

Editorial

This issue of the *African Human Rights Law Journal (AHRLJ)* appears as the world celebrates 75 years since the adoption of the United Nations (UN) Declaration of Human Rights (Universal Declaration). The Universal Declaration did not include a 'right to development'; the closest it has come was to provide, in article 22, that 'everyone' is entitled to the realisation of 'the economic, social and cultural rights indispensable for his dignity and the free development of his personality'.

Over the last few years the right to development has received increasing attention. While the right, as such, has not been made justiciable under any UN human rights treaty, the 1981 African Charter on Human and Peoples' Rights (African Charter) enshrines it (in article 22) as an unequivocally binding provision. At the global level the contours of the right are set out in the non-binding 1986 Declaration on the Right to Development. The year 1986 marked the midway point between the adoption of the Universal Declaration and the present celebratory moment, making this an appropriate time for the ongoing movement towards the adoption of a binding treaty to receive impetus, as indeed happened when the draft International Covenant on the Right to Development was submitted to the Human Rights Council in September 2023. This draft was referred to the UN General Assembly where its consideration by the Third Committee commenced in October 2023.

In the first article of this issue Wanki laments the lack of realisation of the right to development in 'Francophone Africa'. He ascribes this state of affairs to the secret agreements (*Accords de Coopération*) concluded between France and 14 Francophone African states in the immediate post-colonial period, and the colonisation of the minds of Francophone Africans due to the deliberate colonial policy of cultural and educational assimilation. Wanki recommends that the Accords be rescinded as a means to restoring the full political and economic sovereignty of the states and to invest in the decolonisation of the peoples' minds in these states.

The remaining articles have a country-specific focus.

The first of these deals with the right to political participation. This right is contained in the Universal Declaration (article 21) and, like many of its provisions, subsequently became concretised in a legally-binding treaty (article 25 of the International Covenant on Civil and Political Rights). Departing from the recognition of a similar right in the 2010 Constitution of Kenya, Bwire interrogates the evolution of a constitutionally-legitimised 'Big Man' political culture over the political regimes of Kenyatta, Moi, Kibaki and Uhuru, and analyses its influence on political participation by Kenyan youth. The article applies insights from these past experiences to inform recommendations on how the state can ensure the full(er) political participation of Kenyan youth.

Olayanju considers the importance of the 2020 decision by the Nigerian High Court in Lagos State in the case of *SERAP v Attorney-General Lagos State* dealing with maternal health. In the decision the government's duty to give effect to the right to health on the basis of the law domesticating the African Charter on Human and Peoples' Rights (African Charter Ratification Act) was upheld. Before this ruling, there had been unsuccessful attempts to hold the Nigerian government accountable for infringements upon the right to health based on its obligations under this Act. Although the author identifies imperfections in the decision, the case stands as a landmark of a judge's willingness not to revert to legal technicalities, but to deal head-on with the substantive issue of injustice.

Three contributions focus on issues of contemporary interest on the South African legal landscape. One of these, by Hall and Lukey, discusses public participation as an essential requirement of South Africa's approach to environmental rule of law policy and practice. Two further articles draw attention to aspects of African customary law and traditional leadership. Nkosi's contribution deals with traditional leadership in South Africa. His historical exposition provides a valuable background to current debates and decisions, such as the 2014 Constitutional Court's decision in *BaPedi Marota Mamone v Commission on Traditional Disputes and Claims & Others*. Nkosi concludes that changes are required but should be gradual and adaptive, and should not be hastily imposed on the affected communities so as to avoid a paradoxical situation of dysfunctional constitutional compliance.

Kruise and Mwambene place the focus on a series of decisions by the South African Supreme Court of Appeal. These decisions (*Mbungel & Another v Mkabi & Others*, and *Tsambo v Sengadi*)

concern the 'requirement' under customary law that the wife had to be integrated into the husband's family. Although it recognised the importance of bringing together two families, the Court held that the requirement was not mandatory, and could be waived. Countering the views of some critics of this decision, and relying on historical-sociological theorist Ramose's 'social acceptance' thesis, the authors support the Court's approach of affirming the flexibility of customary rules generally, even though it views as regrettable the Court's reliance on or use of the term 'waiver'.

This edition also contains two case discussions in the 'Recent developments and case discussions' section. Both deal with the rights of transgender persons.

Magashula and Ngwena draw the attention of *AHRLJ* readers to *Nathanson v Mtetiso & Others*, a 2019 decision by the Zimbabwe High Court at Bulawayo. In this matter the Court found unlawful the arrest and detention of a transgender woman on the charge that she was a man who had entered a women's toilet. Although the authors point out why in their view the decision does not comprehensively engage with the intersection between gender diversity and fundamental rights, by unequivocally recognising that transgender persons are entitled to the rights guaranteed in the Zimbabwean Constitution and international human rights law, it represents a progressive step forward in the domain of sexual and gender minority rights in Africa.

Baird considers the South African Alteration of Sex Description and Sex Status Act and Marriage Act against the background of the 2017 South African Western Cape High Court decision in *KOS v Minister of Home Affairs*. In this matter three applicants, born biologically male, were married to three applicants, born biologically female but who transitioned to male. The parties were effectively told that they could not remain in a marriage in terms of the Marriage Act and had to go ahead with divorce proceedings and then 're-marry' under the Civil Union Act. None of the parties wished to do so. The Court held that the treatment by the government (Department of Home Affairs) was inconsistent with the Constitution in that its conduct violated their right to administrative justice and human dignity. However, the decision did not change the underlying confusion and discrepancies in the South African legislation.

The contributions in this issue provide hopeful signs of a progressive development pertaining to human rights in Africa, especially around themes that have seen much contestation and 'push-back' globally and on the continent. However, the contributions also highlight that this trend rides on the back of the judiciaries in these countries: the

Nigerian High Court (in *SERAP v Attorney-General Lagos State*); the South African Supreme Court (on customary marriages in *Mbungela & Another v Mkabi & Others* and *Tsambo v Sengadi*) and High Court (in *KOS v Minister of Home Affairs*) and the Zimbabwean High Court (in *Nathanson v Mteliso & Others*).

The editors would once again like to thank all the reviewers who devoted their time and expertise to ensuring the quality of the Journal.

Editors

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