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Editorial

As is customary, this issue of the Journal straddles developments in both the regional and national dimensions of human rights protection. The first four articles deal with aspects of the African regional human rights system. The next five articles focus on four countries: Kenya, Nigeria, South Africa and Uganda.

The first article draws attention to one of the African Union (AU) human rights bodies, namely, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). It explores the role of this AU body in relation to climate change, an abiding concern of our time. This edition of the *Journal* appears in the immediate aftermath of the 27th Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC). In their contribution, Boshoff and Damtew explore the potential for successful climate change litigation before the African Children's Committee. They conclude that the Children's Committee has the potential to serve as a forum for child rights-based climate litigation, based on the solid substantive rights protection in the African Charter on the Rights and Welfare of the Child (African Children's Charter), the broad and flexible standing requirements, and its transformative remedial practice.

The second and third articles in this edition touch on decisions of one of the other AU human rights bodies, the African Commission on Human and Peoples' Rights (African Commission).

Seizure of communications is an important stage in litigating before the African Commission. Jimoh takes a close look at the African Commission's 2020 Rules of Procedure which introduced some significant procedural changes. A pertinent change is that the admissibility criteria contained in the seizure criteria under the 2010 Rules are no longer required for the Commission to become seized of a communication. The author compares the Commission's practice before and subsequent to the entry into force of the 2020 Rules.

While both the African Court on Human and Peoples' Rights (African Court) and the African Commission have been drawn into election-related disputes, this issue focuses on the role of the Commission in this context. Using the Commission's decision in *Ngandu v Democratic Republic of Congo* as a starting point, Makunya reflects on the challenges faced by a regional body when it adjudicates disputes related to national elections. By its very nature, a regional body may have to be more attuned to ascertaining the correct legal position. As well, because of the delays that are likely to ensue in the process of obtaining regional justice, a regional body may be more constrained in awarding meaningful restitution. These, and other factors, may impede the prospects of effective implementation of regional decisions related to electoral disputes.

One of the distinguishing features of the African Charter on Human and Peoples' Rights (African Charter) is that it provides for a justiciable right to development. For an initial discussion of the distinguishing features of the African Charter, see the two volumes published in the *Journal*'s inaugural year, 2001, 20 years after the adoption of the African Charter. For some stock taking 20 years later, see OC Okafor & GEK Dzah 'The African human rights system as "norm leader": Three case studies' (2021) 21 *African Human Rights Law Journal* 669-698. Ashukem and Ngang examine the implications for the right to development in Africa of an issue that has become more pronounced in the last decade or so, namely, land grabbing. The authors conclude that African states should re-think their right to development obligations and the land ownership and land use policy prerogatives relevant to protecting the livelihood sustainability interests of their peoples.

Two articles deal with aspects of domestic human rights protection in Kenya. One article concerns children's rights, and the other refugees' rights in the context of COVID-19.

The Bill of Rights in the Constitution of Kenya, 2010 provides in detail for children's rights. Article 53(1) provides that every child has the right

(a) to a name and nationality from birth;
(b) to free and compulsory basic education;
(c) to basic nutrition, shelter and health care;
(d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;
(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; and

(f) not to be detained, except as a measure of last resort, and when detained, to be held –
  (i) for the shortest appropriate period of time; and
  (ii) separate from adults and in conditions that take account of the child's sex and age.

Article 53(2) stipulates that a 'child's best interests are of paramount importance in every matter concerning the child'.

Odongo scrutinises the interpretation of these children's rights provisions by the Kenyan judiciary. He concludes that the courts have largely recognised children's vulnerability and their need for protection, and affirmed children's autonomy and agency. He also notes that, based on its expansive approach, the courts adopted systematic remedial measures such as recommendations for the reform of the legal framework.

The other contribution on Kenya deals with an aspect that became pronounced during the COVID-19 pandemic. Haldimann and Biedermann discuss the legal obligations and responsibilities to distribute face masks in a very specific setting, the Kakuma refugee camp in Kenya, during a particular period, the COVID-19 pandemic. They argue that under these territorial and temporal conditions, the state owes an increased duty of care towards refugees. This increased duty of care entails a positive obligation to provide face masks to the inhabitants to protect them from COVID-19, based on the right to the best attainable standard of health and the right to life. The article also identifies a shift in responsibility from the host state to the United Nations (UN) Refugee Agency.

The last decades have seen an increase in the adoption of access to information laws by African states. This process was informed by one of the soft law instruments developed by the African Commission, the Model Law on Access to Information in Africa (see https://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/model_law_on_ati_in_africa/model_law_on_access_to_infomation_en.pdf). In a contribution discussing two such laws, Osawe compares the right of access to information under the Nigerian Freedom of Information Act 2011 (FOIA) and the South African Promotion of Access to Information Act 2001 (PAIA). The article evaluates the strengths and weaknesses of these two pieces of open-access legislation. It finds that the PAIA is a more robust law in respect of, for example, ensuring access to public information, restricted exemptions to access information, extensive measures to promote the right of access and a broader scope of the right of access. The

author concludes that inspiration should be drawn from the PAIA so as to strengthen the Nigerian FOIA.

In another contribution Sogunro shines a spotlight on homophobia in Nigeria. He analyses the social and political context surrounding the evolution of criminalising laws during the colonial phase of Nigeria's history. The article illustrates that political homophobia, by way of laws that criminalised same-sex relationships during the colonial administration, served to protect colonial interests and maintain the legitimacy of colonisation. Sogunro highlights the linkages between political homophobia, elitism and social exclusion in the colonial origins of anti-gay laws in Nigeria. He argues that an understanding of the rationale behind the colonial evolution of anti-gay laws can provide an insight into the entrenchment of political homophobia in Nigeria and similar legal systems in Africa, and he challenges the rhetoric that these laws reflect African values.

The issue of 'African values' came up in November 2022 when the African Commission was called upon to decide on the application for observer status by three non-governmental organisations (NGOs) that include advancing the rights of sexual and gender minorities in their activities. Contradicting its position of granting observer status to the Coalition of African Lesbians (CAL) in 2015, the Commission rejected these applications on the basis that 'sexual orientation' is not an 'expressly recognised right' in the African Charter and that it is 'contrary to the virtues of African values' espoused in the Charter (Final Communiqué of the 73rd Ordinary Session of the African Commission on Human and Peoples' Rights, para 58).

It should be recalled that in 2015 the AU Executive Council, in response to the African Commission's CAL decision, directed the Commission to 'withdraw the observer status granted to NGOs who may attempt to impose values contrary to the African values' (Decision on the Thirty-Eighth Activity Report of the African Commission on Human and Peoples' Rights EX.CL/Dec.887(XXVII) para 7). After some prevarication and delay, and an ultimatum from the Executive Council, the African Commission in 2018 relented and withdrew CAL's observer status.

One must have some sympathy for the African Commission's predicament when faced with these three new applications in 2022. Either it grants observer status and in the process invites the wrath of the AU policy organs, or it denies observer status, thereby reinforcing the impression that its independence and autonomy have been undermined, and that it has accepted that state of affairs. However, the way in which the Commission has now unapologetically, and as

a matter of Charter interpretation, adopted the Executive Council's instructions and mindset, is deeply disconcerting. The most recent rejection of observer status, therefore, is a more serious erosion of its independence and autonomy than the previous instance, since the Commission appears to have 'appropriated' the Executive Council's position.

The last article deals with Uganda's transition into a human rights-based constitutional dispensation. In his discussion of article 274 of the 1995 Ugandan Constitution, Mujuzi interrogates the role of the courts in dealing with laws that contradict the Constitution. While only the Constitutional Court has the mandate to declare legislation unconstitutional, the author notes that other courts also use article 274 to protect the rights of the most vulnerable. He suggests that the Constitution be amended to allow all courts to declare legislation unconstitutional, but with the caveat that declarations of unconstitutionality be confirmed by the Constitutional Court before they become effective.

Two recent publications are also reviewed. The first, reviewed by Rotberg, is D Kuwali (ed) *Palgrave handbook on sustainable peace and security in Africa*. The second, reviewed by Dada, is KM Clarke *Affective justice: The International Criminal Court and the pan-Africanist pushback*.

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