis of [the supremacy clause] of the Constitution need not allege that the [Bill] of Rights has been infringed. Such an allegation need only be made where the challenge is made in terms of the [Bill of Rights enforcement clause]. That provision is concerned exclusively with the jurisdiction of the courts in respect of the enforcement of the [Bill of Rights]. [The supremacy clause] is broader in that it justifies challenging the constitutionality of any law, regardless of whether or not it is alleged that the impugned law has violated a provision in the [Bill of Rights].<sup>117</sup>

The practice of the superior courts in Lesotho reveals that the constitutional right to constitutional behaviour has been anecdotally realised and extended to the Law Society,<sup>118</sup> a professional body of lawyers, and to some private actors,<sup>119</sup> in very limited circumstances. This practice, however, is not rooted in any theoretical or doctrinal basis, but is an intuitive reaction on a case-by-case basis. In several cases the Law Society mounted constitutional challenges against a public authority's unlawful conduct.<sup>120</sup> In all these cases, the Law Society admittedly could not have established standing on the basis of section 22(1) of the Constitution as it neither purported to be enforcing any Bill of Rights provisions, nor was it acting on behalf of some 'detained person'. The purpose of the Law Society in instituting these cases was to uphold the rule of law and constitutional integrity. It may be argued, therefore, that the Law Society, in addition to its statutory role, had at all material times been granted standing on the basis of the supremacy clause. The fact that the Law Society is a statutory body seized with the stated purposes under its constituting Act was not an answer to the threshold issue that was inquired into.

In the context of private actors, and commenting on the importance of section 2 of the Constitution (the supremacy clause),

116 See PW Hogg *Constitutional Law of Canada* (2007) 773-774; Roach (n 112) 491-492.

117 Linington (n 101) 73.

118 *Chief Justice & Others v Law Society* (C OF A (CIV) 59/2011 (constitutionality of rules authorising registrars to make judicial decisions in uncontested matters); *Law Society of Lesotho v Ramodibedi NO* Constitutional Case 1 of 2003 (constitutionality of Justice Ramodibedi performing judicial functions at the Court of Appeal, while he remained a judge of the High Court); *Law Society of Lesotho v Brendan Peter Cullinan* CIV/APN/438/2004 (constitutionality of the appointment of a retired judge as acting judge to hear a single matter).

119 *Koro-Koro Constituency Committee* (n 105) para 40.

120 See cases referred to in n 108.

the Court of Appeal in *Koro-Koro Constituency Committee* pointed out that section 2 was peremptory and the obligations imposed had to be fulfilled.<sup>121</sup> The Court went on to state that because the courts in Lesotho are the foremost protectors of the Constitution, its values and mores, they have an obligation to respect, protect, promote and fulfil constitutional obligations.<sup>122</sup> As a result the Court concluded that '[n]o court may countenance or enforce a contractual clause that is incongruent with the Constitution as it would be acting in violation of the Constitution – the supreme law'.<sup>123</sup>

The importance of this declaration by the Court of Appeal lies in the fact that the court realised the far-reaching obligation of the judicial system to consider constitutional questions raised by litigants before the court, and the correlative right, the right to constitutional behaviour, that inheres on the part of private actors to raise the issues before the courts in Lesotho. It is a recognition of public interest standing based on the supremacy clause.

In *Mosito v Letsika* the respondents (first applicants in the High Court) challenged the constitutionality of the 'removal' of Justice Nugent and the 'appointment' of Dr Kananelo Mosito as the President of the Court of Appeal. The respondents were attorneys and senior advocates, and therefore members of the Law Society. The respondent in the High Court had objected to their standing to challenge the constitutionality of the removal of Justice Nugent and the appointment of Dr Mosito, but the High Court had dismissed the objection, holding that the applicants did have such standing.<sup>124</sup>

It is important to point out that the respondents had not relied, for the constitutional challenge, on any Bill of Rights provisions in terms of section 22(1) of the Constitution. To establish their standing to litigate the respondents had in their founding affidavit alleged that the basis of their instituting the proceedings was that they were legal practitioners and that the administration of justice would be brought into disrepute should an unqualified person be appointed to head the apex court. Furthermore, as legal practitioners they had legal and ethical obligations and duties to uphold the rule of law.<sup>125</sup>

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121 *Koro-Koro Constituency Committee* (n 105) para 40.

122 As above.

123 As above.

124 See the High Court decision in *Letsika v Dr K Mosito* (CC 16/2017) [2018] LSHC 1 (9 February 2018), <https://lesotholii.org/node/11045> (accessed 12 April 2020) (*Letsika*).

125 *Mosito v Letsika* (n 8) para 23.

It therefore was clear that the respondents could not launch a constitutional challenge in terms of section 22(1) of the Constitution. They sought to establish non-Bill of Rights standing. During the hearing, however, the Court was persuaded, not by the respondents but by the appellants' counsel, to regard the respondents as having public interest standing based on the supremacy clause (section 2 of the Constitution). The Court reasoned:<sup>126</sup>

[Counsel for the appellants], in an argument not contained in the written heads of argument, argued in the alternative that, perhaps the respondents could have sued in terms of S.2 of the Constitution – the Supremacy clause. He argued that the supremacy clause permits public interest litigation in certain circumscribed circumstances and referred this Court to the approach in Canada as evidenced by the decision in *Minister of Justice (Can) v Borowski*. While we agree that there maybe [sic] much force in this submission, it needs to be remembered that the respondents were not challenging 'any other law' for being inconsistent with the Constitution. This argument, in our considered view does not find application in *casu*.

The Court further rejected any suggestion that the respondents had 'sufficient interest'<sup>127</sup> and held that the respondents did not have standing in the matter which entitled them to sue as they could not establish the personal injury standing required by section 22(1) of the Constitution.<sup>128</sup> Clearly, the Court of Appeal overlooked the implication of the supremacy clause, the role of the court in democratic Lesotho in upholding the Constitution and the rule of law, and the corresponding right of the respondents to constitutional behaviour on the part of the Prime Minister. At the High Court level, the Court had correctly determined that the respondents had the necessary (public interest) standing to challenge the appointment. The High Court allowed the applicants standing on the basis that

[i]t is about the perceived violation of the supreme law, the perceived subversion of ... the rule of law and the perceived threat to the rule of law. Therefore, it appears that supreme interest may well be at stake in this matter. If that is correct, it cannot be contended, with conviction, that the [respondents] have no legal standing ... they, individually and collectively, have a direct interest in the legality of the appointment of judges in general.<sup>129</sup>

<sup>126</sup> *Mosito v Letsika* para 24.

<sup>127</sup> Para 25.

<sup>128</sup> Paras 29-32.

<sup>129</sup> High Court decision in *Letsika* (n 124) paras 30-31.

## 5 Conclusions and recommendations

The foregoing discussion demonstrates that the current position of public law in Lesotho favours a restrictive approach to standing. This trajectory is inspired by the Constitution itself and the judicial approach. As has been demonstrated, section 22(1) of the Constitution, which is based on private interest standing, has been a convenient justification for a general approach by the judiciary in Lesotho to exclude even meritorious cases on the basis of a lack of standing. Signs of a liberal approach only emerge in the High Court, and are then reversed by the Court of Appeal. The article argues that section 22(1) of the Constitution, which seems to inspire the restrictive approach to standing in Lesotho, is antiquated; it belongs to old conceptions of the enforcement of human rights and therefore must be amended. However, the reticence and conservatism of the Court of Appeal are also to blame for this judicial approach. Other common law judiciaries a long time ago moved away from an insistence on the 'privatisation of public law'.<sup>130</sup> The bellwether of this new approach was the *dictum* of Lord Diplock in *R v Inland Revenue Commissioners*,<sup>131</sup> that

[i]t would be ... a grave *lacuna* in our system of public law if a pressure group, like the federation, or even a single public spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the courts to vindicate the rule of law and get the unlawful conduct stopped. The contemporary situation is that in the United Kingdom standing no longer presents an insurmountable challenge to public interest litigation.<sup>132</sup>

The two main theories used in this article squarely apply to the Constitution of Lesotho. The Court of Appeal can readily invoke these theories to liberalise standing in Lesotho. The supremacy clause in the Constitution gives the courts a mechanism to relax the rules of standing. The Canadian Supreme Court has already blazed the trail on how a supremacy clause in the constitution can be utilised to liberalise standing. In *Canadian Council of Churches* the Court took the view that the main purpose of the supremacy clause is to ensure that the Constitution and other applicable laws are adhered to and to prevent the immunisation of law and conduct from any constitutional challenge, thereby enforcing the rule of law and constitutionalism.<sup>133</sup>

<sup>130</sup> Sunstein (n 63) 1432-1481.

<sup>131</sup> *R v Inland Revenue Commissioners: Ex parte National Federation of Self-Employed and Small Businesses* (1982) AC 617.

<sup>132</sup> *Inland Revenue Commissioners* (n 131).

<sup>133</sup> *Canadian Council of Churches* (n 35) 252-253; *Downtown* (n 33) paras 31-34. Also see Hogg (n 116) 781. The same rationale underpinned the liberalisation of rules of standing in the UK. See *Re ex parte National Federation of Self Employed*

Similarly, the Indian Supreme Court stated that public interest standing ensures the 'effective policing of the corridors of power' by courts.<sup>134</sup> Public interest standing 'serve[s] to enhance the principle of legality with respect to serious issues of direct concern to some of the most marginalised members of society'.<sup>135</sup> It therefore facilitates access to justice for the marginalised and disadvantaged who cannot afford to approach the courts.<sup>136</sup>

However, while there is a general move towards the liberalisation of standing, the concern about busybodies who may flood the court system remains. For this reason, modern constitutions and judicial precedent have established requirements for standing, however liberal their approach may be. The Constitution of South Africa lists the people who may have standing to litigate.<sup>137</sup> Similarly, the Canadian Supreme Court has developed a body of principles to guide the courts in determining whether a litigant may be granted standing. In the main, public interest standing under the supremacy clause is granted to a party who establishes the following requirements. First, the matter must raise a serious legal question. Second, the applicant must establish that he or she has a genuine interest in the resolution of the question. Third, the applicant must establish that there is no other reasonable and effective manner in which that question may be brought to court.<sup>138</sup> The third requirement or factor in the public interest standing analysis has recently been recast to be more flexible as follows: 'whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court'.<sup>139</sup>

The granting of public interest standing to a public-spirited applicant is at the discretion of the courts, taking into account the exigencies of each particular case. In exercising their discretion with respect to public interest standing, the courts weigh the three factors in light of the underlying purposes and the particular circumstances of the case.<sup>140</sup> Important factors that the courts may consider include, but are not limited to, whether the particular case raises a serious justiciable issue; whether the party bringing the action has a

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*and Small Businesses Ltd* [1982] AC 630 644; *Re ex parte The World Development Movement Ltd* [1995] 1 All ER 611.

134 *Fertilizer Corporation Kamgar Union v Union of India* (1981) 2 SCR 52 70.

135 *Downtown* (n 33) para 76.

136 *Downtown* para 22.

137 Sec 38 of the South African Constitution.

138 Roach (n 112) 491; Hogg (n 116 above) 779. For a similar position under the South African interim Constitution, see *Port Elizabeth Municipality v Prut* 1996 (4) SA 318 (ECD) 324-325.

139 *Downtown* (n 33) para 20.

140 *Downtown* para 2.

real stake or a genuine interest in its outcome; and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means of bringing the case to court.<sup>141</sup> The courts should exercise this discretion to grant or refuse public interest standing in a 'liberal and generous manner'.<sup>142</sup>

It should always be remembered that in determining whether or not to grant or refuse public interest standing, the court's paramount consideration is the need to uphold the Constitution and the rule of law and to prevent the immunisation of the law and public conduct from constitutional scrutiny.<sup>143</sup> This approach was adopted correctly by the High Court in *Letsika*<sup>144</sup> but, regrettably, was reversed on appeal. On the other hand, the use of the discretion should be informed by the need to avoid the proliferation of public interest litigants, particularly where unmeritorious cases are brought before the courts by meddlesome interlopers.<sup>145</sup> Superior courts must encourage public-spirited persons to champion the public interest cause, rather than characterising them as meddlesome interlopers and busybodies. The judicial liberalisation of the rules of *locus standi* to recognise public interest litigants in Lesotho is imperative, taking into account the fact that the office of Attorney-General, the first defender of the public interest in Lesotho,<sup>146</sup> has not since the dawn of democracy 27 years ago initiated a single case before the courts in defence of the public interest.

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141 *Downtown* paras 2 & 37.

142 *As above*. See also *Canadian Council of Churches* (n 35) 253.

143 *Downtown* paras 33-36.

144 High Court decision in *Letsika* (n 124) paras 30 & 31.

145 *Ressler* (n 68) 103.

146 See sec 98(2)(c) of the Constitution.

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## The 2017 military *coup* in Zimbabwe: Implications for human rights and the rule of law

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**Summary:** *November 2017 saw the Zimbabwean Defence Forces executing a military coup against Mr Robert Mugabe, Zimbabwe's long-serving President. The military sought to justify the coup on the basis that there were divisions in the party in government – ZANU-PF – and that it was stepping in to protect what it called the gains of the liberation struggle. The military demanded, among other things, the reinstatement of those ZANU-PF party members who had been removed from their government and party positions. By brazenly involving itself in politics, let alone aligning itself with a political party, the military violated a number of constitutional provisions that prohibit the involvement of the security services in politics. Several individual freedoms and liberties, including the right to liberty, freedom of expression, freedom of movement and the right to security and freedom from torture, were violated during the coup. There are also allegations that there was loss of life directly linked to the coup. In effecting the coup, the military immobilised the police service and arrogated to itself the role of civilian policing, including the setting up of roadblocks on major roads and arresting and*

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*detaining those it identified as 'criminal elements'. The Zimbabwean Defence Forces have a long history of serious human rights violations, including politically-related torture and murder. They also stand accused of chronic involvement in politics, including the unleashing of violence during elections on behalf of ZANU-PF. Therefore, there is no hope that human rights protection and promotion will be on the agenda of the post-coup government – itself consisting of the main coup leaders and most of the ministers that served in the repressive Mugabe government. There is a need to establish mechanisms to ensure that those responsible for the coup and its attendant human rights violations and crimes are brought to account.*

**Keywords:** *Zimbabwe; military coup; Constitution of Zimbabwe; rule of law; human rights protection; accountability*

## 1 Introduction

At the age of 93 years and having presided over a deeply-divided party with two factions vying for his position in the event of the inevitable, the 37-year one-party state reign of Robert Mugabe and his Zimbabwe African National Union-Patriotic Front (ZANU-PF) was coming to an end, and it seemed as if a genuinely democratic transition was on the horizon.<sup>1</sup> However, although still possible, that no longer seems likely. With Mugabe barely a week before dismissing one of his Vice-Presidents, Mr Emmerson Mnangagwa, the military, brazenly identifying itself as a military wing of ZANU-PF – a political party, rather than a national institution in a constitutional democracy – moved in and executed a *coup* in mid-November 2017. The military effectively placed Mugabe under house arrest; took over the public radio and television stations and public newspapers and dictated news content; arrested some members of the other faction; immobilised the civilian police force and patrolled the streets of the capital city Harare; and mounted roadblocks on all major roads.<sup>2</sup>

1 As demonstrated in the article, ZANU-PF has used a combination of violence, abuse of state resources and electoral rigging to remain in power.

2 See CNN 'Zimbabwe is under military control after army seizes power from Mugabe', <http://edition.cnn.com/2017/11/14/africa/zimbabwe-military-chief-treasonable-conduct/index.html>, (accessed 11 February 2018); 'The inside story of Zimbabwe *coup* that toppled Robert Mugabe' *Bulawayo 24 News*, <https://bulawayo24.com/index-id-news-sc-national-byo-123086.html> (accessed 7 April 2018); ABC News 'Thousands march in Zimbabwe against President Robert Mugabe after military put longtime ruler under house arrest', <http://abcnews.go.com/International/thousands-march-zimbabwe-president-robert-mugabe-military-put/story?id=51242618>, (accessed 11 February 2018).

There has been considerable debate in various quarters as to whether the political developments of November 2017 in fact were a military *coup*.<sup>3</sup> However, it was a *coup* plain and simple, and it was also unlawful in terms of Zimbabwe's legal framework.<sup>4</sup> It violated the letter and spirit of several African regional instruments regarding unconstitutional changes of government.<sup>5</sup>

Without doubt the military facilitated a change of government through the use of force and the threat of use of force and influenced the composition of the new government which likely will be beholden to it: Emmerson Mnangagwa, whose dismissal as Vice-President triggered the *coup*, subsequently was installed as President; the man who set in motion the *coup* – Commander of the Zimbabwe Defense Forces, General Constantino Chiwenga, became the Vice-President; the face of the *coup*, Lieutenant-General Sibusiso Moyo, became the Minister of Foreign Affairs; while another high-ranking military officer, Air Marshall Perence Shiri, became a cabinet minister in the new government.

While ultimately it was made to appear as if a combination of marches and the threat of impeachment forced Mugabe to resign, the reality is that the military *de facto* had suspended the Constitution and brought a combination of military force and the threat of use of such force to bear on the Zimbabwean nation. The marches themselves were aided, if not engineered and sanctioned, by the military;<sup>6</sup> and there is no gainsaying that the sudden shift

3 See CNN 'Zimbabwe's military takeover was the world's strangest coup', <https://edition.cnn.com/2017/11/20/africa/zimbabwe-military-takeover-strangest-coup/index.html>, (accessed 11 February 2018); 'Zimbabwe's strange crisis is a very modern kind of *coup*' *The Guardian* 21 November 2017, <https://www.theguardian.com/world/2017/nov/21/zimbabwes-strange-crisis-is-a-very-modern-kind-of-coup> (accessed 7 April 2018). See also, generally, S Hofisi 'Military assisted transition, constitutional order in Africa and transitional justice in Zimbabwe: Towards effective change management' (2019) 6 *Journal of African Foreign Affairs* 139. According to Hofisi, the military has a constitutional right to intervene in the internal affairs of Zimbabwe. As demonstrated in this article, this is a flawed interpretation of the Constitution of Zimbabwe. See also A Magaisa 'Zimbabwe: An opportunity lost' (2019) 30 *Journal of Democracy* 143-144. According to Magaisa, what took place in Zimbabwe in November 2017 in reality was a *coup*, despite the spin that those involved in the *coup* put on it. For the meaning of a *coup*, see T Mahmud 'Jurisprudence of successful treason: *Coup d'état* and common law' (1994) 49 *Cornell International Law Journal* 51. Mahmud defines a *coup d'état* as a change of government that often issues from the threat or use of force against the incumbent regime.

4 As is demonstrated below, the 2013 Zimbabwean Constitution categorically prohibits military involvement in politics.

5 See the 2000 Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration); arts 2(4) & 3(10) of the 2007 African Charter on Democracy, Elections and Governance (Zimbabwe, however, signed this latter instrument (which entered into force on 15 February 2012) in March 2018, after the *coup*); and art 4(p) of the Constitutive Act of the AU.

6 See *ABC News* (n 2).

of allegiance in ZANU-PF was more a matter of coercion than an exercise of free political will.

Mr Mugabe had a bitter taste of his own medicine. For many years he had undermined and ridiculed democratic processes, proclaiming, quite ironically, that the pen (meaning a vote) could never be mightier than the bullet that brought Zimbabwe's independence.<sup>7</sup> As demonstrated in this article, Mugabe used Zimbabwe's security apparatus, including the military, the police, the Central Intelligence Organisation, and even the prison service, to unleash violence against his perceived political opponents and also to threaten a *coup* in the event of the opposition winning the elections.<sup>8</sup>

However, much of the irony surrounding the *coup* lies in the fact that its engineers and beneficiaries have always been part of ZANU-PF's oppressive, violent regime. This, therefore, raises fundamental questions about the *coup's* implications for democracy and constitutionalism, particularly the protection and promotion of human rights and the rule of law. As such, the celebration of Mugabe's inglorious exit from office – something that was in the offing anyway in view of his advanced age and the divisions within his party – should not be at the expense of safeguarding constitutionalism and the rule of law.

This article discusses the implications of the *coup* for democratisation, the protection and promotion of human rights and the rule of law in Zimbabwe from the perspective of the Zimbabwean constitutional framework. It examines a number of constitutional provisions that were violated and what this means to Zimbabwe's nascent democracy. The article also discusses the challenges now faced by those whose human rights were violated by Mugabe and his ZANU-PF party, assisted by the very military that eventually showed him the door.

The next part sets out the scope of the article. Part 3 three discusses the statements of, and actions by the military during the course of November 2017 and their compatibility with the Constitution. It also addresses the role of a military in a constitutional democracy and the philosophical underpinnings of such role. The part also addresses the impact of the *coup* on a number of constitutional rights, including the right to liberty, freedom of expression, freedom of movement and the

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7 T Musavengana 'How can a ballpoint pen fight with a gun?' <http://nehandaradio.com/2011/12/28/how-can-a-ballpoint-pen-fight-with-a-gun/> (accessed 15 January 2018).

8 As above.

right to security and freedom from torture. Part 4 discusses the past human rights records of the major players in the *coup* and what the 'success' of the *coup* means to human rights protection in Zimbabwe, especially the rights to have judicial recourse of those whose human rights have been violated in Zimbabwe under the ZANU-PF government. Part 5 discusses the reaction of the Zimbabwe Human Rights Commission to the *coup*. It discusses how such a reaction, especially the failure to pronounce on the military's blatant breach of the Constitution and the military's violation of several individual freedoms and liberties, might impede the Zimbabwe Human Rights Commission's exercise of its powers in the future. Also discussed is the reaction to the *coup* by the Law Society of Zimbabwe – a quasi-guardian of the rule of law and human rights in Zimbabwe.

Part 6 discusses mechanisms that may be employed to address the challenges posed by the *coup*, especially the need for accountability for the lives that might have been lost as well as freedoms that were violated and the need to ensure that there is no repetition of these events.

## 2 Scope of the article

Several perspectives may be used by different scholars from diverse academic disciplines to attempt to analyse the 2017 Zimbabwe military *coup*. Indeed, different scholars, past and present, have sought to explain some of the military *coups* that have taken place, including in Africa. For example, Benyera has attempted to explain the recurrence of *coups* in Lesotho from what he calls a de-colonial perspective, in which he seeks to locate the causes of Lesotho's *coups* in the country's colonial history.<sup>9</sup> Another scholar, Japhet, in seeking to establish the causes of the 1966 military *coup* in Nigeria, identifies a range of possible causes, including tribal tensions and institutional weaknesses of the military establishment.<sup>10</sup> With regard to the 1975 Nigerian *coup*, Japhet puts the blame on General Yakubu Gowon's failure to deliver on his promise to transition to civilian rule, which decision was made against the backdrop of a poorly-performing economy, widespread corruption and industrial unrest, among other challenges.<sup>11</sup>

9 See, generally, E Benyera 'Towards an explanation of the recurrence of military *coups* in Lesotho' (2017) 8 *Air and Space Power Journal – Africa and Francophone* 56.

10 M Japhet 'Military *coups* and military regimes in Africa' (1978) 8 *Scientia Militaria: South African Journal of Military Studies* 1-3 5.

11 Japhet (n 10) 7.

Yet, other hypotheses have been put forward by scholars to explain the occurrence of *coups*. Abartli and Arbatli, for example, discuss the regional spillover hypothesis which posits that the occurrence of a *coup* in one country affects the subsequent probability of *coups* in other countries. They also advance the foreign linkage and leverage hypothesis.<sup>12</sup>

However, this article narrowly focuses on the subject of the implications of the *coup* for democracy and the rule of law in Zimbabwe. This discussion is made in the context of Zimbabwe's recently-adopted Constitution. The discussion of the *coup* in the context of the Constitution, or rather the *coup's* compatibility with the Constitution, is crucial since, as the article will show, there have been attempts, on the one hand, to deny that there in fact was a *coup* and, on the other, there have been some argument, buttressed by some judicial order, that the actions of the Zimbabwean military were carried out in terms of the Constitution.

### 3 November events: A legal-historical perspective

In order to put the actions of the military in their proper perspective, it is important to restate what the Constitution says about the Zimbabwe Defence Forces. First, however, in section 208 the Constitution sets out certain principles that relate to the whole security establishment. These principles apply without exception to the Zimbabwe Defence Forces. The section provides:

- (1) Members of the security services must act in accordance with this Constitution and the law.
- (2) Neither the security services nor any of their members may, in the exercise of their functions –
  - (a) act in a partisan manner;
  - (b) further the interests of any political party or cause;
  - (c) prejudice the lawful interests of any political party or cause; or
  - (d) violate the fundamental rights or freedoms of any person.
- (3) Members of the security services must not be active members or office bearers of any political party or organisation.
- (4) Serving members of the security services must not be employed or engaged in civilian institutions except in periods of public emergency.

However, despite the above unequivocal proscriptions, section 208 has been violated routinely without any consequence. For example, serving members of the security services have long been engaged in

<sup>12</sup> E Arbatli & C Arbatli 'The international determinants of military *coup* behaviour' (2017) *Oxford Research Encyclopedia of Politics*.

civilian institutions such as the National Prosecuting Authority and the Zimbabwe Anti-Corruption Commission.<sup>13</sup> Also, in the aftermath of the 2017 *coup*, the then ambassador to Tanzania, Major-General Edzai Chimonyo, was appointed commander of the Zimbabwe National Army,<sup>14</sup> with the instrument of his appointment indicating that when he was appointed as ambassador, he did not cease to be a serving member of the army as his ambassadorial appointment merely was a secondment to the Ministry of Foreign Affairs.<sup>15</sup>

Section 211(3), which deals specifically with the Zimbabwe Defence Forces, provides that '[t]he Defence Forces must respect the fundamental rights and freedoms of all persons and be non-partisan, national in character, patriotic, professional and subordinate to the civilian authority as established by this Constitution.

Further, section 213 provides:

- (1) Subject to this Constitution, only the President, as Commander-in-Chief of the Defence Forces, has power –
  - (a) to authorise the deployment of the Defence Forces; or
  - (b) has power to determine the operational use of the Defence Forces.
- (2) With the authority of the President, the Defence Forces may be deployed in Zimbabwe –
  - (a) in defence of Zimbabwe;
  - (b) in support of the Police Service in the maintenance of public order; or
  - (c) in support of the Police Service and other civilian authorities in the event of an emergency or disaster.

The Constitution therefore only establishes the Zimbabwean Defence Forces,<sup>16</sup> but it also sets out their role and prohibits them, in

13 See 'Goba spells out NPA roadmap' *The Herald* 16 September 2017, <https://www.herald.co.zw/goba-spells-out-mpa-roadmap/> (accessed 7 April 2018). Police officers have also been seconded to the Zimbabwe Anti-Corruption Commission; see also *Moyo v Sgt Chacha & Others* CCZ 19/17 where this became an issue in the constitutional challenge brought by the applicant. It should also be noted that in the case of *Zimbabwe Law Officers Association & Another v National Prosecuting Authority & 4 Others* CC 1/19, the Constitutional Court declared that the engagement of serving members of the security services to perform prosecutorial duties was in contravention of sec 208(4) of the Constitution of Zimbabwe (that section prohibits the employment or engagement of security services in civilian institutions save in periods of public emergency).

14 See the 18 December 2018 press statement by the Chief Secretary to the President and Cabinet, <https://www.zambianobserver.com/here-is-the-official-full-list-of-new-military-promotions-and-retirements-in-zimbabwe/> (accessed 7 April 2018).

15 Major-General Chimonyo was appointed ambassador to Tanzania in December 2007. His continued role in that position after the adoption of the 2013 Constitution was contrary to sec 208(4) of the Constitution.

16 The Zimbabwe Defence Forces are established in terms of sec 211 of the Constitution.

unambiguous language, from involvement in politics. The rationale for this is obvious. It now is a globally-accepted norm that the involvement of the military in politics has a negative bearing on the democratisation process in a country.<sup>17</sup> It has, for example, been argued that the conduct of the military is key to the development of democracy and its robustness.<sup>18</sup> This is because, as Hunter points out, the involvement of soldiers in politics limits ‘popular sovereignty, the guiding principle of democracy’.<sup>19</sup> Some authors have opined that the involvement of the military in politics can ‘impede democracy’s consolidation’, thereby causing ‘democracy to die a slow death’.<sup>20</sup> It should, therefore, be obvious that the military’s involvement in politics serves to undermine than enhance and promote democracy.

In terms of the Constitution, civilian policing is a mandate that vests in the police service. Section 219 provides:

- (1) There is a Police Service which is responsible for –
  - (a) detecting, investigating and preventing crime;
  - (b) preserving the internal security of Zimbabwe;
  - (c) protecting and securing the lives and property of the people;
  - (d) maintaining law and order; and
  - (e) upholding this Constitution and enforcing the law without fear or favour.

The constitutional hierarchical ordering of the civilian-military relations in Zimbabwe in essence requires the military to be under civilian command. Even when they are deployed together with the police in the fulfillment of their constitutional duties, their role is that of ‘support’ to the civilian police – the police service, also emphasising their subservience to civilian authority.

It is against the above constitutional background that the events of November 2017 are discussed. According to reports, ZANU-PF for a long time had been involved in an internecine factional battle where two factions sought to succeed the aged and increasingly frail

17 See W Hunter ‘Politicians against soldiers: Contesting the military after post-authorization in Brazil’ (1995) 4 *Comparative Politics* 425.

18 As above. See also K Rakson ‘The influence of the military in Thai politics’ (2010) *Asia Research Centre, Working Research Paper 16*, where the author points out that the ‘persistence of the military’s influence has impaired the consolidation of Thai democracy’.

19 Hunter (n 17) 425.

20 Hunter (n 17) 426, where she makes reference to G O’Donnell ‘Challenges to democratization in Brazil’ (1988) 5 *World Policy Journal* 281; F Hagopian ‘Democracy by undemocratic means? Elites, political facts, and regime transition in Brazil’ (1990) 23 *Comparative Political Studies* 147; and TL Karl ‘Dilemmas of democratization in Latin America’ (1990) 23 *Comparative Politics* 1-21 in their analysis of the transition from military to civilian rule in Brazil in 1985.

Robert Mugabe.<sup>21</sup> The factional wars resulted in then Vice-President Emmerson Mnangagwa being dismissed by Mugabe on 6 November 2017.<sup>22</sup> Mnangagwa fled Zimbabwe alleging that threats to his life and security had been made.<sup>23</sup>

On 13 November 2017 General Chiwenga, then commander of the Zimbabwe Defence Forces, addressed a press conference where he made a number of unpalatable remarks.<sup>24</sup> He stated that there was instability in ZANU-PF, the political party in government.<sup>25</sup> He went on to state that the Zimbabwe Defence Forces were the major 'stockholders' in respect of the gains of the liberation struggle, and that the Zimbabwe Defence Forces will take 'corrective measures' when these are threatened.<sup>26</sup> He warned that the military was ready to 'step in' to deal with those behind the 'current treacherous shenanigans' so as to protect 'our revolution'.<sup>27</sup> Initially having pointed out that simmering differences within ZANU-PF had historically been resolved by military intervention without usurpation of power, General Chiwenga then, chillingly, ordered ZANU-PF to stop the 'purging' of members of the party with 'liberation war credentials' from ZANU-PF.<sup>28</sup>

Quite interestingly, a few years before the press conference, then Vice-President Mnangagwa had referred to General Chiwenga, contrary to the Zimbabwean constitutional order, as ZANU-PF's foremost political commissar.<sup>29</sup>

In his statement General Chiwenga was uninhibited not only in the display of his political partisanship, but also in his conflation of party and state: He called ZANU-PF a household name in Zimbabwe<sup>30</sup>

21 See 'Mugabe, ED feud escalates' *The Standard* 3-9 September 2017; 'Mugabe, Grace bury ED' *The Standard* 5-11 November 2017; 'Mnangagwa's great escape: The details' *Zimbabwe Independent* 10-16 November 2017; 'How succession fallout started' *Zimbabwe Independent* 10-16 November 2017.

22 'Mugabe fires Mnangagwa' *Newsday* 7 November 2017, <https://www.newsday.co.zw/2017/11/mugabe-fires-mnangagwa/> (accessed 2 April 2018).

23 'Mnangagwa goes into hiding' *Newsday* 8 November 2017, <https://www.newsday.co.zw/2017/11/mnangagwa-goes-hiding/> (accessed 21 March 2018).

24 See 'Full text of statement by General Constantino Chiwenga before military coup' Nehanda Radio 16 November 2017, <http://nehandaradio.com/2017/11/16/full-text-statement-general-constantino-chiwenga/> (accessed 5 March 2018).

25 As above.

26 As above.

27 As above.

28 As above.

29 See 'Chiwenga introduced as ZANU-PF commissar' *Bulawayo 24 News* 9 March 2015, <https://bulawayo24.com/index-id-news-sc-national-byo-64011-article-chiwenga+introduced+as+zanu-pf+political+commissar.html> (accessed 5 March 2018). See also 'Chiwenga our commissar – ZANU-PF' *Newsday* 9 March 2015, <https://www.newsday.co.zw/2015/03/chiwenga-our-commissar-zanu-pf/> (accessed 5 March 2018).

30 Statement by General Constantino Chiwenga (n 24).

(this despite the fact that as recently as 2008 it was an opposition in parliament<sup>31</sup> and had lost the first round of the presidential vote,<sup>32</sup> and the victor in the first round, Morgan Tsvangirai of the Movement of Democratic Change (MDC), had to withdraw from the race after ZANU-PF had unleashed violence that left more than 200 MDC members dead),<sup>33</sup> and that whatever affected ZANU-PF's stability by default affected national stability.<sup>34</sup>

One of the demands made by General Chiwenga was that ZANU-PF members should be allowed to contest for ZANU-PF positions at the forthcoming December 2017 ZANU-PF Extraordinary Congress – an overt demand for the reversal of the dismissal of Mnangagwa and some members of his faction from government and the party.<sup>35</sup>

It indeed was quite disconcerting that General Chiwenga attempted to base the military's interference in civilian, specifically political party matters, on what he deemed to be the pre-independence tradition of the Zimbabwe African National Liberation Army, the pre-independence military wing of ZANU-PF). In so doing he conveniently ignored the fact that the current Zimbabwe Defence Forces are an integrated institution comprising the Zimbabwe People's Revolutionary Army (the pre-independence military wing of the Zimbabwe African People's Union) and Rhodesian elements as well.<sup>36</sup> In any event, the Zimbabwe Defence Forces are and should be viewed as a single, professional national institution and not from the perspective of only one of its historical elements. Also, 37 years into independence, the vast majority of those currently serving should have no experience of the war of liberation and therefore were not part of the integration process at independence. In any event and, most importantly, in a constitutional democracy, historical traditions of a guerilla force should be subordinated to the constitutional norms currently obtaining.

Following the press conference, on 14 November 2017 the army deployed its tanks and other equipment and took over strategic places such as Munhumutapa Building (the seat of government in Harare), the Supreme Court, Parliament and the Zimbabwe

31 The parliamentary election results are available at <http://archive.kubatana.net/html/archive/elec/080329kubres.asp>, (accessed 7 April 2018).

32 The presidential election results are available at <http://archive.kubatana.net/html/archive/elec/080329kubres.asp>, (accessed 7 April 2018).

33 D Coltart *The Struggle Continues, 50 Years of Tyranny in Zimbabwe* (2016) 477.

34 Statement by General Constantino Chiwenga (n 24).

35 As above.

36 K Chitiyo & M Rupiya 'Tracking Zimbabwe's political history: The Zimbabwe Defence Forces from 1980-2005' in M Rupiya (ed) *Evolutions and revolutions: A contemporary history of militaries in Southern Africa* (2005) 338-340.

Broadcasting Corporation (the public broadcaster) facilities.<sup>37</sup> Army tanks also took up positions outside Mugabe's residence.<sup>38</sup> By 03:00 on the following day the army had secured all strategic locations, and at 04:00 then Major-General Sibusiso Moyo announced that the Zimbabwe Defence Forces had stepped in to address a degenerating situation,<sup>39</sup> stating that Mugabe and his family were safe and their security was guaranteed.<sup>40</sup> Major-General Moyo went on to state that the military was not taking over power but was after some 'criminals' surrounding the President.<sup>41</sup>

The announcement by Major-General Moyo for all intents and purposes was a *coup* announcement.<sup>42</sup> Other than the fact that it was made against the background of the sound of gunfire and explosions in some parts of Harare,<sup>43</sup> the announcement made it clear that the military had taken over the operations of government and was limiting a number of fundamental rights enshrined in the Constitution. Among other things, the announcement made it clear that the freedoms of movement and assembly were being suspended, namely, '[t]o the generality of the people of Zimbabwe, we urge you to remain calm and limit unnecessary movement'.<sup>44</sup>

The deployment of military equipment and personnel outside Mugabe's residence effectively placed him under house arrest as he then had very limited movement, both at a personal level and also officially, to discharge governmental functions as head of state. This, coupled with the presence of soldiers in the streets of Harare and at roadblocks on all major roads in the country, and the immobilisation of civilian police officers, meant that Zimbabwe was effectively under military rule.<sup>45</sup>

37 See 'How army takeover was executed' *Zimbabwe Independent* 17-23 November 2017, <https://www.theindependent.co.zw/2017/11/17/army-takeover-executed/> (accessed 23 November 2017); *ABC News* (n 2).

38 See 'Under military siege for seven days' *Zimbabwe Independent* 24-30 November 2017, <https://www.theindependent.co.zw/2017/11/24/military-siege-seven-days/> (accessed 30 November 2017).

39 See 'Full text of army statement delivered on ZBC TV – "We are targeting criminals around the President"' *Nehanda Radio* 16 November 2017, <http://nehandaradio.com/2017/11/16/full-text-army-statement-delivered-zbc-tv-targeting-criminals-around-president/> (accessed 17 November 2017).

40 As above.

41 As above.

42 See 'What a *coup*? Robert Mugabe "safe and sound" as Zimbabwe military targets "criminals" in government' *Newsweek*, <http://www.newsweek.com/zimbabwe-coup-robert-mugabe-zimbabwe-army-711704> (accessed 11 February 2018).

43 See 'Zimbabwe's crisis: "Moment of hope" as Robert Mugabe's iron grip on power evaporates – Latest news' *Telegraph* 15 November 2017, <https://www.telegraph.co.uk/news/2017/11/14/tanks-seen-heading-towards-zimbabwe-capital-harare/> (accessed 22 March 2018).

44 Army statement (n 39).

45 See '*Coup de Grace*, Zimbabwe's army mounts a *coup* against Robert Mugabe' *The Economist* 15 November 2017, <https://www.economist.com/news/middle->

The military also deployed to the homes of some cabinet ministers. They arrested and detained Finance Minister Ignatious Chombo.<sup>46</sup> Ministers Jonathan Moyo and Saviour Kasukuwere are said to have escaped bullet fire at their respective homes.<sup>47</sup> A director of intelligence, one Albert Ngulube, was detained by the army as well as then ZANU-PF youth leader, Kudzanai Chipanga, who had challenged Chiwenga's statement and called it treasonous.<sup>48</sup> Chipanga later appeared on national television, apparently under duress, profusely apologising to General Chiwenga and dissociating himself from the statement he had previously read condemning the latter's statement.<sup>49</sup>

There was a mass rally in Harare, reportedly organised by the army and the country's war veterans to pile pressure on Mugabe to leave office.<sup>50</sup> Meanwhile, his party met and resolved to remove him from its leadership, expelled his wife and a number of its members belonging to the vanquished faction and reinstated the previously-expelled Mnangagwa and appointed him its leader.<sup>51</sup>

ZANU-PF then announced that Mnangagwa had been chosen to complete Mugabe's presidential term.<sup>52</sup> It also announced that it would institute impeachment proceedings against Mugabe since he had failed to heed the demand to resign.<sup>53</sup> The opposition agreed to support the impeachment motion and seconded the motion when moved.<sup>54</sup> Amid such process, the powerless and emasculated Mugabe

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east-and-africa/21731339-after-37-years-power-game-up-zimbabwes-army-mounts-coup-against (accessed 2 April 2018).

46 *Zimbabwe Independent* (n 37).

47 As above.

48 As above.

49 See 'Chipanga apologises, spills the beans' *Herald* 16 November 2017, <https://www.herald.co.zw/chipanga-apologises-spills-the-beans/> (accessed 10 January 2018).

50 See 'Mugabe's inglorious exit: The timeline' *Zimbabwe Independent* 22-28 December 2017, <https://www.theindependent.co.zw/2017/12/22/mugabes-inglorious-exit-timeline/> (accessed 15 January 2018).

51 See 'Zanu recalls Pres Mugabe' *Herald* 20 November 2017, <http://www.herald.co.zw/zanu-pf-recalls-pres-mugabe/> (accessed 15 January 2018).

52 See 'Zanu-PF Central Committee resolutions' *Herald* 20 December 2017, <http://www.herald.co.zw/zanu-pf-central-committee-resolutions/> (accessed 15 January 2018).

53 The Constitution does not use the word 'impeach' but 'removal'. However, it is clear that the said removal is through an impeachment process. See also Zanu-PF Central Committee resolutions (n 52).

54 Supported by Mabvuku/Tafara MDC MP, James Maridadi. See 'Breaking News: President Mugabe resigns ... Announcement of new leader tomorrow' *Herald* 21 November 2017, <http://www.herald.co.zw/live-parliament-sit-to-impeach-president-mugabe/> (accessed 15 January 2018). See also *Liberal Democrats & 4 Others v President of the Republic of Zimbabwe & 4 Others* CCZ 7/18 pp 20-21 where reference to the *Hansard* is made.

capitulated and on 21 November 2017 tendered his resignation to the Speaker of Parliament.<sup>55</sup>

Mnangagwa returned to Zimbabwe on 22 November 2017,<sup>56</sup> and addressed a ZANU-PF rally in Harare where he confessed having been in constant communication with the military throughout the whole episode.<sup>57</sup> He subsequently was sworn into office as President on 24 November.<sup>58</sup>

The Constitution imposes an obligation on the state and every person, including juristic persons, and every institution and agency of government at every level to 'respect, protect, promote and fulfil' the rights and freedoms set out in chapter 4 of the Constitution.<sup>59</sup> Chapter 4 is binding on the state and all executive, legislative and judicial institutions and agencies of government at every level.<sup>60</sup> The Zimbabwe Defence Forces, therefore, are bound by the fundamental human rights and freedoms set out in chapter 4.

In this regard, the Zimbabwe Defence Forces cannot abrogate the rights set out in chapter 4 without triggering accountability. The Zimbabwe Defence Forces are bound to respect the right to liberty, freedom of expression, freedom of movement and the right to security and freedom from torture. These rights came into sharp focus in the unfolding *coup* in Zimbabwe. The conduct of the Zimbabwe Defence Forces in the execution of the *coup*, itself being unconstitutional,<sup>61</sup> has had serious implications for the enjoyment of fundamental human rights and freedoms set out above.

The fundamental human rights and freedoms set out in chapter 4 of the Constitution can only be limited in terms of section 86 of the Constitution through a law of general application. In *Brian James v Zimbabwe Electoral Commission & Others*<sup>62</sup> Patel JA (as he then was), commenting of the application of section 86, opined that '[t]he crux of the present matter is whether or not that derogation

55 As above.

56 See 'Zimbabwe's Mnangagwa promises jobs in "new democracy"' *BBC* 22 November 2017, <http://www.bbc.com/news/world-africa-42077233> (accessed 20 January 2018).

57 See 'Zanu-PF nominates ED Mnangagwa for President' *Herald* 22 November 2017, <http://www.herald.co.zw/just-in-zanu-pf-nominates-ed-mnangagwa-for-president/> (accessed 15 January 2018).

58 See Bill Watch 42/17 by Veritas 'President Mnangagwa sworn in on Friday 24 November 2017', <https://mail.google.com/mail/u/0/#search/veritas%40mango.zw/16002e24db924eb7> (accessed 15 January 2018).

59 Sec 44 of the Constitution.

60 Sec 45(1) of the Constitution.

61 See sec 213 of the Constitution.

62 CCZ 4/13.

falls within the bounds of permissible limitation under s 86(2) of the Constitution’.

As has been held with respect to the Declaration of Rights in the former Constitution, any derogation from a fundamental right or freedom must be strictly and narrowly construed. There must be a rational connection between the objective of the derogation and the implementing law. Moreover, the means employed should not impair the right in question more than is necessary to achieve the declared objective.<sup>63</sup>

Any limitation of fundamental human rights and freedoms executed outside section 86 of the Constitution therefore is unconstitutional and should trigger legal accountability.

The statement by the military that it was pursuing criminals around Mr Mugabe<sup>64</sup> meant that the Zimbabwe Defence Forces had arrogated to themselves the role of arresting suspects and defining what constituted a criminal. There is no law that permits the military to arrest civilians. The law reposes that role in a group of people falling within the definition of a ‘peace officer’, all of whom civilians.<sup>65</sup> In *Wilson v Minister of Defence & Others*,<sup>66</sup> a case where the army had arrested two journalists and the Court had issued a *habeas corpus* order against the army officials which had been defied whereupon contempt of court proceedings were brought against them, the Court held:<sup>67</sup>

Having once determined that the applicant acted reasonably in instituting proceedings for contempt then I can do no better than respectfully to endorse the unequivocal sentiment expressed by the learned Judge President. Where persons have been unlawfully deprived of their liberty - and despite regrettable equivocation from Mrs Goredema on the point there can be no doubt that the arrest and detention of Mark Chavunduka was unlawful - and it is necessary to resort to litigation, even litigation for contempt, to secure their release.

In executing the *coup*, the Zimbabwe Defence Forces undoubtedly infringed a number of fundamental freedoms of various persons. These include the right of personal liberty;<sup>68</sup> the rights of arrested

63 *Brian James* (n 62).

64 Army statement (n 39).

65 See secs 24 and 25 of the Criminal Procedure and Evidence Act (Chap 9:07) as read with the definitions section of a peace officer which excludes the military.

66 1999 (1) ZLR 144 (HC).

67 163 para D.

68 Sec 49(1) of the Constitution.

and detained persons;<sup>69</sup> the right to human dignity;<sup>70</sup> the right to personal security;<sup>71</sup> freedom from torture or cruel, inhuman or degrading treatment or punishment;<sup>72</sup> the right to equality and non-discrimination (right to equality before the law and equal protection of the law and benefit of the law);<sup>73</sup> the right to privacy;<sup>74</sup> freedom of assembly and association;<sup>75</sup> freedom of conscience;<sup>76</sup> freedom of expression;<sup>77</sup> political rights;<sup>78</sup> as well as the right to property.<sup>79</sup>

These violations arose from the illegal arrests, detentions and torture of various persons deemed to be criminals. These persons came to lose the protection and benefit of the law as their rights were trampled upon by the military.<sup>80</sup>

There was also a limitation on the freedom of movement. For some days during and after the *coup*, soldiers set up roadblocks around the country. At these roadblocks they required the travelling public to produce and exhibit to them their personal identity documents.<sup>81</sup> This was against the law as it violated freedom of movement. The Supreme Court in *Elliot v Commissioner of Police & Another* laid down the legal position on identity documents and outlawed the action of arbitrarily stopping and arresting persons not carrying an identity document.<sup>82</sup>

There is also a possibility of the commission of murder as there are allegations that there was loss of life directly linked to the *coup*.<sup>83</sup>

69 Sec 50(1) of the Constitution.

70 Sec 51 of the Constitution.

71 Sec 52(a) of the Constitution.

72 Sec 53 of the Constitution.

73 Sec 56(1) of the Constitution.

74 Secs 57(a), (b) and (c) of the Constitution.

75 Sec 58(1) of the Constitution.

76 Secs 60(1)(a) and (b) of the Constitution.

77 Sec 61(1)(a) of the Constitution.

78 Sec 67(1)(b) of the Constitution.

79 Sec 71(2) of the Constitution.

80 See sec 56 which vests in every person the right to protection of the law.

81 The authors personally witnessed this.

82 1997 (1) ZLR 315 (SC) 323B. The requirement to produce an identity document and the criminal liability for not doing so was in terms of s 10(1)(c) of the National Registration Act Chap 10:17 which the Supreme Court held was inconsistent with the then sec 22(1) of the then Constitution of Zimbabwe (the freedom of movement provision).

83 See 'Zimbabweans hold memorial service for CIO boss killed in November military intervention' *Voice of America Zimbabwe Service* 28 January 2018, <https://www.voazimbabwe.com/a/zimbabwe-relatives-of-slain-cio-operative/4228254.html> (accessed 28 April 2018); 'Mugabe one-on-one interview' *Zimbabwe Independent* 23-29 March 2018, where Mugabe alleged that some people were killed during the *coup*; 'Moyo says Zimbabwe army killed dozens during *coup*, shows pictures' *Zimbabwe Mail* 26 December 2017, <http://www.thezimbabwemail.com/zimbabwe/moyo-says-zimbabwe-army-killed-dozens-coup-shows-pictures/> (accessed 27 April 2018).

In a nutshell, the conduct of the military during the *coup* resulted in the nullification of various rights as guaranteed in the Constitution. In effect, the Constitution was overthrown as the conduct of the army could not find any validation in it. This is despite the fickle attempt to sanitise the *coup* by some people approaching the High Court to validate such conduct and that Court in fact agreeing to do so.<sup>84</sup> Basing its order on the consent of the parties, the High Court held:

- (1) The actions of the Zimbabwe Defence Forces in intervening to stop the take-over of first respondent's constitutional functions by those around him are constitutionally permissible and lawful in terms of section 212 of the Constitution of Zimbabwe in that –
  - (a) they arrest first respondent's abdication of constitutional function, and
  - (b) they ensure that non-elected officials do not exercise executive functions which can only be exercised by elected constitutional functionaries.

The High Court consequently ordered that since the actions of the Zimbabwe Defence Forces were 'constitutionally valid', the Defence Forces therefore had 'the right to take all such measures and undertake all such acts as [would] bring the desired end to its intervention'. The section 212 referred to in the order in fact deals with the functions of the Zimbabwe Defence Forces, which functions are to 'protect Zimbabwe, its people, its national security and interests and its territorial integrity and to uphold this Constitution'. The Court shut its judicial eyes to clear violations of the Constitution and instead went out of its way to read into the Constitution non-existent provisions not even contemplated by the spirit of the Constitution. The Court erred in one main respect, namely, that it ignored clear constitutional provisions dealing with the removal from office of a President who is no longer capable of exercising his or her functions.<sup>85</sup> It does not matter that the parties who appeared in court consented to the order sought. A court cannot merely issue an order by consent without considering the legality of the order sought.

84 See *Sibanda & Another v President of the Republic of Zimbabwe NO & Others* HC 1082/17. A later attempt to challenge the constitutionality of the conduct of the Zimbabwe Defence Forces in the Constitutional Court was dismissed on procedural technicalities. See *Liberal Democrats & 4 Others v President of the Republic of Zimbabwe & 4 Others* CCZ 7/18 6.

85 See secs 97(1)(a)-(d) of the Constitution. These provisions deal with the removal of the President from office on account of serious misconduct, failure to obey, uphold or defend the Constitution, willful violation of the Constitution, inability to perform functions of the office because of the physical or mental incapacity. The Constitution sets out clear and detailed procedures to be followed by Parliament.

The unfortunate decision of the High Court of Zimbabwe on the legality of the *coup* is not an isolated act by a court faced with such a situation. Mahmud records a history of validation and legitimisation of *coups* by the courts in several countries.<sup>86</sup> The Pakistani case of *State v Dosso* is a good example.<sup>87</sup> In that case the Pakistani Supreme Court relied on the Hans Kelsen theory of revolutionary legality to validate the *coup*.<sup>88</sup> In that decision the Court held that the efficacy of the *coup* was the basis of its validity.<sup>89</sup> Mahmud, however, argues that no evidence was relied upon by the Court to conclude that the *coup* was efficacious.<sup>90</sup>

In the Ugandan case of *Uganda v Matovu* the Court had the opportunity to consider the validity of the new regime.<sup>91</sup> Prime Minister Milton Obote had suspended the Constitution together with Parliament in 1962. In 1966 he came up with another Constitution, recalled Parliament to pass it to create an executive presidency and a unitary state. In the same year Obote declared martial law. Matovu, a Buganda chief, was served with a detention order in terms of the 1966 Constitution and he instituted *habeas corpus* proceedings, arguing the detention order under the 1966 Constitution violated fundamental rights provisions in the 1962 Constitution.<sup>92</sup> Relying on the Kelsen theory and on *Dosso*, the Court concluded that the regime was efficacious.<sup>93</sup> However, unlike in *Dosso*, the Court had regard to a number of affidavits of officials as evidence to prove that the 1966 Constitution was efficacious.<sup>94</sup> The Court thus validated and legitimised the new regime that had overthrown an existing constitution.

In the Rhodesian cases of *Madzimbamuto v Lardner-Burke*<sup>95</sup> and *Regina v Ndhlovu*,<sup>96</sup> a similar reasoning was ultimately followed in the determination of the legality of a new regime arising out of an overthrow of the 1961 Constitution and the adoption of another in 1965, accompanied with a Unilateral Declaration of Independence (from Britain).

86 Mahmud (n 3) 54.

87 PLD 1958 SC 553.

88 Mahmud (n 3) 54.

89 Mahmud 55.

90 Mahmud 56.

91 1966 E Afr LR 514.

92 Mahmud (n 3) 57-58.

93 Mahmud 59.

94 As above.

95 [1968] 2 SALR 284 (Rhodesia Appellate Division).

96 [1968] 4 SALR 555 (Rhodesia Appellate Division).

However, the above cases clearly are distinguishable from the Zimbabwean case since they deal with the question of effectiveness of a new regime where the old constitutional order had been overthrown. The Zimbabwean High Court based its decision on a wrong interpretation of an extant Constitution, not on the legal status of a new regime.

The duty to respect, protect, promote and fulfill the fundamental human rights and freedoms by the three arms of the state, as enunciated in section 44 of the Constitution, was thrown out the window. Distressingly, when the High Court was presented with an opportunity to assert the provisions of the Constitution (assuming that the whole litigation process was not a choreographed charade) it slipped. The High Court order makes it difficult for potential litigants in matters dealing with the protection of fundamental human rights and freedoms to repose their faith in Zimbabwean judicial institutions. The future looks bleak from the perspective of the protection of fundamental human rights and freedoms. Unless the Constitutional Court steps in (if it is called upon to do so in the future) to assert the supremacy of the Constitution and overturn the High Court order, democracy, human rights and the rule of law are on the knife edge in Zimbabwe.

The chilling effect of the military's conduct cannot be underestimated. It now is probable that should their 'political' interests again be threatened, the Zimbabwe Defence Forces would readily execute another *coup*, suspend the Constitution, and brazenly violate people's rights.

#### **4 Major players in the *coup* and their past human rights records**

This part of the article discusses the major players in the *coup*, both as a collective and as individuals, and their past human rights records. This is important because, while the process of the transition itself may not necessarily define the outcome of the transition, where both the process undermines democracy and violates fundamental rights and the people behind the process have a record of consistently violating human rights and undermining democratic processes, the prospect of the *coup* ushering in democracy lessens.

The players involved in the *coup* are institutions and individuals that have been implicated in a number of past human rights abuses and violations. The entirety of the high command of the Zimbabwe Defence Forces apparently was involved in the process, projecting an

appearance of unity of purpose.<sup>97</sup> The commander of the air force at the time of the *coup*, Air Marshall Perence Shiri, was the commander of the 5 Brigade at the time it is alleged to have committed the *Gukurahundi* atrocities in Matabeleland and the Midlands provinces.<sup>98</sup> These atrocities left an estimated 20 000 innocent civilians dead, many raped and severely tortured and an unknown but significant number of missing persons.<sup>99</sup> The 5 Brigade has long been accused of being the main military unit behind the *Gukurahundi* atrocities. In the aftermath of the *coup* Perence Shiri was appointed Minister of Lands and Agriculture, and was always accused of the actual execution of the *Gukurahundi* atrocities.<sup>100</sup>

Emmerson Mnangagwa, whose dismissal from the position of Vice-President appears to have triggered the *coup*, and who in fact confessed to have maintained constant communication with the military throughout the *coup*, likewise has been implicated as one of the leading figures in the execution of *Gukurahundi*.<sup>101</sup>

The atrocities themselves were egregious and were carried out in the most inhuman, barbaric and gruesome fashion: Tens of thousands of unarmed civilians, who were supporters of the strongest opposition party at the time – PF-ZAPU – or who happened to be in areas deemed to be PF-ZAPU strongholds were subjected to extra-judicial cold-blooded killings, with a number of them being buried alive and others burnt to death; pregnant women had their stomachs slit open with bayonets to reveal still moving fetuses, some being forced to kill and eat their own infant babies; some women had sharp objects inserted into their genitals leading them to adopting a painful, wide-legged gait; and men would receive blows on their testicles from rubber truncheons (on one occasion the victim's scrotum burst open

97 L Msipa 'The Chipanga and Simon Khaya Moyo – Implications', <http://www.thezimbabweemail.com/opinion/chipanga-simon-khaya-moyo-implications/> (accessed 10 March 2018).

98 D Masunda "'You must thank your ancestors": My strange encounter dinner with Perrance Shiri' *NewZWire* 3 August 2020, <https://newswire.live/you-must-thank-your-ancestors-my-strange-dinner-with-perrance-shiri/> (accessed 29 September 2020).

99 See 'Breaking the silence: Building true peace: A report on the disturbances in Matabeleland and the Midlands, 1980-1988: A summary' Catholic Commission for Justice and Peace and Legal Resources Foundations (summary of the 1997 version of the same report), <http://hrforumzim.org/wp-content/uploads/2010/06/breaking-the-silence.pdf> (accessed 7 April 2018).

100 Coltart (n 33) 133 as read with the chapter on *Gukurahundi* in the same book.

101 Other names that feature prominently in the CCJP report are those of Robert Mugabe and Dr Sydney Sekeramayi, former Minister of Defence. See S Eppel "'Gukurahundi": The need for truth and reparation' in B Raftopoulos & T Savage (eds) *Zimbabwe – Injustice and political reconciliation* (2004) 62; see also M Killander & M Nyathi *Accountability for Gukurahundi atrocities thirty years on: Prospects and challenges* (2015) 158 *CILSA* 463.

and he died);<sup>102</sup> school children were forced to publicly engage in sexual intercourse with one another;<sup>103</sup> many victims disappeared without a trace and nothing is known of what befell them;<sup>104</sup> yet many more were subjected to assaults and torture<sup>105</sup> while others were raped,<sup>106</sup> arbitrarily detained,<sup>107</sup> had their property destroyed, or were deliberately starved as food access was completely cut off in some areas.<sup>108</sup>

Of course, the ultimate responsibility for *Gukurahundi* should fall on former President Mugabe who at the time was the executive head of government. However, this should in no way lessen the responsibility of the others who were involved, especially those who at the time held relevant high military and political positions.<sup>109</sup> There has been no legal accountability for the *Gukurahundi* atrocities owing largely to the fact that those accused of it have escaped due process due to the fact that they have continued to have control of the entire political, military and intelligence infrastructure in Zimbabwe, and some of them have since died.

The military as an institution has been implicated in a number of post-*Gukurahundi* human rights violations. These include Operation Murambatsvina and Operation Maguta. The UN Special Envoy, Mrs Anna Tibaijuka, in her 2005 report titled Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Settlements Issues in Zimbabwe,<sup>110</sup> where she investigated the massive displacement of urban dwellers in Zimbabwe at the behest of President Mugabe, states the following:<sup>111</sup>

On 19 May 2005, with little or no warning, a military-style 'clean-up' operation started in the Zimbabwe capital, Harare. It quickly developed into a deliberate nationwide campaign, destroying what the Government termed illegal vending sites, structures, other informal business premises and homes, literally displacing hundreds of thousands of people. Termed 'Operation Murambatsvina' by the Government (hereafter referred to as Operation Restore Order), and

102 Killander & Nyathi (n 101) 467.

103 Killander & Nyathi 466.

104 Coltart (n 33) 141.

105 Killander & Nyathi (n 101) 466.

106 Killander & Nyathi 467.

107 Coltart (n 33) 140.

108 See Killander & Nyathi (n 101) 466 and the references therein.

109 For a discussion of accountability for the *Gukurahundi* atrocities, see generally Killander & Nyathi (n 101).

110 Available at [http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe\\_rpt.pdf](http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe_rpt.pdf) (accessed 2 February 2018).

111 See Introduction (12 of the report) (our emphasis).

commonly referred to by the people as 'Operation Tsunami', the army and police were mobilised to carry out the demolitions and evictions.

Operation Maguta is another example of the Zimbabwean military's penchant for human rights violations. This was an army-headed operation designed to 'boost agriculture production and food security'.<sup>112</sup> Government sought to initially bring 250 000 hectares under irrigation and then expanded it to 800 000 hectares.<sup>113</sup> Ironically, and contrary to its stated aims, the operation was characterised by massive human rights violations by the army. In Insiza District in the Matabeleland South Province there were reports of villagers being subjected to forced labour where they were forced-marched to the irrigation sites and forced to work.<sup>114</sup> These villagers were subjected to punishing working conditions.<sup>115</sup> They were forced to start work at 06:00, denied water and only allowed a break at 12:00 for a pathetic lunch of 'a plate of boiled vegetables and stale [cooked maize paste]'.<sup>116</sup> According to *The Zimbabwean*:<sup>117</sup>

Reports that the soldiers were flogging 'defiant and lazy' farm workers using sjamboks could not be independently verified. But the forced labour gave a graphic illustration of the true horror of the army-led Operation Maguta, which is deliberately fostering a situation where notions of human decency are debased, and where this debasement is celebrated.

Also, ZANU-PF and the military have since independence worked hand-in-glove in using violence and the threat of violence as a means to win elections.<sup>118</sup> In 2002 General Vitalis Zvinvashe issued a threat that the Zimbabwe Defence Forces would not salute anyone without liberation credentials, declaring the office of President 'a strait-jacket office'.<sup>119</sup> In 2008 when President Mugabe lost the first round of elections to Morgan Tsvangirai, the army deployed and unleashed violence against opposition members and thus forced Tsvangirai to pull out of the run-off poll, thus handing Mugabe an automatic victory.<sup>120</sup> In 2008 the violence meted out by ZANU-PF, the military

112 C Mutami 'Smallholder agriculture production in Zimbabwe: A survey' (2015) 14 *Consilience: The Journal of Sustainable Development* 140.

113 Mutami (n 112) 149.

114 See 'Operation Maguta – State-sanctioned slavery' *The Zimbabwean* 27 July 2006, <http://www.thezimbabwean.co/2006/07/operation-maguta-state-sanctioned-slavery/> (accessed 2 February 2018).

115 Villagers would be required to use short hoes to weed the crops, wearing tattered clothing, during winter in biting cold conditions.

116 *The Zimbabwean* (n 114).

117 As above.

118 See J Nkomo, *Nkomo: The story of my life* (2001) 206 207.

119 Musavengana (n 7).

120 See CRS Report for Congress, Zimbabwe: 2008 Elections and Implications for US Policy, updated 10 July 2008, [https://digital.library.unt.edu/ark:/67531/metadc700870/m1/1/high\\_res\\_d/RL34509\\_2008Jul10.pdf](https://digital.library.unt.edu/ark:/67531/metadc700870/m1/1/high_res_d/RL34509_2008Jul10.pdf) (accessed 2 April 2018).

and other state agents is estimated to have resulted in the death of approximately 200 people, mostly MDC-T election agents.<sup>121</sup> These killings were accompanied by mass assaults, rapes, displacements and arson.<sup>122</sup>

One prominent ZANU-PF politician recounts that in the 2008 presidential election run-off he was shocked to find himself sharing a platform with military commanders in the mining town of Zvishavane.<sup>123</sup> One of them was addressing the crowd, a gun in one hand and a pen in the other; telling the crowd that if they did not vote for ZANU-PF 'they had better flee from their homes because the army would come looking for them'.<sup>124</sup>

The military has also been fingered in farm invasions during the 'land reform' programme.<sup>125</sup> Following the defeat of the ZANU-PF government by popular vote in the 2000 constitutional referendum, farm invasions by war veterans commenced and the military was implicated in the coordination and facilitation of the illegal land invasion.<sup>126</sup> For example, prominent human rights lawyer and former Minister of Education and Senator, David Coltart, points out the extra-judicial execution of Martin Olds, a farmer, by a group of invaders, some of whom had AK-47 assault rifles, who apparently were highly trained and drove in 13 trucks past a police roadblock.<sup>127</sup> In order to conceal the involvement of the military, Coltart points out that those involved in the Olds murder were all dressed (obviously to conceal their identity) in civilian attire but their weapons and conduct on the day gave them away as military men.<sup>128</sup>

In the past, while the involvement of the military in politics and in political violence has been widely known, there were attempts to either make their involvement as covert as possible and, where this was not possible, to at least attempt to justify their involvement

121 Coltart (n 33) 477.

122 See 'Zimbabwe: The elections on 29 March and the later runoff event and by-elections on 27 June 2008: Report by Kare Vollan' *Nordem Report* 8/2008 38, <http://www.jus.uio.no/smr/english/about/programmes/nordem/publications/2008/0808.pdf> (accessed 10 March 2018).

123 CG Msipa *In pursuit of freedom and justice, A memoir* (2015) 172 173.

124 Msipa (n 123) 173.

125 See 'Fast track land reform in Zimbabwe – Land reform in the twenty years after independence – Human Rights', <https://www.hrw.org/reports/2002/zimbabwe/ZimLand0302-02.htm> (accessed 10 March 2018). See also 'Zimbabwe: Army steps up role in farm invasions', <http://allafrica.com/stories/200005050126.html> (accessed 10 February 2018).

126 Coltart (n 33) 278.

127 Coltart (n 33) 277 278, where he points out that Olds assailants 'used military weapons and acted with military planning and discipline'. This implicates the army in the murder.

128 Coltart (n 33) 278.

in order to give it a veneer of legality. This time, the military's involvement in politics and in the violation of human rights has been so overt and brazen that it needs no speculation.

Also, the Zimbabwean political and socio-economic landscape for some time now has been subjected to the militarisation of civilian institutions. Serving soldiers have been deployed in parastatals,<sup>129</sup> independent institutions such as the Zimbabwe Electoral Commission,<sup>130</sup> the National Prosecuting Authority,<sup>131</sup> and in corrupt mining ventures.<sup>132</sup> A Zimbabwean scholar, Musavengana, observes that the past few years have 'witnessed the *Zanufication* of the public service, traditional leadership structures, youth training centres and the militarisation of public institutions. Musavengana points out that this pervasive conduct has extended to 'electoral commission, strategic grain reserve, the judiciary, prison services, permanent secretary positions in government ministries and heads of state enterprises (parastatals)'.<sup>133</sup>

With the military so involved in the daily affairs of Zimbabwe and its penchant for the violation of human rights, the protection of fundamental freedoms may have reached a nadir. Where the courts have come in to rubber stamp and thus lend legitimacy to a straightforward illegality, there is very little hope that the Zimbabwean human rights landscape may improve. Indeed, human rights violations are likely to continue, with the courts cowering, if not actively aiding, such violations.

129 G Moyo, 'The curse of military commercialisation in state enterprises and parastatals in Zimbabwe', (2016) 42 *Journal of Southern African Studies* 351 Volume 42, 2016, Issue 2. See also 'Deployment of personnel to parastatals to continue' *Chronicle*, 26 August 2013, available at <https://www.tandfonline.com/doi/abs/10.1080/03057070.2016.1145981?src=recsys&journalCode=cjss20> (accessed 7 January 2018); 'Top military officers to run NRZ', *The Zimbabwean*, 25 May 2006, available at <http://www.thezimbabwean.co/2006/05/top-military-officers-to-run-nrz/> (accessed 8 January 2018).

130 See 'Mugabe succession: Military involvement raises the stakes', *Zimbabwe Independent*, 17 July 2017, available at <https://www.theindependent.co.zw/2017/07/17/mugabe-succession-military-involvement-raises-stakes/> (accessed 8 January 2018).

131 See 'Military takes over prosecuting authority' *Zimbabwe Independent* 28 October 2016, <https://www.theindependent.co.zw/2016/10/28/military-takes-prosecuting-authority/> (accessed 8 January 2018).

132 See 'Military looted diamonds – Report' 15 September 2017, <https://www.theindependent.co.zw/2017/09/15/military-looted-diamonds-report/> (accessed 10 January 2018).

133 Musavengana (n 7).

## 5 Reactions of Zimbabwe's institutions to the *coup*

Chapter 12 of the Constitution establishes independent commissions supporting democracy. One of these is the Zimbabwe Human Rights Commission (ZHRC). The ZHRC has a duty to monitor, assess and ensure the observance of human rights and freedoms.<sup>134</sup> Second, it has an obligation to protect the public against the abuse of power and maladministration by the state and public institutions and by officers of all those institutions.<sup>135</sup> Third, it has a duty to 'secure appropriate redress, including recommending the prosecution of offenders, where human rights or freedoms have been violated'.<sup>136</sup> Finally, the ZHRC has a duty to visit and inspect places of detention in order to ascertain the conditions under which persons are kept and thus make recommendations to the minister responsible for administering the law relating to such places.<sup>137</sup>

In the wake of the *coup* the ZHRC issued a lackluster one-page statement.<sup>138</sup> In the statement the Commission noted the political situation obtaining in the country. It then proceeded to point out its role as being to 'support and entrench human rights and democracy, to protect sovereignty and interests of the people and to promote constitutionalism'.<sup>139</sup> The ZHRC then lauded the military's assurances to uphold 'constitutionalism, values of justice, non-violence, human rights and freedoms in resolving the current political situation'.<sup>140</sup> The ZHRC then noted further assurances made by the military and then bizarrely implored a return to constitutionalism, when it had previously lauded the military for assurances to 'uphold constitutionalism'.<sup>141</sup> The ZHRC did not at all condemn the military action as being in violation of the Constitution.

The ZHRC did not act on its mandate as is required by the Constitution. It did not undertake the monitoring and assessment of the *coup* and its effects so as to ensure that human rights in fact were respected. It did not protect the public against human rights abuses by the military. The ZHRC did not 'secure appropriate redress, including recommending the prosecution of offenders, where human

134 Sec 243(1)(c) of the Constitution.

135 Sec 243(1)(e) of the Constitution.

136 Sec 243(1)(g) of the Constitution.

137 Sec 243(1)(k)(i) of the Constitution.

138 See 'ZHRC: Press Statement by the Zimbabwe Human Rights Commission (ZHRC) on the political situation in Zimbabwe' 16 November 2017, <https://minbane.wordpress.com/2017/11/16/https-wp-me-p1xtjg-5uo/> (accessed 3 February 2018).

139 As above.

140 As above.

141 As above.

rights or freedoms have been violated' as rights of various persons were violated, as indicated above.

The Law Society of Zimbabwe (LSZ) is another important body in Zimbabwe with its stated commitment to justice and the rule of law in Zimbabwe.<sup>142</sup> While not a Chapter 12 institution, the LSZ is a creature of statute – the Legal Practitioners Act, Chapter 27:07.<sup>143</sup> One mandate of the LSZ is ensuring that the rule of law is upheld. In the wake of the *coup*, the LSZ on 15 November 2017 issued a short, terse and lukewarm statement, which it circulated to its membership where it noted the 'current developments in the country'.<sup>144</sup> It noted the assurances of peace and calm made by the military and that 'constitutional order will be respected' while asserting its commitment to justice and the rule of law.<sup>145</sup> It further expressed its encouragement on the undertaking not to interfere with judicial independence.<sup>146</sup>

The statement of the LSZ was severely criticised in some quarters. An organisation calling itself Open Parly stated that the LSZ refused to condemn the military *coup*.<sup>147</sup> Open Parly further pointed out that the move by the LSZ was strange but might have been in keeping with the mood then obtaining in Zimbabwe which seemed to embrace anything that brought to an end Mugabe's 37-year reign.<sup>148</sup> However, the LSZ lost its moral high ground of being the organisation that is at the forefront of ensuring observance of the rule of law in Zimbabwe. At a critical moment the LSZ, being the foremost law-based organisation, failed to provide leadership on the legality of the conduct of the military where such conduct clearly was contrary to the Constitution.

## 6 Accountability for the *coup*

This article has outlined the legal and constitutional challenges that have arisen as a result of the *coup*. Mechanisms therefore needed to be put in place to address the challenges posed by the *coup*. One of

142 See the vision of the LSZ, <http://lawsociety.org.zw/AboutUs> (accessed 10 March 2018).

143 Sec 51 of the Act.

144 See 'The Law Society calls for a quick return to constitutional order' by Wisdom Murema of Open Parly, <https://openparly.co.zw/2017/11/16/law-society-of-zimbabwe-calls-for-a-quick-return-to-constitutional-order/> (accessed 14 February 2018).

145 The full statement by the Law Society is not available on its website but was circulated within its membership on 15 November 2017.

146 The 15 November 2017 statement by the Law Society.

147 Law Society (n 144).

148 As above.

the most important of these is accountability of those involved in the violation of rights and freedoms and the need to ensure that there is no repetition of these events. The military should always be confined to the barracks and should submit itself to civilian control.

There is a need to institute an independent, impartial and competent judicial commission of inquiry into the *coup* and the underreported constitutional violations that occurred during its execution, including extra-judicial killings that may have occurred. Specifically, the inquiry would have to examine the circumstances that led to the *coup*; the causes of the failure of civilian leadership over the military; human rights violations that occurred as a result of the *coup*; the lives that may have been lost as a consequence of the *coup* and the circumstances of such loss of life; the persons responsible for such loss of life as well as recommendations as to what has to be done to redress such violations; and recommendations to ensure the non-recurrence of such violations in the future.

## 7 Conclusion

As demonstrated above, the 2017 *coup* in Zimbabwe was unconstitutional. There therefore is a need for urgent accountability for the *coup* and for all the crimes and delicts or torts that were committed during its execution. Responsibility for the crimes and wrongful acts should not only apply to those directly responsible, but should extend to those in military command positions and their civilian co-conspirators who are established to have played a role in the commission of crimes.

The *coup* has brought to the fore the partisan nature of Zimbabwe's military. The conflation of political party internal affairs with those of the state in flagrant violation of the Constitution is as unacceptable as it is dangerous in a democratic constitutional state. It embarrasses and violates those professional men and women in the Zimbabwe Defence Forces who are committed to serving the country, not a political party. In short, the *coup* has been one of the crudest and most severe assaults on Zimbabwean constitutionalism so far, or what is left of it.

It is also safe to conclude that the *coup* might have planted poisonous seeds of mistrust between and among Zimbabwe's security apparatus which might in the long term lead to disunity, instability and insecurity. The immobilisation of the civilian police force and the usurpation of its powers by the military were unfortunate and dangerous.

By adopting a new Constitution in May 2013, Zimbabweans made a bold statement about a clear break from a past characterised by the lawlessness of the state and public institutions. They sought to found a state based on the rule of law. This lofty goal came under attack during the *coup* which undermined the very essence of a constitutional state.

## The Children's Bill of Mauritius: A critical assessment of key aspects

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**Summary:** *This article critically assesses the Children's Bill that has been presented as a law that will revolutionise the sphere of children's rights in Mauritius. It is set to replace the Child Protection Act which was way below the required international standard for children's rights. Essential aspects of the Bill are reviewed by using as barometers the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Some of the aspects explored are the principle of the best interests of the child, the protection of the child, the child as a juvenile offender and the Children's Court. The article also compares the Bill to the previous Child Protection Act to evaluate the efficacy of the changes brought about by the Bill.*

**Key words:** *children's rights; Mauritius; Children's Bill; Children's Court*

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## 1 Introduction

Children's rights have always received the necessary importance and attention in Mauritius. Since independence, various governments have legislated on the issue with the creation of acts of parliament and necessary subsequent amendments.<sup>1</sup> Mauritius has also ratified and acceded to critical international treaties and conventions on the rights and welfare of the child.<sup>2</sup> While the existing normative framework on children's rights was a rather decent one,<sup>3</sup> it could be said that with respect to certain aspects it fell short of the required standard set by international human rights law. In 2019 the Children's Bill was presented in Parliament with the primary aim of significantly ameliorating the existing legal framework on the rights and welfare of the Mauritian child.

A final draft of the Children's Bill was submitted to the Mauritian National Assembly in September 2019. The Bill would have become an Act last year had it not been delayed because of the general elections of November 2019. As the ruling party has won the general elections between 2014 and 2019 and remain in power, the Children's Act will very soon materialise and gain the force of law.<sup>4</sup> It is considered a significant upgrade to the existing Child Protection Act of 1994 (CPA), as it is in line with international standards on children's rights such as the African Charter on the Rights and Welfare of the Child (African Children's Charter) and the United Nations (UN) Convention on the Rights of the Child (CRC).

Against this background this article seeks to critically assess certain aspects of the Children's Bill, namely, (i) the best interests and protection of the child; (ii) child offenders and the juvenile justice system; and (iii) the Children's Court. This exercise is undertaken by using the African Children's Charter and CRC as barometers in view of examining the extent to which these provisions of the Children's

1 Child Protection Act; Protection from Domestic Violence Act; Education Act; Computer Misuse and Cyber Crime Act; Juvenile Offenders Act; Ombudsperson for Children Act; National Children's Council Act; Criminal Code; Cinematograph Act; Dangerous Drugs Act; Divorce and Judicial Separation Act.

2 African Charter on the Rights and Welfare of the Child; Hague Convention on Civil Aspects of Child Abduction; Convention on the Rights of the Child; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; Worst Forms of Child Labour Convention 1999; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts.

3 UN CRC 'Consideration of reports submitted by states parties under Article 44 of the Convention – Mauritius' UN Doc CRC/C/3/Add.36 2 October 1995 paras 3-7.

4 Kalpana Koonjoo-Shah 'Sur le Children's Bill *L'Express* 4 July 2020.

Bill are in line with the required international standards. The above-mentioned aspects of the Children's Bill are then analysed critically, highlighting the ways in which it may be considered a significant upgrade to the current legal position.

## 2 An overview of the normative framework on children's rights in Mauritius

Mauritius has maintained a decent record regarding children's rights. Nevertheless, there still is room for improvement.<sup>5</sup> The positive situation of children's rights in Mauritius has been highlighted by the UN Committee on the Rights of the Child (CRC Committee) in its Concluding Observations issued to Mauritius in 2015. The Committee indeed noted with appreciation the ratification of a number of international conventions and treaties on children's rights,<sup>6</sup> welcomed the adoption of a series of legislative Acts<sup>7</sup> and the establishment of a number of policies, action plans and programmes concerning the rights and welfare of the child.<sup>8</sup>

As an illustration of the above, government expenditure on education for 2019/2020 has been estimated at around US \$500 000, which is 10 per cent of its total expenditure.<sup>9</sup> For pre-primary education, the gross enrolment ratio, that is, the number of students enrolled per 100 of the population aged four and five years, is around 96 per cent, out of which 49 per cent are girls.<sup>10</sup> The same ratio concerning primary education is 95 per cent out of which

5 See Recommendations for Universal Periodic Review – Updated as at December 2015, [https://www.upr-info.org/sites/default/files/document/mauritius/session\\_17\\_-\\_october\\_2013/mauritius\\_mid-term\\_2ndcycle\\_2016.pdf](https://www.upr-info.org/sites/default/files/document/mauritius/session_17_-_october_2013/mauritius_mid-term_2ndcycle_2016.pdf) (accessed 10 March 2020).

6 UN CRC 'Concluding Observations on the combined third to fifth periodic reports of Mauritius' UN Doc CRC/C/MUS/CO/3-5 27 February 2015 para 3.

7 As above. Equal Opportunities (Amendment) Act, which established the Equal Opportunity Commission to prevent all forms of discrimination, 1 January 2012; Institute for Judicial and Legal Studies Act, 1 October 2011; Combating of Trafficking in Persons Act 2009; Amendment to the Child Protection Act which set up a child mentoring scheme, in December 2008.

8 As above. Political manifesto of the new government, which strengthens the protection of children against illicit substances, sexual exploitation and exploitation on the internet, December 2014; National Child Protection Strategy and its Action Plan which aims at preventing violence against children, October 2014; Human Rights Monitoring Committee in order to ensure the implementation of the recommendations of the National Human Rights Action Plan, December 2013; National Human Rights Action Plan 2012-2020, October 2012; Fast-track procedure by the Office of the Director of Public Prosecutions to investigate sexual offences involving child victims effectively, June 2012; Community Child Protection Programme, August 2007; National Parental Empowerment Programme, May 2007.

9 Statistics Mauritius 'Education Statistics', [http://statsmauritius.govmu.org/English/Publications/Pages/Edu\\_Stats\\_Yr19.aspx](http://statsmauritius.govmu.org/English/Publications/Pages/Edu_Stats_Yr19.aspx) (accessed 10 March 2020).

10 As above.

50 per cent are girls. Regarding secondary education, the gross enrolment ratio is 72 per cent out of which 52 per cent are girls.<sup>11</sup> Out of a population of around 110 000 secondary school students, around 50 per cent managed to successfully proceed to tertiary education.<sup>12</sup> It should also be noted that education in Mauritius from pre-primary up to tertiary education level (for a first degree) is free. Even transport is free for students during term-time.<sup>13</sup>

As far as the right to health of children in Mauritius is concerned, the situation has seen great amelioration compared to the early 1990s. For instance, still-births, early neonatal deaths, perinatal deaths, late neo-natal deaths, neonatal deaths, post-neonatal deaths and infant deaths have decreased by approximately 60 per cent in 2018 compared to 1994 levels.<sup>14</sup> The programme of immunisation for babies and children provided by the public health sector also can be said to be robust with around 134 000 babies receiving vaccinations of all kinds, including Rotavirus, pneumococcal, Bacillus Calmette-Guerin and Mumps-Measles-Rubella vaccine.<sup>15</sup> The primary school health statistics are encouraging with the screening of 70 000 children (representing almost 100 per cent of the primary school population) done for scabies, nits, lice, dental care (tooth decay), vision acuity and immunisation.<sup>16</sup> For young adolescents, the public health sector provides free medical treatment, as a matter of right, for health issues and complications similar to that of adults in Mauritius.<sup>17</sup>

The relative success of Mauritius as far as children's rights are concerned, especially comparatively speaking, may be explained by its strong normative framework. At the apex there is the Constitution of Mauritius with its Bill of Rights which protects the civil and political rights of children. The strong sense of constitutionalism, the rule of law and separation of powers that prevail in Mauritius ensure that constitutional provisions are applied to the best interests of the child, as discussed elsewhere by the author.<sup>18</sup> The absence of

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11 As above.

12 As above.

13 Tertiary Education Commission 'Free transport and education', <http://www.tec.mu/freetransport> (accessed 10 March 2020).

14 Ministry of Health and Quality of Life 'Health statistics report 2017' (2017) 35, <http://health.govmu.org/English/Documents/2018/ANNUAL%20REPORT%202017%20FOR%20PRINTING.pdf> (accessed 10 March 2020).

15 Ministry of Health and Quality of Life (n 14) 42.

16 Ministry of Health and Quality of Life (n 14) 56.

17 Republic of Mauritius 'Access to key health care services is every citizen's fundamental right, says Minister Husnoo', <http://www.govmu.org/English/News/Pages/Access-to-key-health-care-services-is-every-citizen's-fundamental-right,-says-Minister-Husnoo.aspx> (accessed 10 March 2020).

18 See in general R Mahadew 'The role of the Mauritian Supreme Court in upholding democracy and the Constitution' (2018) 5 *African Journal of Democracy and*

socio-economic rights in the Constitution is noted but, at the same time, the argument remains that the strong welfare state system of Mauritius does cater for socio-economic benefits and privileges despite providing for lesser guarantees than those of constitutional provisions.<sup>19</sup>

In terms of legislation, the main Act is the CPA which is set to be replaced by the Children's Bill. The main objective of the CPA is to give protection to child victims of abuse and neglect.<sup>20</sup> In 1998 a number of amendments were brought in through the Protection of the Child (Miscellaneous Protection) Act to no fewer than 23 pieces of legislation, including the CPA itself.<sup>21</sup> A second round of amendments came about in 2005 to cater for issues such as child trafficking, abandonment and abduction and fines and terms of imprisonment were also increased to make penalties stricter.<sup>22</sup> In summary, the CPA was a relatively short Act with 22 sections with several provisions dedicated to the child mentoring scheme and the emergence protection order and others focusing on issues such as ill-treatment, sexual offences, indecent photographs of children and mendacity. Some of these sections are discussed from a comparative perspective with the provisions of the Children's Bill in subsequent parts of the article.

The CPA was supported by other pieces of legislation to provide a protective framework for Mauritian children. For instance, the Protection from Domestic Violence Act 1997 was amended in 2004 to extend the scope of the term 'domestic violence' to include physical, sexual and moral violence on children and not only on a spouse.<sup>23</sup> In terms of compulsory education, the Education Act 1957 was amended in 2004 to ensure that education is compulsory for every child up to the age of 16 years.<sup>24</sup> In 2003 the Computer

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*Governance* 49.

- 19 R Mahadew 'Economic and social rights as constitutional guarantees, compared to privileges under the welfare state system: An assessment of the case of Mauritius' (2018) 19 *Economic and Social Rights Review* 9-12.
- 20 Ministry of Women's Rights, Child Development, Family Welfare and Consumer Protection 'Mauritius National Progress Report of the Special Session of the General Assembly on Children' (2006) 3, [https://www.unicef.org/arabic/worldfitforchildren/files/Mauritius\\_WFFC5\\_Report.pdf](https://www.unicef.org/arabic/worldfitforchildren/files/Mauritius_WFFC5_Report.pdf) (accessed 10 March 2020).
- 21 Amendments to the CPA included the definition of the word 'harm' extended so include physical, sexual, psychological, emotional or moral injury, neglect, ill-treatment, impairment of health or development as the forms of harm; 'place of safety' amended to also include 'a convent, a charitable institution, an institution for children and a hospital'. The definition of who can report cases of suspected abuse has been expanded.
- 22 Ministry of Women's Rights, Child Development, Family Welfare and Consumer Protection (n 20).
- 23 Sec 2 Protection from Domestic Violence Act 1997.
- 24 Sec 37 Education Act 1957.

Misuse and Cybercrime Act was enacted to make child pornography and indecent photography a criminal offence punishable by law.<sup>25</sup> According to the Juvenile Offenders Act 1935, juveniles who cannot be controlled by their parents or guardians may be removed and placed in an institution by court order.<sup>26</sup> Another key piece of legislation on children's rights is the Ombudsperson for Children Act, establishing an office of an Ombudsperson for Children.<sup>27</sup> The Ombudsperson for children is empowered under the Act to act as an advocate for children's rights, to advise ministers and public bodies and authorities on the promotion and protection of children's rights, and to investigate complaints related to the rights and welfare of the child.<sup>28</sup> In 2005 amendments were made to the Act to compel witnesses to attend and testify before the Ombudsperson in connection with investigations being conducted and to make acts such as giving false evidence and documents or wilfully interrupting proceedings criminal offences.<sup>29</sup>

In addition to legislation, various units have been created to provide the necessary framework within which the provisions of the various Acts of Parliament can be made effectively operational. For example, the Child Development Unit under the Ministry of Gender Equality and Family Welfare is effective in intervening in cases of child abuse and neglect.<sup>30</sup> The unit has the duty to enforce legislation pertaining to children and to implement policies and programmes relevant to the survival, development, promotion and participation of children.<sup>31</sup> The Family Welfare and Protection Unit is responsible for implementing strategies and policies to promote family welfare and to adopt relevant strategies and implement actions to address the problem of gender-based violence.<sup>32</sup> This unit operates through six regional offices known as Family Support Bureaux providing for greater proximity to victims of domestic violence, including children.<sup>33</sup> There equally is the Child Perpetrator Support Unit set pursuant to the recommendations of CRC. The main objectives of this unit are to (i) cater for the psychological needs of juvenile

25 Sec 16 Computer Misuse and Cybercrime Act 2003.

26 Sec 18 Juvenile Offenders Act 1935.

27 Sec 3 Ombudsperson for Children Act 2003.

28 Sec 6 Ombudsperson for Children Act 2003.

29 Sec 11A Ombudsperson for Children Act 2003.

30 Ministry of Gender Equality and Family Welfare 'Child Development Unit', <http://gender.govmu.org/English/Pages/Units/Child-Development-Unit.aspx> (accessed 10 March 2020). The state has the obligation to ensure a parental role wherever parents fail to do so and this role is ensured by the CDU.

31 Ministry of Women's Rights, Child Development, Family Welfare and Consumer Protection (n 20) 12.

32 Ministry of Gender Equality and Family Welfare 'Family Welfare and Protection Unit', <http://gender.govmu.org/English/Pages/Units/Family-Welfare-and-Protection-Unit.aspx> (accessed 10 March 2020).

33 As above.

offenders and provide adequate psychological support that would pave the way towards their rehabilitation and reintegration in the society; (ii) attend to requests from different stakeholders, namely, the DPP and the judiciary, with respect to the forensic psychological evaluation of juvenile offenders; (iii) come up with appropriate psychological treatment programmes designed and targeted to assist child perpetrators to develop skills to reduce reoffending; and (iv) provide pre-trial support and post-trial follow-up for juveniles involved in court proceedings.<sup>34</sup>

The normative framework discussed above supported the agenda of all governments in Mauritius to protect and promote the rights and welfare of the child since the country's independence.<sup>35</sup> It should be noted that the legislations, policies, actions plans and programmes are not limited to the ones discussed above.<sup>36</sup> In spite of the positive situational overview of children's rights in Mauritius, illustrated by access to education and healthcare services, the Committee nevertheless has highlighted certain areas of concern. These include the definition of the child; non-discrimination; the best interests of the child; violence against children; children with disabilities; and the administration of juvenile justice.<sup>37</sup> The Children's Bill consequently attempts to address these issues in line with the recommendations of the Committee. The following part of the article focuses on the Children's Bill by comparing it to the previous CPA and assessing its effectiveness using the international normative framework on children's rights as standard.

### 3 Children's Bill: A critical assessment

The explanatory memorandum that introduces the Children's Bill clearly sets out its main object. The main aim of the proposed Bill is to repeal and replace the CPA by providing for a more appropriate, comprehensive and modern legislative framework on children's rights. In addition, it explicitly mentions that another goal of the Bill is to give better effect to CRC and the African Children's Charter.<sup>38</sup> It is observed that such a statement may be interpreted as the state's

34 Ministry of Gender Equality and Family Welfare 'Child Perpetrator Support Unit', [http://gender.govmu.org/English/Department/Pages/Psychological\\_percent20Services\\_Child-Perpetrator-Support-Unit.aspx](http://gender.govmu.org/English/Department/Pages/Psychological_percent20Services_Child-Perpetrator-Support-Unit.aspx) (accessed 10 March 2020).

35 CRC (n 3).

36 Eg, the Early Childhood Development Policy; National Children's Policy; Education Reform Policy; National Gender Policy; National Policy Paper on Family; National Children's Council; Drop in Centres.

37 CRC (n 6) paras 25, 27, 29, 37, 49 & 69.

38 See The Children's Bill 29 of 2019 'Explanatory Memorandum' 13 September 2019, <http://mauritiusassembly.govmu.org/English/bills/Documents/intro/2019/bill2919.pdf> (accessed 20 March 2020).

admission that thus far the CPA and other related pieces of legislation on children's rights are not necessarily consistent with international standards and the Bill aims at rectifying such inconsistency. In accordance with the above objectives, the explanatory memorandum states that the Bill makes provision

- (a) for the better care, protection and assistance to children and their families;
- (b) for the respect and promotion of the rights and best interests of children;
- (c) for the setting up of structures, services and means for promoting and monitoring the sound, physical, psychological, intellectual, emotional and social development of children;
- (d) for children under the age of 12 not to be held criminally responsible for any act or omission;
- (e) for child witnesses and child victims under the age of 14, subject to certain conditions, to be competent as witnesses without the need for them to take the oath or making solemn affirmation;
- (f) for the setting up of a Children's Court, consisting of a civil division, a protection division and a criminal division; and
- (g) for addressing the shortcomings in the Child Protection Act.

### 3.1 Best interests of the child

The best interests of the child is a cardinal principle which is one of the pillars of CRC, the other three being child participation, non-discrimination and life, survival and development.<sup>39</sup> This principle is enshrined in article 3 of CRC, giving the child the right to have his or her interests assessed and taken into account as a primary consideration in all actions and decisions in both the public and the private sphere.<sup>40</sup> The CRC Committee has also identified article 3 as a general principle for the interpretation and implementation of all the rights of the child provided for in CRC.<sup>41</sup> The Committee has further underlined the principle of the best interests of the child as a threefold concept consisting of a substantive right, a fundamental interpretative legal principle and a rule of procedure.<sup>42</sup> This clearly

39 See in general European Commission 'CRC and its four guiding principles', <https://europa.eu/capacity4dev/sites/default/files/learning/Child-rights/2.7.html> (accessed 20 March 2020); Save the Children 'Child rights programming', [https://resourcecentre.savethechildren.net/node/2015/pdf/getting\\_it\\_right\\_chapter2\\_0.pdf](https://resourcecentre.savethechildren.net/node/2015/pdf/getting_it_right_chapter2_0.pdf) (accessed 20 March 2020).

40 UN CRC Committee General Comment 14 'The right of the child to have his or her best interests taken as a primary consideration' 29 May 2013 UN Doc CRC/C/GC/14 para 1.

41 UN CRC Committee General Comment 5 'General measures of implementation of the Convention on the Rights of the Child' 3 October 2003 UN Doc CRC/C/GC/2003/5 para 12.

42 General Comment 14 (n 40) para 6.

highlights the importance of this sacrosanct principle regarding children's rights.

The African Children's Charter has also enshrined this principle in article 4 which provides that in all actions concerning the child, undertaken by any person or authority, the best interests of the child is the primary consideration. The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has likewise employed this principle in numerous decisions that interpret the African Children's Charter.<sup>43</sup> While the African Children's Committee has not dedicated any specific general comment on the principle of the best interests of the child, it nonetheless has highlighted the application of this principle as an interpretative tool in its Joint General Comment on ending child marriage.<sup>44</sup> A similar approach underlined by the application of the principle was taken in the General Comment on the right to birth registration, name and nationality and the General Comment on State Party Obligations.<sup>45</sup>

It is now apposite to assess the extent to which this principle has been domesticated by the Children's Bill after showcasing its importance and application at the international level as a guiding principle. Section 5 of the Bill is dedicated to the best interests-principle in the following terms: 'The best interests of a child shall, in respect of any matter concerning the child, be paramount and be the primary consideration by any person, court, institution or other body.' This section is similar to article 4 of the African Children's Charter in that it considers this principle as a primary one. It is worth noting that section 5 also elaborates on a list of actions or behaviour expected from every person, court, institution or any other body in order to be in line with the best interests-principle.<sup>46</sup>

43 See generally *Michelo Hunsungule & Others (on behalf of children in Northern Uganda) v The Government of Uganda* Communication 1/Com/001/2005 (2005); *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya* Communication 2/Com/002/2009 (2009).

44 See 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) para 6, [https://www.acerwc.africa/wp-content/uploads/2018/04/ENGLISH\\_Joint\\_GC\\_ACERWC-ACHPR\\_Ending\\_Child\\_Marriage\\_14\\_March\\_2018.pdf](https://www.acerwc.africa/wp-content/uploads/2018/04/ENGLISH_Joint_GC_ACERWC-ACHPR_Ending_Child_Marriage_14_March_2018.pdf) (accessed 20 March 2020).

45 General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child: Right to Birth Registration, Name and Nationality para 14, [https://www.acerwc.africa/wp-content/uploads/2018/04/General-Comment\\_Art6\\_ACRWC\\_English.pdf](https://www.acerwc.africa/wp-content/uploads/2018/04/General-Comment_Art6_ACRWC_English.pdf) (accessed 20 March 2020); General Comment 5 on State Party Obligations under the African Charter on the Rights and Welfare of the Child and Systems Strengthening for Child Protection 11.

46 Sec 5(2): '(a) respect, protect, promote and fulfil the rights and the best interests of the child; (b) respect the inherent dignity of the child; (c) treat the child fairly and equitably; (d) protect the child from discrimination; (e) bear in mind the needs of the child for his development, including any special needs which may

From an interpretation viewpoint, one may argue that a person or institution not adhering to these compulsory actions or behaviours will automatically be in breach of the best interests-principle.

This is in stark contrast with the way in which the best interests-principle was previously domesticated in the CPA. It is noted that there was no specific or stand-alone provision that enshrined the principle. Therefore, there was no legal obligation to consider the principle as 'paramount' and as a 'primary consideration' as is the case now under the new law. The principle was merely referred to in the CPA in relation to the issuance of a mentoring order<sup>47</sup> and committal to a place of safety.<sup>48</sup> Nonetheless, it has to be noted that courts in Mauritius have utilised the best interests-principle wherever appropriate despite its absence as a substantive rule in the CPA. For instance, in the case of *Gungahreessoon v Ministry of Women, Family Welfare and Consumer Protection* the issue of an emergency protection order was discussed at length and the application for a discharge order was rejected after the Court had duly considered the best interests of the child in question, even though the section providing for a discharge order did not mention the principle. The Court held that '[i]n the light of the foregoing and in view of a rise in the prevalence of child sexual abuse cases in our society, this court is not satisfied that it would be in the best interests of the child to grant a discharge order under section 6 of the Child Protection Act'.<sup>49</sup>

It is argued that the principle is now properly domesticated in line with what CRC and the African Children's Charter require. The principle is an enforceable and justiciable right. In addition, it also is in line with the UN Committee's threefold elaboration of the concept as a substantive right, an interpretative tool and a rule of procedure.

### 3.2 Protection of children

The CPA contained provisions related to ill-treatment, child trafficking, the abandonment of children, the abduction of a child, sexual offences on children, indecent photography of children and mendacity. While most of these offences have been retained and

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be due to a disability; (f) where appropriate, give the child's family member an opportunity to express his views; (g) as far as possible, act promptly.'

47 Sec 3D: '[w]here the Permanent Secretary reasonably believes that it is in the best interest of a child to be placed under the Scheme'.

48 Sec 8(2): 'Upon an application under subsection (1), the Court shall order an urgent enquiry ... as may enable it to deal with the case in the best interests of the child.'

49 *Gungahreessoon v Ministry of Women, Family Welfare and Consumer Protection* 2008 RDR 122.

further elaborated upon by the Bill, other much-needed new offences have been added. This part considers the new provisions related to the protection of children.

### 3.2.1 *Non-discrimination*

Children arguably were conferred protection against discrimination by the Constitution and the Equal Opportunities Act which constitute the legislative framework for non-discrimination in Mauritius.<sup>50</sup> However, the CRC Committee noted that discrimination persists against children and recommended that a general prohibition on direct and indirect discrimination be incorporated into a Children's Act.<sup>51</sup> Section 8 of the Bill provides for further protection from discrimination against children on the listed grounds applicable not only to the child but also to the child's parent.<sup>52</sup> The fact that this section prohibits discrimination against a child on the grounds of his or her parent's colour, for instance, is a very commendable and useful addition. It is in line with the African Children's Charter and CRC which also protect the child against discrimination based on the parents' attributes.<sup>53</sup> However, one criticism that may be levelled against section 8 of the Bill is that the list of grounds is limited with the notable absence of the term 'or other status'. It is argued that other grounds such as ethnicity or sexual orientation of the child or parents therefore are not covered by the provision.

### 3.2.2 *Child marriage*

Child marriage has become a real issue in Mauritius with statistics alarmingly showing that between January and August 2019, 101 minors contracted marriage.<sup>54</sup> It should be noted that the legal age of marriage is set at 18 by the Mauritian Civil Code<sup>55</sup> but exceptions

50 Secs 3 & 16 of the Constitution.

51 UN CRC, Concluding Observations on the combined third to fifth periodic reports of Mauritius 27 February 2015 UN Doc CRC/C/MUS/CO/3-5 para 27: 'While noting the establishment of the Equal Opportunities (Amendment) Act, the Committee is concerned that discrimination persists, notably in the form of obstacles to accessing and enjoying various services and facilities, particularly for children from disadvantaged and marginalised families, including street children, children who are affected and/or infected by HIV/AIDS, children using drugs, children deprived of their family environment, children with disabilities and minor offenders.'

52 'No person shall discriminate against a child on the ground of the child's, or the child's parent's, race, caste, place of origin, political opinion, colour, creed, sex, language, religion, property or disability'.

53 Art 3 African Children's Charter; art 2 CRC.

54 'From January to August 2019, 101 minors have said "yes"' *L'Express* 11 January 2020.

55 Art 144 Mauritian Civil Code.

to this minimum age is possible<sup>56</sup> and have been extensively granted with the consent of parents and courts.<sup>57</sup> The CPA did not impose the age of marriage at 18 years because a child is defined as any unmarried person under the age of 18.<sup>58</sup> It is noted that this is to conform to CRC rather than the African Children's Charter. The CRC Committee urged the state of Mauritius to ensure that the minimum age of marriage, set at 18 years, is strictly enforced, in line with the state party's obligations under the African Children's Charter.<sup>59</sup>

The Bill explicitly addresses the issue of child marriage in section 9. It provides that no person may force a child to be married civilly or religiously and anyone in contravention of this section is liable to a fine not exceeding US \$285 and imprisonment not exceeding two years. The definition of a child has also been amended to mean 'a person under the age of 18' in order to align it with section 9. However, it is argued that section 9 does not stand as a blanket prohibition as required under the African Children's Charter.<sup>60</sup> The operative word in section 9 is no one shall 'force' a child to be married. It implies that if the child himself or herself consents together with their parents, then he or she can be married. It suffices for the parents to prove that the child was not forced. In addition, there is no indication yet from the state that article 145 of the Mauritian Civil Code will be repealed which allows one to reasonably conclude that consenting children and parents are able to agree to the marriage of a child.

### 3.2.3 *Corporal or humiliating punishment*

Corporal or humiliating punishment was not regulated by the CPA. Section 13 of the Education Regulations of 1957 prohibits corporal punishment at school. The CRC Committee noted that '[c]orporal punishment is applied in general as part of the school culture, even though it is prohibited by the Education Regulations of 1957, and that corporal punishment is not explicitly prohibited by law in all settings, including home and alternative care settings, as well as the penal system'.<sup>61</sup> It also urged the state of Mauritius to

ensure that its legislation, including a children's act, explicitly prohibits corporal punishment in all settings. The Committee also urges the

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56 Art 145.

57 UN CRC Concluding Observations (n 51 above) para 25.

58 Sec 2 CPA.

59 UN CRC Concluding Observations (n 51 above) para 26.

60 Art 21(2) provides 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.

61 UN CRC Concluding Observations (n 51) para 37.

State party to promote positive, non-violent and participatory forms of child-rearing and discipline. The State party is further encouraged to establish a clear reporting system for incidents of corporal punishment, notably in schools.<sup>62</sup>

The Bill has accordingly provided for corporal or humiliating punishment in section 11. It provides that no parent or other person responsible for the care, treatment, education or supervision of a child may inflict corporal or inflict humiliating punishment on the child as a measure to correct or discipline the child. Offenders may get a fine not exceeding US \$285 and a term of imprisonment not exceeding two years. The law, however, is silent on a reporting system as recommended by the CRC Committee.

### 3.2.4 *Child prostitution and child pornography*

Sexual offences against children are on the rise in Mauritius with the country being considered 'a source, transit and destination country'.<sup>63</sup> Article 27 of the African Children's Charter is explicit regarding the fact that it is the state party's responsibility to protect children from sexual exploitation and sexual abuse and to take all measures to prevent the use of children in prostitution and in pornographic activities.<sup>64</sup> A similar legal obligation is imposed on state parties by the CRC.<sup>65</sup> In addition, Mauritius on 14 June 2011 ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography which further amplifies the legal obligation on Mauritius to protect children from such extremely harmful activities.

The CPA contained one section entitled 'sexual offences' which provided for both child prostitution and pornography.<sup>66</sup> However, it was a provision of the law that lacked substance. For instance, the wording of the section was limited to 'any person who causes, incites or allows any child to engage in prostitution shall commit an offence'. On the contrary, the new Bill has dedicated a whole and separate section to the offence of child prostitution.<sup>67</sup> This provision is more explicit and is worded as follows:

62 As above, para 38.

63 YUVA 'Help us eradicate child prostitution in Mauritius' 13 June 2016, <https://yuvamauritius.com/2016/06/13/help-us-eradicate-child-prostitution-in-mauritius-yuva/> (accessed 20 March 2020).

64 Art 27.

65 Art 34.

66 Sec 14 CPA.

67 Sec 17 of the Bill.

No person shall –

- (a) offer, obtain, procure or provide a child for prostitution;
- (b) cause, coerce or force a child to participate in prostitution;
- (c) profit from, or otherwise exploit, a child's participation in prostitution; or
- (d) have recourse to child prostitution.

It is argued that the scope of the law regarding child prostitution has been widened significantly so that it encompasses more. While the previous law criminalised child prostitution for causing, inciting or allowing this, the new law provides for more grounds on which the offence is punishable. This also eases the task of prosecuting bodies given that such offence is tried in accordance with the principle of beyond reasonable doubt as the standard of proof. More convictions are likely to be possible under the new provision and this certainly will act as a strong deterrent to potential offenders.

A similar argument applies to the offence of child pornography which so far is provided for in the CPA without explicit details essential for prosecution.<sup>68</sup> Indeed, it merely states that a child shall be deemed to be sexually abused if he or she has taken part in any activity of a pornographic, obscene or indecent nature.<sup>69</sup> The Bill completely departs from this position and provides for a comprehensive definition of what child pornography entails.<sup>70</sup> It even criminalises simulated explicit sexual activities, implying that it need not be real for it to constitute an offence.<sup>71</sup> Undoubtedly, a judicial body would have had to struggle with the interpretation of the term 'pornography' to determine whether it included simulated activities since the CPA did not define the term. Therefore, this may be considered a significant upgrade providing for better protection.

### 3.2.5 *Right to privacy*

The importance of children's right to privacy is highlighted by the fact that the African Children's Charter elaborately guarantees the protection of children's privacy in article 10.<sup>72</sup> Such protection is reiterated by the CRC.<sup>73</sup> A child is guaranteed the right to privacy

68 Art 14(2).

69 As above.

70 See sec 18(4).

71 Sec 18(4)(a).

72 No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

73 Art 16.

under the Constitution of Mauritius.<sup>74</sup> However, this right has been interpreted as only guaranteeing privacy in relation to the home, property and body of a person.<sup>75</sup> What is debatable is the extent to which a child's privacy will be respected and guaranteed in certain circumstances, such as where he or she is the victim of sexual abuse and at the same time the subject of media coverage. The CRC Committee highlights this issue as follows: 'While noting the constitutional protection of the right to privacy, the Committee is concerned at instances where the privacy of children who have been victims of abuse or have been in conflict with the law is not respected by the media.'<sup>76</sup>

As a remedial action and in the absence of any reference to the right to privacy in the CPA, the Bill enshrines this right in section 23.<sup>77</sup> It provides for strict guidelines regarding publication in the media of photographs, pictures, video or audio recordings of children as witnesses, victims or offenders.<sup>78</sup> Courts of law in Mauritius are also encouraged to use initials or pseudonyms of a child involved in any legal proceedings.<sup>79</sup> It is argued that the insertion of the right to privacy in the Bill is an effective measure given that, with the soaring popularity of social networks and digitalisation, it is too easy for a child to have their privacy violated, sometimes beyond repair.

#### 4 Child offenders and the juvenile justice system

Previously, the rights of children in the juvenile justice system of Mauritius were not explicitly regulated by law. For example, thus far there has been no minimum age of criminal responsibility under Mauritian law, with the result that a child as young as nine or ten years could be criminally convicted as required by article 17(4) of the African Children's Charter.<sup>80</sup> This was raised as a matter of concern by the CRC Committee.<sup>81</sup> In addition, the legal framework governing child offenders, child victims and child witnesses were to be found, in a rather scattered manner, in various pieces of legislation aided by judicial precedence. The law in general was also silent on a number of matters such as the admissibility of evidence of children and the

<sup>74</sup> Sec 9 of the Constitution.

<sup>75</sup> See R Mahadew 'Does the Mauritian Constitution protect the right to privacy? An insight from *Madhewoo v The State of Mauritius*' (2018) 18 *African Human Rights Law Journal* 204.

<sup>76</sup> UN CRC Concluding Observations (n 51) para 35.

<sup>77</sup> No person shall do an act which affects the privacy of the child.

<sup>78</sup> Sec 23(2).

<sup>79</sup> Sec 23(3).

<sup>80</sup> There shall be a minimum age below which children are presumed not to have the capacity to infringe the penal law.

<sup>81</sup> UN CRC Concluding Observations (n 51) para 69.

mandatory nature of a competency test before allowing a child to testify.<sup>82</sup> It could therefore be fairly said that Mauritius was not aligned with the requirement of the CRC Committee on the rights of children in the juvenile justice system.

#### 4.1 Child Offenders

The Juvenile Offenders Act 1935, to which amendments were made in 1991 and 1998 and which now would be repealed by the Children's Bill after it comes into force, was the only piece of legislation on juvenile offenders. Its primary focus was the Juvenile Court and its administration and there was less focus on the child or the young person than the offender.<sup>83</sup> It defines a child as a person below 18 years of age and a young person as someone above 14 years but below 18 years of age. It does not provide for a minimum age of criminal responsibility as recommended by the CRC Committee.<sup>84</sup>

The Children's Bill addresses the minimum age of criminal responsibility in section 43, by providing that a child under the age of 12 shall not be held criminally responsible for any act or omission. In fact, section 44 provides for a procedure regarding a child under 12 suspected of having committed an offence which is in line with the child's welfare, development and best interests. Children in such cases are to be referred to a probation officer rather than police officers and to a psychologist for an assessment of the state of mind of the child at the time of the alleged commission of the offence.<sup>85</sup> Henceforth, a child under the age of 12 years who has committed an offence cannot be sent to correctional youth centres or youth rehabilitation centres.

Article 17(1) of the African Children's Charter imposes legal obligations on state parties to ensure that a child who has infringed penal law should, as a matter of right, be given special treatment in a manner consistent with the child's sense of dignity and worth. Section 45 of the Bill attempts to maintain this dignity and worth by mandatorily requiring the assessment of a child offender by a probation officer. There is a need to assess the educational level, cognitive ability, domestic and environmental circumstances,

82 See *Jeetah A K v The State* 2014 SCJ 337.

83 Sec 3 on the constitution of a juvenile court; secs 5 and 6 on powers and procedures of the court; sec 9 on bail and detention; secs 15 and 16 on restrictions on punishment and punishment of certain grave crimes.

84 UN CRC General Comment 10 (n 82) para 30.

85 Secs 44(1)(b) & 44(1)(c).

age and maturity of the child.<sup>86</sup> Information obtained during the assessment is required to be kept confidential failing which a fine not exceeding 10 000 rupees or a term of imprisonment not exceeding six months may be imposed by a court.<sup>87</sup>

#### **4.2 Discretion to prosecute juvenile offenders aged 12 years or above but below the age of 14 years**

The Children's Bill provides for a discretionary power on the Director of Public Prosecutions (DPP) whether to prosecute a juvenile offender aged between the ages of 12 and 14.<sup>88</sup> Section 49 provides a list of factors to be taken into account while such discretion is being exercised. These are (i) the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child; (ii) the nature and seriousness of the offence; (iii) the impact of the offence on any victim and the community; (iv) the appropriateness of diversion; and (v) such other relevant factors as the DPP may in the circumstances determine. The DPP is also empowered to call for an assessment of the child by a probation officer.<sup>89</sup>

The criminal capacity of a juvenile offender is another factor that the authorities take into account before deciding on prosecution. According to section 49(3), a magistrate of the criminal division of the Children's Court may, on his own motion or at the request of the DPP or the child's legal representative, order an evaluation of the criminal capacity of a child aged 12 years or above but below the age of 14 years by a suitably-qualified person. The evaluation consists of an assessment of the cognitive, moral, emotional, psychological and social development of the child.<sup>90</sup>

It is noted that the above measures are in line with the requirements of the CRC Committee. It prescribes that states have a discretion to decide on the exact nature and content of the measures for dealing with children in conflict with the law without resorting to judicial proceedings, and to take the necessary legislative and other measures for their implementation.<sup>91</sup> Under the CPA there was a serious lack of such measures and juvenile offenders were not afforded any treatment that would be in line with their best interests.

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86 Sec 45(4)(f).

87 Secs 46(1) & 46(3).

88 Sec 49(1).

89 Sec 49(2).

90 Sec 49(3)(b).

91 UN CRC General Comment 10 (n 82) para 27.

### 4.3 Best interests of juveniles not to be prosecuted or criminal proceedings against juvenile to be discontinued

Indeed, the best interests of a juvenile offender are supposed to be the guiding principles in matters of juvenile justice administration.<sup>92</sup> The Children's Bill provides that if the DPP considers that it is in the best interests of the juvenile offender, then he or she shall not be prosecuted for an offence and the criminal proceedings instituted against the juvenile shall be discontinued.<sup>93</sup> In such a case, the DPP may request a probation officer to assess whether it is in the best interests of the juvenile offender to enrol in a diversion programme in accordance with section 50(1) of the Bill.

Section 51 provides that a diversion programme shall be an individualised non-residential supervision and rehabilitation scheme implemented by the Ministry responsible for the subject of probation and aftercare services for the purpose of rehabilitating the juvenile without resorting to formal criminal proceedings. It is also a programme designed to meet the specific needs of a juvenile offender.<sup>94</sup> It is argued that such a measure provides for another remedial opportunity for a juvenile offender and refrains from adopting a strictly punitive approach which is not in accordance with the leading principles for juvenile justice spelled out in article 40(1) of CRC.<sup>95</sup>

## 5 Children's Court

Court proceedings with regard to juvenile offenders in Mauritius have been criticised by civil society organisations as being too lengthy with unduly prolonged delays for cases to be heard which contributed to the anguish and suffering of juvenile offenders.<sup>96</sup> Ordinary courts, although through special sittings, used to hear cases of children in conflict with the law and detained in correctional youth and youth rehabilitation centres.<sup>97</sup> There was a serious lack of specialised judges adjudicating on children matters.<sup>98</sup> This situation was highlighted with concern by the CRC Committee and it recommended that Mauritius should 'expeditiously establish juvenile justice tribunals

92 UN CRC General Comment 10 (n 82) para 10.

93 Sec 50(1).

94 Sec 51(3).

95 UN CRC General Comment 10 (n 82) para 71.

96 CRC 'Alternative Report for Mauritius' March 2014 28, [https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MUS/INT\\_CRC\\_NGO\\_MUS\\_18011\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MUS/INT_CRC_NGO_MUS_18011_E.pdf) (accessed 30 March 2020).

97 As above.

98 As above.

with adequate human, technical and financial resources, designate specialised judges for children and ensure that such specialised judges receive appropriate education and training'.<sup>99</sup>

### 5.1 Children's Court with its divisions

The Children's Bill attempts to align the juvenile justice system with reference to a juvenile court with the recommendations of the CRC Committee by the establishment of the Children's Court. Section 66 of the Bill establishes the Children's Court as a specialised court with a civil division, a protection division and a criminal division. It is worth noting that this court is to be presided over by a judge, and not a magistrate, as designated by the Chief Justice.<sup>100</sup> It is contended that hearings and sessions involving children will benefit from the experience of a judge as compared to that of a magistrate. The civil division of the Court will have exclusive jurisdiction to try any action entered under the Mauritian Civil Code for adoption, the sale of a minor's rights, the appointment of a guardian and sub-guardian, the search for maternity and paternity as well as any other civil action as the Chief Justice may direct.<sup>101</sup>

The protection division of the Court will have exclusive jurisdiction to try any application under Part III of the Bill<sup>102</sup> which concerns children in need of care and protection.<sup>103</sup> Specifically for this division, the Chief Justice has the power to designate one or more magistrate of the intermediate court to exercise jurisdiction.<sup>104</sup> As for the criminal division of the Court, it will have exclusive jurisdiction to try (i) in the case of a child victim, prescribed offences committed on the child;<sup>105</sup> (ii) in the case of a child witness, cases where a child is a witness as per section 75(1)(b) of the Bill; and (iii) in the case of a juvenile offence, any criminal offence committed by the child.<sup>106</sup> The setting up of the Children's Court addresses the gap of a lack of specialised judicial mechanisms for children's rights. Previously, cases involving children, both civil and criminal, were heard by either district courts or the intermediate court or the Supreme Court depending on the nature of the matter. None of these courts is specialised in hearing children's rights-related matters and the magistrates or judges are

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99 UN CRC Concluding Observations (n 51) para 70.

100 Sec 70.

101 Sec 69.

102 Sec 72.

103 These include the assessment order, emergency protection order, placement order, ancillary order, long-term care order, contact order and mentoring order.

104 Sec 73.

105 Sec 75(1)(a).

106 Sec 75(1)(c).

not necessarily trained to deal with children's rights-related cases. It should also be highlighted that the CPA had no provisions regarding a children's court.

## 5.2 Proceedings before the Children's Court

The Bill has explicitly highlighted the need of a child-friendly environment by prescribing how any court proceedings involving a child are to be conducted.<sup>107</sup> First, proceedings should be conducted in a language which is simple and comprehensible to the child by taking into account the age and level of maturity of the child. Second, proper arrangements must be made in the courtroom to hear the evidence of a child and for the child to be accompanied by a parent.<sup>108</sup> Third, there is a legal obligation on a court to ensure that during the proceedings, no person treats a child in a manner that is disrespectful of the child's dignity, taking into account the child's personal situation and immediate and special needs, age, gender, disability and level of maturity.<sup>109</sup> Fourth, there is also a provision that prohibits a court from requiring a child to give evidence against his will or without the knowledge of any of his parents. Fifth, section 79(3) of the Bill provides that every court shall ensure that a child is treated in a caring and sensitive manner which is respectful of his dignity throughout the proceedings by considering the personal situation and immediate and special needs of the child. The CPA contained no provisions regarding proceedings in court for children's matters, especially with regard to the friendly and accommodating environment that a children's court should have. This, therefore, may be considered a very significant upgrade in the system of administration of justice for children.

## 6 Conclusion and the way forward

If passed into law, the Children's Bill undoubtedly will enhance the legal and normative framework governing the rights of the child in Mauritius. As discussed above, several aspects of children's rights have been aligned with international standards following recommendations by the CRC Committee. Going forward, however, some changes still need to be effected to the existing legal architecture on children's rights in Mauritius to justify and render more effective the significant and positive changes that the Children's Bill will bring. First, it is essential for the state of Mauritius

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107 Sec 79.

108 Sec 79(1)(b).

109 Sec 79(2).

to domesticate both CRC and the African Children's Charter, taking into account the status of the country's dualist legal tradition where domestication is compulsory for international legal instruments to have legal effect domestically. Domestication will further bolster the legal framework on children's rights given that it will present the possibility to argue child-related cases using both the Children's Bill and CRC and international children's rights instruments in a complementary manner.

While the establishment of a Children's Court is a positive step, it is necessary to have judges and magistrates who are well-versed and trained in children's rights matters. Therefore, intensive training and education of judges and magistrates as well as legal practitioners are mandatory. They must become highly conversant with the UN and the African Union (AU) systems on children's rights to be able to draw inspiration from these while interpreting and adjudicating domestic cases that concern children's rights. Civil society organisations also have a crucial role to play especially in disseminating the Children's Bill. They need to ensure that the new law with all its novel provisions is widely introduced and utilised around the country by stakeholders working in the field of children's rights. They should also ensure that the available mechanisms under the African Children's Charter, such as shadow reporting and the submission of complaints to the African Children's Committee, are fully and effectively utilised.

With the implementation of the recommendations made above, children's rights in Mauritius will be effectively respected, promoted, protected and fulfilled. At the same time, parents, teachers and society need to cultivate the correct mentality and attitude to raising and dealing with children. Only then will the law be able to effectively protect the Mauritian child.

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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.
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- Proper nouns used in the body of the article are written out in full the first time they are used, but abbreviated the next time, eg the United Nations (UN).
- Words such as 'article' and 'section' are written out in full in the text.
- Where possible, abbreviations should be used in footnotes, eg ch; para; paras; art; arts; sec; secs. No full stops should be used. Words in a foreign language should be italicised. Numbering should be done as follows:
  - 1
  - 2
  - 3.1
  - 3.2.1
- Smart single quotes should be used; if something is quoted within a quotation, double quotation marks should be used for that section.
- Quotations longer than 30 words should be indented and in 10 point, in which case no quotation marks are necessary.
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Position as at 31 July 2020

Compiled by: I de Meyer

Source: <http://www.au.int> (accessed 10 November 2020)

	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		18/07/18	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	24/04/18
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		18/04/19		18/04/19	18/04/19
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	12/08/16
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	23/08/18	
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>49</b>	<b>30</b>	<b>42</b>	<b>34</b>

\* Additional declaration under article 34(6)

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